U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 14307522

Date: MAR. 19, 2021

Motion on Administrative Appeals Office Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, a floor cleaning service, seeks to seeks to continue the Beneficiary's temporary employment as its managing director under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 of the California Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the Beneficiary has been employed abroad in a managerial or executive capacity; and (2) the Beneficiary will be employed in the United States in a managerial or executive capacity. The Director then granted the Petitioner's motion to reopen and reconsider, and issued a new decision, citing only the second ground for denial.

We dismissed the Petitioner's appeal from the Director's decision, because: (1) the Petitioner had provided inconsistent information about the nature of the Beneficiary's position; and (2) the Petitioner did not appear to employ the Beneficiary or be able to afford his salary at the time of filing. We also noted that the Beneficiary's L-1A status elapsed before the petition's filing date, and therefore he was not eligible for an extension under 8 C.F.R. § 214.1(c)(4). The matter is now before us on a combined motion to reopen and reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the combined motion.

[1] A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position. The Petitioner initially filed a "new office" petition in January 2016. The approval of that petition granted the Beneficiary L-1A status from April 14, 2016, until April 13, 2017. The Petitioner filed a petition on April 11, 2017, seeking a second year as a new office, but that petition was denied. While an appeal was pending, the Petitioner filed the present petition. The Petitioner has continued to pursue the other petition through an appeal and subsequent motions, all of which have been dismissed in whole or in part.

I. LAW

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and 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). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Under the above regulations, a motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

II. ANALYSIS

A. Motion to Reopen

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). We will dismiss the motion because the Petitioner introduces no relevant new facts into the proceeding.

The Petitioner asks that we delay adjudication of this motion until after we have considered a motion to reopen a separate proceeding, through which the Petitioner seeks to reinstate its former status as a "new office." The outcome of *that* motion is material to the outcome of *this* motion, because the purpose of the present proceeding is to seek an extension that is only available before the expiration

of the one-year new office period. *See* 8 C.F.R. § 214.2(l)(14)(i). Thus, the extension sought here can only be granted if we grant the motion on the other case and approve that petition.

We have reviewed that other motion, and will not grant the benefit sought. Because that other petition has not been approved, it introduces no new facts that would support reopening this proceeding.

The Petitioner submits a copy of its revised 2017 tax return. This document includes the same information as a copy submitted previously and therefore introduces no new facts into the record. The only notable difference is that the newly-submitted copy includes a signature. We will discuss the tax information further in the context of the motion to reconsider; but that discussion does not revolve around any new information that was not already in the record.

Local tax documents refer to the Petitioner as offering "Janitorial Services." The Petitioner submits these documents to support the assertion that the underlying denied extension petition relied on "the same . . . facts" as the earlier, approved new office petition. As above, we will address this argument when we discuss the motion to reconsider. Here, it will suffice to state that these two documents do not provide relevant new facts that were not already taken into account previously.

Finally, the Petitioner submits a letter from an elected official in Ohio who engaged the services of the petitioning company for his "investment property" in Florida. The individual praises the quality of the service provided and states: "Far too many tax payer dollars are being wasted on pursuing hard working, law abiding immigrants living in America over mere technicalities." The present case is not a matter of U.S. Citizenship and Immigration Services "pursuing" the Petitioner or the Beneficiary "over mere technicalities." The Petitioner chose to initiate this proceeding by requesting a benefit on the Beneficiary's behalf, and the burden lies with the Petitioner to show that the Beneficiary meets the requirements for that benefit. The writer's opinions do not provide a substantive basis for approving the petition.

Because the Petitioner has submitted no relevant new facts, the motion does not meet the requirements of a motion to reopen and must be dismissed under 8 C.F.R. § 103.5(a)(4).

B. Motion to Reconsider

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services policy. A motion to reconsider a decision on an application or petition must, when filed, also 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). As explained below, the motion does not meet these requirements.

The Petitioner alleges no incorrect application of law or policy. Instead, the Petitioner alleges errors of fact that led to the dismissal of the appeal.

