U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6336105

Date: NOV. 13, 2019

Motion on Administrative Appeals Office Decision

Form I-129, Petition for Nonimmigrant Worker (L-1A)

The Petitioner, describing itself as a technology company providing software as a service, filed a Form I-129, Petition for L-1A Manager or Executive seeking to continue the Beneficiary's temporary employment as its chief operating officer.[1] 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 denied the petition, concluding that the record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under an extended petition.

The Petitioner later filed an appeal, which we dismissed. In dismissing the appeal, we affirmed the Director's conclusion that the Petitioner did not demonstrate that the Beneficiary would be employed in a managerial or executive capacity under an extended petition. Further, we also noted that the Petitioner was listed as "inactive" and subject to "administrative termination" as of the date of our adjudication of the appeal. We indicated that this raised question as to the whether the Petitioner continued to exist as an importing employer.[2] The matter is now before us again on a motion to reopen and a motion to reconsider.

On motion, the Petitioner's counsel submits an additional explanation of the Beneficiary's executive level duties and contends that this clears up any confusion as to his daily tasks. The Petitioner asserts that the Beneficiary oversees subordinate managers supervising operational level sales employees that primarily relieve him from performing non-qualifying operational duties.

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

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[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period January 13, 2017, until January 12, 2018. 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.

[2] On motion, the Petitioner submits a printout of its business status from the Office of the [redacted] Secretary of State reflecting that it is active and in good standing as of April 23, 2019. As such, this additional issue we raised on appeal is withdrawn.

I. MOTION REQUIREMENTS

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 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). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

A. Motion to Reopen

On motion, the Petitioner does not submit additional documentary evidence or affidavits, only a brief from counsel setting forth additional details related to the Beneficiary's claimed executive-level duties along with certain legal contentions. As noted above, a motion to must (1) state the new facts to be provided in the reopened proceeding; and they must (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). We note that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence through affidavits and declarations. Here, the Petitioner has not submitted any additional documentary evidence specific to whether the Beneficiary would act in an executive capacity under an extended petition; as such, it has not met the requirements of a motion to reopen. Therefore, the motion to reopen is dismissed.

B. Motion to Reconsider

As noted, the Petitioner submits additional details regarding the Beneficiary's claimed executive-level duties in the United States. The Petitioner asserts that this clarification from counsel is sufficient to establish that its operations and employees are sufficient to support him in an executive capacity. As noted in our previous decision, the Petitioner only contends that the Beneficiary would be employed in an executive capacity; as such, we will only analyze this issue and not whether he would be employed in a managerial capacity.

The term "executive capacity" is defined as an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

In dismissing the appeal, we concluded that the Petitioner had submitted an ambiguous duty description for the Beneficiary lacking detail as to his specific daily tasks and also noted that the description did not reference its specific business operations. Further, we stated that an additional duty description provided for the Beneficiary in response to the Director's request for evidence (RFE) included several apparent non-qualifying operational duties suggesting his significant involvement in

sales and service delivery related tasks. We also pointed to the Petitioner's apparently limited operations after one year and emphasized that the evidence reflected that it had not hired operations staff to handle order fulfillment, delivery, and customer support functions. We concluded that the evidence suggested that the Petitioner had not developed sufficiently after one year to support the Beneficiary in a qualifying executive capacity. For instance, we indicated that the Petitioner did not submit supporting documentation to substantiate its claimed employees and that it provided vague duty descriptions for the Beneficiary's claimed subordinates.

On motion, Petitioner's counsel submits an additional duty description for the Beneficiary and contends that this establishes "the specific nature of the beneficiary's duties" as executive in nature. For instance, the Petitioner listed broad categories of duties for the Beneficiary along with general percentages of time he devoted to each and listed additional tasks that made up each of these categories. The additional duties are as follows:

Leadership- 15%

- Establish the goals and policies of the organization,
- Act at all times in a way that is professional and respectful,
- Craft organizational goals and policies which respect and support all employees, and
- Coach and mentor staff as appropriate to improve performance and meet with staff to encourage morale and discuss upcoming special projects or new products.

