U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U-E-, LLC

DATE: MAR. 16, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a travel services, management consulting, and import and export business, seeks to extend the Beneficiary's temporary employment as its managing member under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition. The Petitioner appealed the Director's decision and we dismissed the Petitioner's appeal. The Petitioner subsequently filed two combined motions to reopen and reconsider, which we denied.

The matter is now before us again on a third combined motion to reopen and reconsider. On motion, the Petitioner submits additional evidence and asserts that mere "minor technicalities" have wrongfully prevented the petition's approval. The Petitioner emphasizes that, based on the nature of its three lines of business, there is little non-managerial work to be done and no reason for the Beneficiary, as the company's senior employee, to participate in non-managerial tasks.

Upon review, we will deny the combined motion.

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1).

A motion to reopen is based on factual grounds and must (1) state the new facts to be provided in the reopened proceeding; and (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider is based on legal grounds and must (1) state the reasons for reconsideration; (2) be supported by any pertinent precedent decisions to establish that the decision

was based on an incorrect application of law or policy; and (3) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

II. ANALYSIS

The sole issue in this matter is whether the Petitioner established that the Beneficiary would be employed in a managerial or executive capacity, as defined at sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B), under the extended petition. The Beneficiary's previously approved new office petition expired on May 9, 2014, and the Petitioner must establish eligibility as of that date.

For the reasons discussed below, we will deny the motion to reopen and the motion to reconsider. While the current motion includes newly submitted evidence and assertions that we incorrectly applied the law and U.S. Citizenship and Immigration Services (USCIS) policy to the facts presented, the Petitioner has not shown proper cause for reopening or reconsideration.

A. Previous AAO Decision

In denying the Petitioner's second motion to reopen and reconsider, we determined that we determined that the record on motion did not support a finding that the Beneficiary's duties, at the time of the requested extension, would be primarily managerial or executive in nature, although we did not question his level of authority over the company as its senior employee. We observed that supporting evidence in the record indicating that the Beneficiary was significantly involved in non-managerial duties, such as making travel arrangements and arranging shipments of products, as of the date of filing. In addition, we found a lack of evidence that the Petitioner's other employees would be actually providing the services of the company.

We also considered the nature of the Petitioner's business, along with its staffing levels, organizational structure, and stage of development at the end of its initial year of operations. The Petitioner documented three employees as of May 2014, and indicated that all three workers, an office manager and two regional sales and marketing managers, performed duties related to its import and export business. The Petitioner did not document services provided by its management accountant (who was claimed to work for no salary), or by its director of travels (who was claimed to perform all services related to the Petitioner's travel business remotely from India while remaining on the payroll of the Petitioner's foreign affiliate). Moreover, we observed that the Petitioner stated the director of travels position was vacant at the time of filing, but later indicated that the India-based employee had filled this position since 2013. We noted that the Petitioner had not adequately explained this discrepancy. Finally, we determined that the Petitioner did not establish that the Beneficiary's subordinate employees are professionals, managers, or supervisors.

B. Motion to Reopen

On motion, the Petitioner attempts to further explain and document how work is allocated among employees and contractors within the company in support of its assertion that the Beneficiary performs

primarily managerial or executive duties, and that he is not significantly involved in the day-to-day operations of the company's three distinct lines of business (travel services, import/export and consulting services).

The Petitioner asserts that the "AAO decision had focused on the number of staff members available at any given point in time and assumed that the lean staff could not have handled the administrative work, and therefore the Beneficiary must have been performing non-managerial duties." The Petitioner argues that there are actually few transactions relative to the revenue generated by each line of business and notes that there is no need for a large staff to handle the operational and administrative duties.

The Petitioner further states that it is submitting new corroborative evidence in support of its motion to reopen to establish that the Beneficiary would be primarily performing managerial or executive duties under the extended petition, as well as supervising "senior level managers" identified as and These individuals, along with the Beneficiary, have provided statements in support of the motion.

In his affidavit, the Beneficiary explains that he did not have time to review everything submitted in support of the petition and did not realize that his staff did not fully document the services an employee of the Petitioner's foreign affiliate, has provided for the Petitioner since September 2013.[1] In addition, he lists all employees who worked for the company as W-2 employees or 1099 contractors in 2013 and 2014. The Beneficiary asserts that the Indian company's personnel were available to supplement the U.S. staff in 2013 and 2014, noting that the Indian personnel, specifically took over the travel business while the Petitioner was temporarily without any staff for its travel business in 2014.