The Petitioner asserts that the decisions on its various petitions were inconsistent, because the Director of the Vermont Service Center approved the original new office petition "[b]ased on the same . . . facts" as the present, denied petition. The Petitioner does not show that the facts were, in fact, the

same. Any new office petition inherently relies upon different facts than a subsequent extension petition, because the new office petition relies on expectations of activities that have not yet occurred; the purpose of the extension petition is to show the extent to which the Petitioner has realized those expectations. The regulations governing the two types of petitions are different, and there is no presumption that an extension petition will be approved.

Furthermore, in this case, the initial petition was approved based on the Petitioner's *original* business plan, which the Petitioner later changed. The approved petition, filed in January 2016 and approved in April 2016, is not before us, but the Beneficiary himself stated, in this proceeding:

> [O]ur initial business plan was to provide janitorial services to upscale homeowners, and to attract business thru local advertising. Unfortunately, this plan was not feasible to implement within a reasonable amount of time . . . . As a result, in about June 2016, we scrapped our initial business plan and pivoted to developing a natural stone floor cleaning/restoration business.

The two petitions demonstrably did not rest on "the same . . . facts." The Petitioner admittedly "scrapped [its] initial business plan" in June 2016, nearly two years before filing the present extension petition in April 2018. The Petitioner maintains that both business plans fall under the general umbrella of "janitorial services," as defined by municipal authorities, but the two plans differ significantly in their details even if they fall under the same general category. The Petitioner has also contended that the change in plans was substantial enough to delay business operations by several months, which further illustrates that the two business plans were not fundamentally the same.

In our appellate decision, we concluded that the Petitioner had not shown that the Beneficiary's position with the company was primarily managerial at the time of filing. On motion, the Petitioner disputes this conclusion, responding to various passages from our appellate decision. Sometimes, the Petitioner takes issue with specific points but does not explain how these points amount to errors that affected the outcome of the decision. For instance, the Petitioner disputes our reference to subordinate workers as "part-time contractors," saying that they worked "26-32 hours a week" and were essentially employees because the Beneficiary had authority over them. The stated hours are consistent with part-time employment. The Petitioner's payments to all the subordinates in 2017, and all but one in 2018, were reported on IRS Forms 1099-MISC, Miscellaneous Income statements, which are used to report payments to contractors rather than employees. In 2018, the Petitioner issued only one IRS Form W-2, Wage and Tax Statement, to one of three team leaders named on an organizational chart. That form listed only $2046 in wages, too low to indicate a full year of full-time employment.[2] This is consistent with the Petitioner's earlier statement that most of the subordinates worked intermittently.

In our appellate decision, we stated: "The Petitioner did not specify to whom the Beneficiary delegated "administrative, advertising, legal and financial" tasks." On motion, the Beneficiary, writing in his capacity as head of the petitioning company, states: "I didn't delegate [the above tasks] to anyone. It is fully under my control." The Beneficiary's *control* over those functions is not in dispute. But if the Beneficiary himself performed the tasks associated with advertising, finances, and other daily business

[2] The employee named on the IRS Form W-2 is not named on any of the quarterly payroll summaries submitted for 2018.

activities, then whatever time he spent performing them was not time spent in a managerial capacity. The Petitioner has not shown that the Beneficiary did *not* perform those tasks himself.

The Petitioner submitted two different organizational charts, one of them showing the company's structure at the time of filing in 2018, and the other reflecting a larger, more complex structure in 2019. On motion, the Petitioner acknowledges the difference between the two charts, and states that the company's expansion shows that the Beneficiary is an effective manager. The issue, however, is that the Petitioner must meet all eligibility requirements at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). The job description submitted by the Petitioner relates to the company's structure in 2019, not to the simpler structure in place at the time of filing in 2018.