Operational Planning and Management- 25%

- Speak daily with the canvassers in order to effectively gather information regarding their first hand understanding of their markets to use that information to adjust the directions of the organization as a whole in order to ensure the company's policies are properly responsive,
- Obtain the information necessary to formulate the plans and policies which will ensure the organization's success,
- Make follow-up calls to clients and coordinate and organize meetings with clients, and
- Prepare quarterly reports which the Beneficiary uses to determine the efficacy of the policies and the organization's performance relative to goals set.

Program Planning and Management- 25%

- Produce plans for the operation of the organization aimed at achieving the organizational goals,
- Work on the development of marketing plans which will provide direction for his subordinates, including general policies which managers and canvassers are expected to specifically implement for each client,
- Research the types of potential clients and develop guidelines for promotional materials his subordinate will tailor to actual leads,
- Meet weekly with subordinates to obtain examples of how they have implemented these plans, and
- Travel to site locations to troubleshoot or provide remote hands on technical support as needed and act as a last line of technical defense for client problems.

Human Resources Planning and Management -5%

- Determine if there is a need to add further personnel by examining sales reports,
- Determine the direction the Petitioner needs to take so his subordinates can implement that direction with regard to staffing levels, and
- Ensure proper staff training orientation and provide direction on company goals.
- Financial Planning and Management- 5%
- Ensure that programs and services offered by the organization reflect the goals and priorities of the CEO,
- Oversee the implementation of performance reviews for employees and monitor cash flow of the organization,
- Review the budget of the CFO and determine if it adequately estimates the company's income, and
- Identify immediate additional capital and secure sources of funding.

Risk Management- 15%

- Provide direction for the organization which will identify and mitigate risk,
- Update organizational plans for securing personnel and client files,
- Consider risk management in all plans and proposals, and
- Direct the management of data and proprietary information.

Once again, similar to the duty descriptions submitted in support of the petition and in response to the Director's RFE, the Petitioner provides a generic duty description for the Beneficiary which does not sufficiently detail and substantiate his daily tasks. Further, the Petitioner submits no supporting documentation to corroborate the Beneficiary's performance of qualifying executive-level duties. The duty description includes several generic duties that could apply to any executive acting in any industry and they provide little insight into the Beneficiary's actual day-to-day executive-level tasks. For instance, the Petitioner did not sufficiently detail or document the goals and policies of the organization the Beneficiary established, the special projects or new products he coordinated with staff, or plans and policies he established after coordinating with his claimed canvassers. Likewise, it did not articulate or document plans the Beneficiary produced for the operation of the organization, marketing plans he developed for each client, clients he worked with, guidelines for promotional materials he put in place, or technical issues he resolved through his subordinates.

In addition, the Petitioner did not detail or substantiate with supporting evidence staffing levels the Beneficiary implemented, staff training he completed, programs and services he put in place, capital or sources of funding he secured, direction he provided to mitigate risks, risks the company faced and he overcame, organizational plans for securing personnel and client files he updated, plans and proposals he considered, or proprietary data he managed. In fact, despite emphasizing several times in the updated duty description that the Beneficiary would establish the "goals and policies" of the Petitioner, it did not provide a single specific example of a goal or policy he set, nor did not submit documentation to corroborate them. Similarly, the Petitioner also indicates that the Beneficiary delegated technical support and other operational matters to his subordinates, but the record does not include any evidence of him delegating these tasks to his subordinates. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive in nature, otherwise

meeting the definitions would simply be a matter of reiterating the regulations. *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).

Therefore, the updated duty description submitted by the Petitioner on appeal does not overcome the primary basis of dismissal in our previous decision; namely, that the Beneficiary's duties are insufficiently vague and generic to establish that he would primarily perform qualifying executive-level duties under the extended petition.