In addition, the Beneficiary emphasizes that, with three lines of business under development, he had "virtually no time to deal with the office day to day operations" surrounding the travel, import/export or consulting businesses. He states that he has no experience as a travel agent and no interest in becoming one, and was instead concerned with hiring appropriate staff and developing additional business. He names and as employees who have assisted with the travel business, although the record shows that none of them were working for the company as of May 2014. The Beneficiary notes that the Petitioner deals with vacation packages, works with travel consolidators and does not print tickets or vouchers itself, and his role is limited to forging relationships with those consolidators. In addition, he states that the company handles an average of only one travel transaction per day.

The Beneficiary states that he was primarily concerned with "expanding the business" and meeting with senior executives of clients or prospective clients, establishing targets and growth strategies, setting

[1] The Beneficiary states that has served as the Petitioner's "Director of Business Development" based in India since September 1, 2013. Previously, in response to a request for evidence issued by the Director, and at times thereafter, the Petitioner stated that had served as "Director of Travel" since December 2013, although it now claims that this date was incorrect. At the time of filing the petition in March 2014, the Petitioner indicated that the "Director of Travels" position was vacant and that it was actively recruiting for the position; it did not identify a "Director of Business Development" position. The Petitioner's brief refers to using both job titles.

policies, and negotiating major contracts and banking arrangements. With respect to the Petitioner's consulting business, the Beneficiary indicates "I primarily do the Consulting business which requires high level meetings with business owners or executives in the U.S. and India." He states that once he finds the "right combination" the companies negotiate their relationship and the Petitioner gets its consultation fees. Finally, the Beneficiary provides a breakdown of the duties he performed in 2013 and 2014 and list of the subordinate staff for both 2013 and 2014. Some of the staff job titles and descriptions provided on this list are different from those provided previously. For example, the petitioner previously referred to [redacted] as its office manager but now states that he was serving as manager operations performing duties related to its travel business that were not previously attributed to him.

The Petitioner also submits a statement from [redacted] states that he has worked for the Petitioner from time to time, as a contractor or employee, since July 2013, and he explains that he has assisted the Beneficiary with managerial, administrative and public relations work related to establishing and developing the travel segment of the business. While the Petitioner has provided evidence that it paid [redacted] in both 2013 and 2014, it has also provided his specific dates of engagement, noting that he worked as "director of travels" from July to August 2013 and as "travel consultant" from July 2014 to the present. The Petitioner does not claim, and the record does not establish, that [redacted] was providing any travel-related services at the time it sought to extend the Beneficiary's status.

In addition, the Petitioner submits an affidavit from [redacted] states that he was hired as the Director-Business Development with the Petitioner's Indian affiliate on September 1, 2013, and became a full time employee on April 1, 2014. He also identifies [redacted] as an assistant manager who has been working with him. He states that he has always reported to the Beneficiary and provides a list of his duties and the percentage of time he spends on each duty, along with copies of pay slips showing he is paid as an employee of the foreign entity's sales department, and copies of emails showing his involvement in the Petitioner's travel business since June 2014.

Finally, the Petitioner provides a statement from [redacted] a certified public accountant and member of the Beneficiary's extended family, who states that he has provided accounting services to the Petitioner free of charge since 2013.

Upon review, the newly submitted evidence described above is not sufficient to overcome our reasons for denying the previous motion.

First, the Petitioner has not addressed our finding that the record does not sufficiently clarify the nature of the Beneficiary's duties or establish that such duties would be primarily managerial or executive in nature. Rather, the Petitioner claims that the Beneficiary does not have the background or interest to perform any travel-related services, and that the company did not have sufficient transactions to warrant the Beneficiary's involvement in the day-to-day operations of the company. In May 2014, the Petitioner had no U.S. employees or contractors who were claimed to be involved in the travel services segment of the business; rather, it claimed that the India-based director of travels, [redacted] was

performing duties such as booking all travel for the company's customers despite also providing documentary evidence identifying the Beneficiary as the representative booking travel for customers. The Petitioner's evidence of role with the foreign entity contains a number of inconsistencies with respect to his date of hire, wages, job title and job duties, some of which have been introduced with this current motion. The Petitioner previously stated that he joined the foreign entity as travel director in December 2013 and provided two different versions of resume, one indicating that he began working as director of business development in December 2013, and one indicating that he began working for the foreign entity as director of travels and promotions in January 2014, while continuing his employment as an associate vice president with These resumes contained completely different position descriptions.

