U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-W- LLC

DATE: MAR. 21. 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a real estate development and export business, seeks to temporarily employ the Beneficiary as the chief executive officer (CEO) of its new office[1] under the L-1A nonimmigrant classification for intracompany transferees. 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the Beneficiary will be employed in the United States in a managerial or executive capacity within one year; (2) the Beneficiary had at least one year of employment abroad in a managerial or executive capacity in the three years preceding the filing of the petition; (3) the Beneficiary's foreign employer is doing business abroad; and (4) the Petitioner has secured sufficient physical premises to house the new office. The Director further determined that the Beneficiary was ineligible for a change and extension of status because he had not maintained his previous nonimmigrant status. The Director affirmed all grounds for denial after reviewing the Petitioner's subsequent motion to reopen and reconsider.

On appeal, we withdrew the Director's findings that the Petitioner did not establish that it secured sufficient physical premises to operate its new office, or that the foreign entity is doing business. However, as the Petitioner did not overcome the remaining grounds for denial, we dismissed the appeal. The matter is now before us on a motion to reopen and motion to reconsider.

On motion, the Petitioner asserts that we "misapplied the regulations" and "ignored the business operations in real world."

Upon review, we will deny the motion to reopen and deny the motion to reconsider.

[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

I. MOTION REQUIREMENTS

A petitioner must meet the formal filing requirements of a motion and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1). A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2).

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security (DHS) policy. We may grant a motion that meets these requirements and establishes eligibility for the benefit sought.

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

In our prior decision, we determined that the Petitioner did not establish that the new office would support a managerial or executive position within one year of approval of the petition.

In the case of a new office petition, we review a beneficiary's proposed job duties as well as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. A petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the evidence must be considered in analyzing whether the proposed managerial or executive position is plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

The Petitioner owns and manages a commercial office building and indicated at the time of filing that it would be building a warehouse on its existing property and exporting medical and hospital equipment during its next phase of development. The Petitioner stated that it will eventually own and manage a hotel and restaurant business, but not during the initial year of operations. On the petition, the Petitioner listed the Beneficiary's proposed duties as CEO as follows:

- Provide leadership and policy making, oversee daily business operations, and supervise managers and employees in all departments of the company.
- Establish the company's overall development strategies and planning; direct the company's overall business operations and management.
- Implement final decisions and sign all finalized documents.
- Coordinate the public relations of the company.
- Oversee recruitment, management, and assessment of all subordinate positions. Manage the Vice President of Finance and the Vice President of Operations, the latter of which will manage the export, property and hospitality departments of the subsidiary company.

- Establish [the Petitioner's] office in the United States and be responsible for hiring all of its U.S. employees, and manage the roll-out of the subsidiary's hospitality branch.
- Oversee the subsidiary's export services branch, which offers export product storage and helps American products companies to find Chinese buyers and contacts for product export sales, trade customs, and distribution, and its property development branch . . . [.]

Later, in response to a request for evidence (RFE), the Petitioner submitted another list of duties with percentages of time devoted to each duty:

- Establishes company overall development strategies and planning (30%)
- Directs company overall business operations and management (20%)
- Review and negotiate company investment projects (10%)
- Implement final decision and signage authority (15%)
- Oversees recruitment, management and assessment of positions of the company. (15%)
- Client and public relationship management (10%)

In our decision, we analyzed these duties and determined that these descriptions are overly broad and do not explain the specific tasks he would perform on a day-to-day basis to carry out his these responsibilities.

On motion, the Petitioner contends that a CEO's duties cannot be described in detail, and that a CEO's "major physical activities every day is to have meetings one after another." It submits an online article from 2014 entitled "What do CEOs do all day?" in support of its proposition that the Beneficiary's job duties cannot be categorized and that most CEO's spend their days in meetings

When examining the executive or managerial capacity of a beneficiary, we will review a petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Simply stating that CEOs spend their days in meetings is not sufficient to establish the executive or managerial nature of the Beneficiary's duties.[2] Here, the Petitioner has not supported its assertions with relevant, probative, and credible evidence establishing that the Beneficiary would be performing primarily managerial or executive duties within one year. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). The burden of proof is on the Petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

[2] We note the Petitioner's Operating Agreement states that the Petitioner shall be managed by a manager appointed by the member, and that the company and all of its business and affairs shall be managed by the manager. The Operating Agreement does not provide for a CEO.

In our prior decision, we also discussed the Petitioner's projected staffing and business plan at length. The Petitioner's business plan indicates that the company has purchased a commercial office building. It states that it plans to build a warehouse on its existing commercial property where it will run an export business focused on the export of U.S. hospital and medical equipment to China. Further, the business plan states a hotel and restaurant business will be launched in approximately three years.

The Petitioner indicated that it had no employees at the time of filing. The staffing chart shows at least 12 employees to be hired for the export business, and an additional 15 employees for the hotel and restaurant business.[3] The business plan also indicates that the Petitioner anticipates sales of $1,228,000 in 2017, with $300,000 in rental income from the office building, and $928,000 in income from its warehouse and export services operation. We noted that the business plan does not explain where the Petitioner derived this income projection.

