U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16774477

Date: MAY 25, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner identifies itself as an exporter and seller of herbal medicines, supplements, and other food products. It seeks to employ the Beneficiary temporarily as its chief executive officer (CEO) under the L-1A nonimmigrant classification for intracompany transferees who are coming to be employed in the United States in a managerial or executive capacity. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the California Service Center revoked the approval of this petition, concluding that the Beneficiary would not be employed in a managerial or executive capacity in the United States. The decision was based on the Director's assessment of the submitted evidence and findings that resulted from a post-adjudicative site visit conducted by an immigration officer (IO). The Petitioner subsequently filed an appeal, which we dismissed, concluding that: (1) the Petitioner did not adequately address and resolve uncertainties that arose from an IO's observations made and interviews conducted during a post-adjudicative site visit; and (2) the Petitioner provided deficient evidence pertaining to the Beneficiary's job duties. The Petitioner then filed a motion to reopen and motion to reconsider, which we dismissed as untimely.

The matter is now before us on a second combined motion to reopen and reconsider. On motion, the Petitioner seeks reconsideration of our decision to dismiss the prior motion as untimely filed.

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 grant the motion and address the merits of the original combined motion to reopen and motion to reconsider, which we dismissed as untimely.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. 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.*

Further, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, a director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

II. MOTION REQUIREMENTS

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 (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceedings at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

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).

III. ANALYSIS

A. Timely Filing of the First Motion

The Director of the California Service Center revoked the approval of this petition, concluding that the Beneficiary would not be employed in a managerial or executive capacity in the United States. The decision was based on the Director's assessment of the Beneficiary's job duties, the Petitioner's staffing, and findings that resulted from a 2018 post-adjudicative site visit conducted by an immigration officer (IO). We affirmed the Director's conclusion and dismissed the Petitioner's appeal on April 17, 2020. The Petitioner filed the previous combined motion to reopen and reconsider on June 18, 2020, 62 days after we issued our decision.

The applicable regulations state that a motion on an unfavorable decision must be filed within 33 days of the date USCIS mails the decision. *See* 8 C.F.R. §§ 103.5(a)(1), 103.8(b). During the coronavirus (COVID-19) pandemic, USCIS issued guidance that Form I-290B, Notice of Appeal or Motion, would be accepted if filed within 60 days of the unfavorable decision. We dismissed the Petitioner's prior motion as untimely in accordance with 8 C.F.R. § 103.2(a)(2)(v)(B)(*1*) because it was not filed within 60 days of the issuance of our decision on April 17, 2020.

On motion, the Petitioner asserts that, since our decision dismissing the appeal was served by mail, the deadline for filing the motion should have included three additional days beyond the 60 calendar day deadline set forth in USCIS' guidance, in accordance with the regulation at 8 C.F.R. § 103.8(b).

The Petitioner therefore maintains that the motion, which was received 62 days after we issued our appellate decision, should be considered timely filed.

The Petitioner's assertions regarding the timeliness of the prior motion are persuasive. We will therefore grant the motion to reconsider, in part, to address the merits of the previous combined motion to reopen and reconsider. With the current motion, the Petitioner also submits new evidence, discussed below. The Petitioner has not, however, submitted new evidence that overcomes our decision dismissing the appeal, nor has the Petitioner demonstrated that our decision dismissing the appeal involved an incorrect application of the law or USCIS policy.

B. Motion to Reconsider

First, we will discuss the Petitioner's original motion to reconsider. As noted above, we are granting the motion to reconsider, in part, to address the merits of the previous combined motion to reopen and reconsider. For the reasons explained below, the dismissal of the Petitioner's appeal will not be disturbed, and the petition will remain denied.