On appeal, the Petitioner had provided November 2013 appointment letter. The appointment letter indicated that would receive an initial salary of Rs. 60,000 and an increase to Rs.111,000 beginning in July 2014. The Petitioner previously submitted "salary certificate/slips" showing that he received Rs. 30,000 in December and January; Rs. 60.000 in February through April 2014, and Rs. 111,000 in May 2014 as "Director of Travels and Promotion." In support of this motion, salary statements look completely different compared to those provided previously, date back to September 2013, give his title as "Director of Business Development," and his salary was Rs. 30,000 for the months of September 2013 through March 2014, with an increase to Rs. 111,000 in April 2014. duties as described in his statement, go well beyond providing travel services and include oversight of departments that the Petitioner does not claim to have, including an IT department, an administration department and an import and export department. In addition, the Petitioner claims for the first time that had an assistant manager who was also assisting with the U.S. company's tasks but has not supported this claim. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, while the Petitioner has now provided some supporting evidence showing that has been involved in its travel services business, this evidence dates back only to June 2014 and does not establish that he relieved the Beneficiary from providing the company's travel services at the time the Petitioner sought to extend the Beneficiary's L-1A status. Due to the unresolved inconsistencies in the record, the Petitioner has not established that was relieving the Beneficiary from direct involvement in providing travel services at the time of filing. The Petitioner has not addressed our previous finding that the Beneficiary was listed as the booking representative for a number of travel arrangements in the months of April and May 2014; simply stating that he is not qualified or interested in providing travel services is insufficient to overcome this tangible evidence of his involvement in providing the Petitioner's services.

The record does not support the Petitioner's claim on motion that the Beneficiary was overseeing "senior level managers" at the time of the requested extension. The nature of role is uncertain based on the inconsistencies described above. as noted, was not working for the company during the relevant time, and it is unclear how independent provision of accounting services qualified him as a senior manager working under the Beneficiary's supervision.

We note that the Petitioner indicates for the first time on motion that held the position of "manager operations," rather than "office manager" as previously stated. The Petitioner now attributes travel services-related duties to him, but previously stated that he was hired to replace an employee who performed general office management duties. The Petitioner has not submitted evidence to clarify this inconsistency and we cannot determine that his actual duties as of May 2014 included providing the Petitioners' travel services. The record does not contain any evidence of travel-related transactions handled by and in fact the Petitioner previously claimed that was providing travel services from India as of May 2014 because the Petitioner did not have its own staff to do so.

Further, the evidence submitted on motion, specifically the Beneficiary's affidavit, confirms that the Beneficiary himself was solely responsible for the consulting line of the Petitioner's business. While we acknowledge that this business line accounted for the smallest proportion of the company's revenue at the time of filing, the record indicates that he was directly providing these services rather than managing the provision of consulting services through subordinate staff and the duties performed in this regard are not managerial or executive in nature.

The record indicates that the Petitioner more likely than not had some assistance from an outside accountant for financial and tax matters and that it had staff responsible for its import and distribution activities as of May 2014. However, the record does not establish that the business had grown to the point where it could support a managerial or executive positon. For the reasons discussed above, the record does not show sufficient staff to support the Beneficiary in the other areas of business. Notwithstanding the Petitioner's claim that its three lines of business required few operational staff, the record contains insufficient evidence to show that the Beneficiary had *any* employees assisting him with the travel or consulting lines of business at the time it sought to extend his status and we cannot conclude that his duties would be primarily managerial or executive in nature.

The newly submitted evidence does not overcome the grounds for denial of the previous motion and establish eligibility for the benefit. Therefore, the Petitioner has not shown proper cause to reopen the proceeding.

C. Motion to Reconsider

In support of its motion to reconsider, the Petitioner asserts that "the fact that the Petitioner had a lean staff should not be a bar to the grant of the petition." The Petitioner acknowledges that it made this claim previously. It cites to an unpublished AAO decision and *Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016), in support of its claim that an employee with few subordinates, or even the sole employee of a company, may qualify as an executive or manager for purposes of the L-1A visa classification.

More specifically, the Petitioner states that "the AAO decision misapplies the law in that its decision focused on the staff of the Petitioner existed on the date of the filing without considering significant evidence that existed for business conducted and duties of the Beneficiary throughout the one year of operations." In this regard, the Petitioner repeats that we did not consider evidence submitted to

establish that the Petitioner's business "required very little administrative staff," and instead incorrectly assumed that the Beneficiary must be performing non-managerial duties.

Second, the Petitioner asserts that our decision contained inconsistences, including conflicting statements that the Petitioner must establish eligibility "as of the date of filing" versus "at the end of the initial year of operations" or "by the end of the first year of operations." The Petitioner argues that we should have taken into account the duties performed by subordinate personnel who left the company shortly after filing, but who nevertheless performed a number of non-managerial functions during a significant portion of the Petitioner's initial year of operations.

Finally, the Petitioner claims that we ignored substantial evidence in the record, made conclusory assertions, ignored the "obvious" fact that there was "zero incentive for Beneficiary to do lower level work," and "ignored the realities of a start-up business" by not looking at the growth pattern established by the Petitioner's evidence. The Petitioner offers new explanations of the relevance of certain evidence submitted previously, dating back to its RFE response in May 2014.