We further noted that the Petitioner indicated in its business plan that it will build a warehouse prior to offering export services to clients, but that it subsequently stated that its office building has storage space that can be used in the short term, and that its U.S. parent company owns a building with a warehouse[4] that the Petitioner can use as a backup. We found it unlikely that the Petitioner intends to establish a warehouse on its existing commercial property where it will run an export business focused on the export of U.S. hospital and medical equipment to China. We also found that the proposed employees for the export business would not be performing managerial duties, or that the Beneficiary's other claimed managerial subordinates in the export and business development departments would actually be hired during the first year. Therefore, we determined that the record does not support the Petitioner's claim that its organizational chart presents a realistic picture of the company's likely structure and staffing levels within one year.

On motion, the Petitioner states that business plans are projections of staffing and income and that they cannot provide precise calculations,[5] but asserts that its projections are realistic. The Petitioner states that we made arbitrary and capricious conclusions based on subjective views and that we did not articulate sound reasons for denying the appeal. However, the Petitioner does not support its assertions with evidence establishing that its projections are realistic. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of

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[3] We noted in our prior decision that the 15 positions are identified as "future hires for phase three." These positions include the entire "Hotels, Restaurants & Hospitality" department. The Petitioner does not expand on its plans for the hotel and restaurant on motion, other than stating that its plans are "realistic."

[4] The Petitioner previously provided a photograph of a small barn located on property purportedly owned by its parent company. The address of this property is listed on the petition as the Beneficiary's residential address. The Petitioner resubmits this picture on motion and reasserts that it has a backup warehouse for its business. However, reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts." 8 C.F.R. § 103.5(a)(2).

[5] A comprehensive business plan, most importantly, must be credible. *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998).

proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376. We clearly articulated the reasons for dismissing the appeal based on the Beneficiary's duties and the Petitioner's staffing and business plan.

The Petitioner argues generally that we did not "articulate good explanations in support of [our] decision" and that we therefore do not pass the "arbitrary and capricious" standard. Citing *Matter of Chawathe*, 25 I& N Dec. at 376, it also states that we failed to properly apply the "preponderance of the evidence" standard of proof and that, given the "clear evidence provided in the petition, [we have] abused [our] discretion in making the decision."

This adjudication requires that we determine whether the Petitioner will act in a qualifying managerial or executive capacity in the United States. The "preponderance of the evidence" standard requires that the evidence demonstrate that the claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. at 376 (quoting *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). The truth is to be determined not by the quantity of evidence alone but by its quality. Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, a director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. *Id.*

Here, the adjudication requires a review of the totality of the evidence when examining the claimed managerial or executive capacity of a Beneficiary, including the Beneficiary's job description, the company's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the Beneficiary's actual duties and role in the business. The Director properly considered the totality of the evidence in this case to determine that the Beneficiary would not be performing primarily managerial or executive duties within one year, and after an in-depth review and discussion of the evidence, we upheld that decision.

The Petitioner has not demonstrated with relevant, probative, and credible evidence that the Beneficiary would primarily engage in managerial or executive duties, or that the new office would support a managerial or executive position, within one year of approval. On motion, the Petitioner has provided no new facts to demonstrate eligibility or identified an incorrect application of law or policy demonstrating that our prior decision is incorrect.

III. BENEFICIARY'S EMPLOYMENT ABROAD

We also dismissed the appeal finding that the Petitioner has not demonstrated the Beneficiary's possession of the required qualifying employment abroad. In this case, the Petitioner must show that its parent company employed the Beneficiary abroad for one continuous year between March 21, 2014 and March 20, 2017. However, as we noted in our decision, DHS records show that the

Beneficiary was physically present in the United States in B1 or B2 status for 732 days (two years and one day, accounting for the leap year in 2016), during that three year period. Periods spent in the United States cannot be counted towards his year of employment abroad. 8 C.F.R. § 214.2(l)(1)(ii)(A).

On motion, the Petitioner states that it "does not argue the physical presence of the Beneficiary" in the United States for the 732 days cited in our decision. However, it asserts that the Beneficiary's physical presence should not be a determinative factor, and that "[n]owhere in the regulations mention physical location of the Beneficiary." It states that "people can work almost anywhere accomplishing the same tasks" and submits an article regarding working remotely. On motion, the Petitioner also provides evidence of traveling bonus paid by the foreign entity to the Beneficiary in addition to his regular salary.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" as:

> An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive *or* involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but **such periods shall not be counted toward fulfillment of that requirement**. (emphasis added)

The one-year foreign employment requirement is only satisfied by the time the Beneficiary spent physically outside the United States working full-time for a qualifying organization. The Petitioner cannot use any time that the Beneficiary spent in the United States to meet the one-year foreign employment requirement, even if the qualifying foreign entity paid the Beneficiary and continued to employ the Beneficiary while he was in the United States. USCIS Policy Memorandum PM-602-0167, *Satisfying the L-1 1-Year Foreign Employment Requirement* 3 (Nov. 15, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-11-15-PM-602-0167-L-1-foreign-employment-requirement.pdf (last visited Mar. 18, 2019). Accordingly, the Petitioner cannot establish that the foreign entity employed the Beneficiary abroad for at least one year, and he cannot meet the foreign employment requirement because of the length of time the Beneficiary spent in the United States. On motion, the Petitioner has provided no new facts to demonstrate eligibility or identified a misapplication of law or policy demonstrating that our prior decision is incorrect.

IV. 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 denied for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of K-W- LLC,* ID# 2597281 (AAO Mar. 21, 2019)