In our dismissal notice, we observed that the record raised several "questions of consistency," including issues regarding the Beneficiary's compensation. We stated:

> On appeal, the Petitioner cites an operating agreement stating that . . . the foreign parent company, not the Petitioner, would pay the [Beneficiary's] $25,000 salary. Such an arrangement is acceptable for a U.S. company's first year as a new office . . . [but a]n extension petition following the new office period must establish the U.S. employer's financial status. 8 C.F.R. § 214.2(l)(14)(ii)(E). Tax documents in the record show that the Petitioner's net income in 2017 (the last full year before the filing date) was below the $25,000 figure cited on appeal.
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> The Beneficiary also receives distributions from the Petitioner's income, but he is entitled to these distributions as a member of the limited liability company, rather than as an employee.

The Petitioner contends that it previously settled this issue. It had initially submitted a copy of Schedule C, Profit or Loss from Business (Sole Proprietorship), from the Beneficiary's 2017 personal income tax return. In response to a request for evidence, the Petitioner submitted a copy of an IRS Form 1065, U.S. Return of Partnership Income, for 2017, dated April 2019. On motion, the Petitioner states that an unnamed "local tax preparer" erroneously described the company as a sole proprietorship owned by the Beneficiary. The Petitioner asserts that the form from 2019 is a corrected return, properly describing the entity as a limited liability company. The two tax returns include inconsistent data, as shown in the following comparison:

	Schedule C	Form 1065
Gross receipts	$64,164	$64,164
Cost of goods sold	—	29,282
Gross profit	64,164	34,882
Guaranteed payments to partners	—	25,000
Car and truck expenses	9088	—
Contract labor	24,841	—
Total deductions/expenses	41,909	28,539
Net profit/Ordinary income	22,255	6343

The Petitioner has not explained why many of the figures in the two returns are so different. The Petitioner blames an unidentified tax preparer for describing the company as a sole proprietorship on the original 2017 return, but this does not explain the other serious discrepancies between the two returns. In the absence of verifiable documentary evidence, a tax return that the Petitioner changed two years after the fact, in response to a request for evidence, is not sufficient to resolve the significant credibility questions that result from the two conflicting tax returns.[3] The Petitioner submits no supporting documentation to show that the 2019 version of the return is more accurate or reliable than the timely filed version.

Our appellate decision included this observation:

> [A]lthough the Petitioner initially specified that the Beneficiary would work full-time, the Petitioner later stated, in response to a request for evidence, that the Beneficiary's position "is not *always* a full time job." Later still, on motion, the Petitioner asserted that, "because [the Petitioner] is a small and still developing company, the position of the Managing Director is part time." This repeated downward revision of the Beneficiary's schedule, even as the company grew more complex and arguably should have demanded more of his time, raises questions about the credibility and consistency of the Petitioner's (largely unsubstantiated) initial assertions regarding the nature of the Beneficiary's work.

On motion, the Beneficiary states: "I may spend both full time, and part time, being at work. And over time too." This assertion does not clarify the issue. Rather than explain further, the Petitioner asserts that its employees and the local economy would benefit from approval of the petition, and implies that the business will close if the petition is not approved. But the Petitioner seeks a specific immigration benefit for the Beneficiary, and must meet specific requirements in order to qualify for that benefit. General assertions about the positive impact of local businesses do not meet those requirements. Furthermore, the scope of our decision is limited to the immigration status of the Beneficiary; it does not order the closure of the company or prohibit the Petitioner from filling the Beneficiary's position with another qualified worker. The decision to continue or cease operations lies with the Petitioner, not with immigration authorities. The implication that the Petitioner would only continue to operate the business with the Beneficiary in charge raises the question of whether the company exists to further the interests of the multinational organization, or, rather, as an avenue for the Beneficiary to seek immigration benefits.

On motion, the Petitioner has alleged several errors of fact in the dismissal decision, but the Petitioner has not established that the appeal should have been sustained and, thereby, the petition approved. As a result, the filing does not meet the requirements of a motion to reconsider, and must be dismissed under 8 C.F.R. § 103.5(a)(4).

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[3] *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *see also Matter of Ma*, 20 I&N Dec. 394 (BIA 1991) (both discussing the diminished evidentiary weight accorded to delayed documents in immigrant visa proceedings).

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration and has not overcome the grounds for dismissal of its appeal. The motion to reopen and motion to reconsider will be dismissed for the above stated reasons.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.