Upon review, the Petitioner's motion to reconsider does not establish that our previous decision was incorrect at the time of that decision.

The Petitioner's two previous motions also contained claims that the size of a petitioning company and the number of employees supervised is not a relevant factor in determining the Beneficiary's eligibility. We discussed this claim at length, explaining that the staffing levels were ancillary to our determination that there was insufficient evidence to show that the Beneficiary's primary duties would be managerial or executive in nature.

The Petitioner now asserts that we did not consider that the company's three separate lines of business involve few transactions and therefore it has no reasonable need for a larger staff. However, the fact remains that the Petitioner has not established that it had any employees to assist the Beneficiary with two of the three lines of business at the time it sought to extend his L-1A status. We acknowledge that the Petitioner, as a new office, was still at an initial stage of operations after its initial year, and may not have the staffing needs of a more established company. However, it still has the burden to show that someone other than the Beneficiary was actually providing its travel and consulting services at the end of its initial year of operations. The Petitioner's claim that the Beneficiary had no incentive to perform non-qualifying duties does help to clarify how the Petitioner operated two service-oriented lines of business without any corroborated staff to provide those services. As noted, the Beneficiary states on motion that he was providing the consulting services, and the record contains evidence that he was booking travel for clients at the end of the first year of operations.

We acknowledge that the Beneficiary is in charge of the company as a whole, makes decisions regarding its operations, and is responsible for its growth and development. However, we must look beyond the Beneficiary's level of authority to his actual duties after reviewing the record as a whole. The Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the Petitioner must prove that the Beneficiary would be *primarily* engaged in managerial or

executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

The Petitioner again refers to an unpublished decision in which we determined that a beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The Petitioner also cites *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), and cites the portion of the decision in which we considered that petitioner's small size in light of evidence that foreign employees within the same organization were assisting with key functions of the day-to-day operations of the U.S. company. The Petitioner here has not established that the facts here are similar. Other than claiming that was serving as director of travels for the Petitioner while employed by its foreign affiliate, the Petitioner has not claimed that foreign staff was involved in its day-to-day activities. As discussed above, there are a number of unresolved inconsistencies in the record pertaining to job title, job duties, and date of hire, and insufficient evidence of his contribution to the Petitioner's operations at the time it sought to extend the Beneficiary's status.

As noted, the Petitioner further claims that our decisions contain conflicting statements that the Petitioner must establish eligibility "as of the date of filing" versus "at the end of the initial year of operations" or "by the end of the first year of operations." The Petitioner suggests that we should have considered the duties performed by persons who left the company prior to the end of the first year of operations and those hired afterwards.

To clarify, ordinarily, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). However, in the case of an extension of a new office petition, the regulations require us to look at the Beneficiary's staffing levels at the end of the first year of operations and the duties the Beneficiary has performed and will perform under the extended petition. *See* 8 C.F.R. § 214.2(l)(14)(ii). The evidence should establish that, at the end of the initial year of operations, the Petitioner has grown to the point where it can employ the Beneficiary in a managerial or executive capacity under the extended petition.

Here, the Petitioner underwent staffing changes between the date it filed the petition in March 2014, and the expiration of the one-year new office approval in May 2014. An employee who had worked as a senior travel agent during the previous year left the company and was not replaced in the interim. The Petitioner indicates that we should consider the duties she performed, but it has not shown who was available to perform these same duties at the end of the first year of operations or under the extended petition, as the Petitioner's only documented employees at the end of the first

year were involved in a different business segment. The fact that the Petitioner may have had more robust staffing levels at other times during the first year or at some point after the end of the first year of operations is not relevant to our determination of whether the Petitioner established its eligibility for an extension of its new office petition pursuant to 8 C.F.R. § 214.2(l)(14)(ii). The denial of this extension petition did not bar the Petitioner from submitting a new individual petition with new supporting evidence at any time.

Lastly, the Petitioner offers new explanations of the relevance of various evidence that it previously submitted in support of this petition, dating back to its RFE response in May 2014. This is the Petitioner's third motion and fourth filing before our office. A motion to reconsider should not be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991) ("Arguments for consideration on appeal should all be submitted at one time, rather than in piecemeal fashion."). We will not revisit all evidence previously submitted in order to look for support for the Petitioner's newly made assertion that its business actually requires few operational employees, or that it has no reasonable need for the Beneficiary to engage in non-managerial duties.

The Petitioner has not established that our prior decision was incorrect at the time of that decision. Therefore, the Petitioner has not shown proper cause for reconsideration.

III. CONCLUSION

Petitioner has not established that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of U-E-, LLC*, ID# 149571 (AAO Mar. 16, 2017)