Furthermore, in our previous decision, we pointed to various non-qualifying operational duties included in the Beneficiary's duty description such as him coordinating with canvassers daily on client matters, identifying interested clients and target markets, developing sample promotional materials, and completing follow-up phone calls to clients to check on customer satisfaction. On motion, the Petitioner again lists non-qualifying duties for the Beneficiary, such as him coordinating with canvassers on client solutions, making follow-up calls to clients, and providing technical support. However, again, these non-qualifying duties are included throughout the record and the updated duty description. The Petitioner only vaguely states that "85% at least" of the Beneficiary's time would be devoted to qualifying executive-level duties, but it does not specifically indicate how much time he would devote to each of his non-qualifying operational tasks. Further, the Petitioner submits no evidence to substantiate that the Beneficiary primarily delegates non-qualifying operational tasks to his claimed subordinates as claimed. For example, the Petitioner contends that "any local support or integration that is needed is carried out by the canvassers or remotely from the parent company," yet it submits no evidence on the record, or now on motion, to corroborate the engagement of these employees or to demonstrate that the Beneficiary primarily delegated duties to them.

Again, whether the Beneficiary is an executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" executive. *See* sections 101(a)(44)(B) of the Act. Here, the Petitioner does not sufficiently document what proportion of the Beneficiary's duties would be executive functions and what proportion would be non-qualifying. The Petitioner lists the Beneficiary's duties as including both executive tasks and administrative or operational duties, but does not sufficiently quantify the time the Beneficiary spends on these different tasks. For this reason, we cannot determine whether the Beneficiary is primarily performing the duties of an executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Furthermore, in dismissing the appeal, we also pointed to the Petitioner's limited operations after one year and noted that it had not hired operations staff to handle order fulfillment, delivery, and customer support functions; indicating that it had not developed sufficiently after one year to support the Beneficiary in a qualifying executive capacity. For instance, we emphasized that the Petitioner did not submit evidence to substantiate its claimed employees and that it had provided vague duty descriptions for the Beneficiary's claimed subordinates.

On motion, the Petitioner does little to overcome these additional grounds for dismissal. In fact, the Petitioner makes conflicting statements indicating that "the organizational chart submitted in response to the request for evidence is the correct one," which was asserted to include subordinate operational level "canvassers," but later states that "[the canvassers] had not yet been hired" as of the date the petition was filed. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA

1988). The Petitioner only vaguely states that the canvassers "work hours they choose themselves and work mainly from home or remotely" and that "they fall between part time and full time." However, the Petitioner does not articulate the actual hours of these employees, whether they were employed as of the date the petition was filed, nor does it submit supporting documentation to corroborate their employment, such as payroll documentation, federal or state quarterly wage reports, or other similar objective evidence. Likewise, as we also discussed in our previous decision, the Petitioner submitted vague and generic duty descriptions for the Beneficiary's claimed subordinates, including the two claimed chief marketing officers and the chief financial officer. However, the Petitioner does nothing to address this insufficiency on motion. In sum, the lack of evidence of the Petitioner's staffing leaves substantial uncertainty as to whether it developed sufficiently to support the Beneficiary within a complex organizational hierarchy after one year.[3]

Lastly, the regulations further require that a petitioner requesting the extension of a new office petition on behalf of a beneficiary submit evidence of the financial status of the United States operation. 8 C.F.R. § 214.2(l)(1)(14)(ii)(E). The Petitioner only briefly indicated in the Form I-129 that it had earned $15,000 in revenue as of the date the petition was filed. This level of revenue during the first year does not reflect that the Petitioner's operations have developed sufficiently to support the Beneficiary in an executive capacity; in fact, it is not clear how it would have maintained its operations under an extended petition given this low level of revenue. Otherwise, the Petitioner provides no evidence to demonstrate its financial position as of the date the petition was filed to establish that it was operating sufficiently to support the Beneficiary in an executive capacity.

For the foregoing reasons, the Petitioner has not set forth sufficient reasons to demonstrate that our previous dismissal 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).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

[3] The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended U.S. operation one year within the date of approval of the petition to support an executive position. There is no provision in USCIS regulations allowing for an extension of this one-year period.