As a preliminary matter, we will address the Director's analysis of the Beneficiary's job duties, which contributed to adverse findings that resulted in revocation of the petition. As correctly argued in the legal brief that the Petitioner submitted in support of its June 2020 motion, the notice of intent to revoke (NOIR) merely restated, but offered no analysis of, the job duty breakdown that was provided in support of the petition. As such, the NOIR did not inform the Petitioner of any deficiencies concerning the Beneficiary's job description and thereby effectively precluded the Petitioner from an opportunity to rebut the revocation's adverse findings on this issue. *See* 8 C.F.R. § 214.2(l)(9)(iii)(B). Because the Director did not include an analysis of the Beneficiary's job duty breakdown in the NOIR, the adverse findings that stemmed from that analysis cannot serve as a basis for revoking the petition. Likewise, because the job duty analysis was not a permitted basis for revocation in this matter, we are similarly precluded from considering the sufficiency of the Beneficiary's job duty breakdown and we will therefore withdraw our prior adverse findings on this issue.

Notwithstanding our withdrawal of the job duty analysis as a basis for revocation and dismissal of the subsequent appeal, neither adverse decision was exclusively based on that analysis. Rather, both decisions cited the uncertainties that materialized from the December 2018 site visit as one of the key reasons for their respective conclusions. In our decision dismissing the appeal, we determined that the Petitioner made inconsistent statements regarding the employees who were interviewed during the site visit. We noted in our appeal decision that the Petitioner described the individuals who were interviewed during the 2018 site visit as its "lowest level employees" who were new to the company and therefore unfamiliar with the Petitioner's operation. However, we pointed to an organizational chart that the Petitioner provided in which the placement of these two employees was shown as only one level below the Beneficiary's claimed subordinate managers; in response to the NOIR the Petitioner described the same two employees as having a "strong background and knowledge in product development and marketing" and stated that they were "hired to strengthen the company's management and professional team." The Petitioner has not resolved these discrepancies with

independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We also considered the lack of evidence documenting the Beneficiary's whereabouts at the time of the 2018 site visit and questioned why the two employees were left alone without supervision at the Petitioner's primary place of business if they were the "lowest level employees," as the Petitioner claimed. Given these multiple unresolved deficiencies, we concluded that the Petitioner did not provide sufficient credible evidence to overcome the basis for revocation. *See id.*

On motion, the Petitioner argued that we failed to consider the timing of the 2018 interview, asserting that the interviewed employees were "still undergoing training" and were not familiar with the foreign entity's general manager. While the claimed newness of the two employees may explain why they were unfamiliar with the staffing at the foreign entity, the same claim does not explain why these employees were unfamiliar with the Beneficiary, who is claimed to be the head of the employing entity. Further, the fact that the two employees were left entirely unsupervised at the Petitioner's primary business location undermines the Petitioner's claim that they were "still undergoing training" and that the brevity of their employment with the U.S. entity should excuse their lack of familiarity with the Beneficiary and her role within the organization.

Lastly, despite the difference between the Beneficiary's Chinese name – [redacted] – and her claimed adopted English name – [redacted] – it is critical to note that the interviewing IO referred to the Beneficiary by her first and last name, not by her first name alone. Therefore, even if the employees adhered to Chinese custom when referring to the Beneficiary, as claimed in an earlier affidavit, it is reasonable to expect such employees to recognize the Beneficiary by last name, which would have been used in conjunction with her job title – in this case, [redacted] – as a way of addressing her. In sum, the name irregularities that the Petitioner described do not explain why the employees who were interviewed in the 2018 site visit were unfamiliar with the Beneficiary's name and position she purportedly held within the U.S. organization. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

C. Motion to Reopen

Next, we will consider the Petitioner's original motion to reopen. In support of the motion, the Petitioner provided evidence in the form of contracts, project plans, reports, proposals, and invoices. However, most of the submitted documents were created in 2019 and 2020 and thus they do not reflect the Petitioner's business activities in 2018, when this petition was filed. The Petitioner must establish that all eligibility requirements for the immigration benefit had been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Moreover, the new submissions did not address the discrepancies and anomalies that resulted for the 2018 site visit. As such, they are not relevant for the purpose of overcoming our previous adverse decision dismissing the appeal.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration of our appellate decision or otherwise established eligibility for the immigration benefit sought. The dismissal of the Petitioner's appeal will not be disturbed, and the petition will remain denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is granted in part and dismissed in part.