U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-E-, INC.

DATE: NOV. 14, 2019

MOTION ON ADMINISTRATIVE APPELAS OFFICE DECISION

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

The Petitioner, claiming to be a waterproofing services provider,[1] seeks to continue the Beneficiary's employment as a managing director under the L-1A nonimmigrant classification for intracompany transferees.[2] *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 of the California Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity under the extended petition. We dismissed a subsequent appeal because the Petitioner did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity. We reserved the issue regarding the Beneficiary's foreign employment.

On motion to reopen and the motion to reconsider, the Petitioner, through counsel, submits additional evidence and asserts that the Beneficiary's father, who purportedly directed the Petitioner's parent company in India, died in [redacted]2017.[3] It asserts that the Beneficiary returned to India for over three

[1] The Petitioner provided evidence indicating that it was, or planned to be engaged in the construction of residential homes.

[2] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf. That petition was approved for the period February 7, 2017, until February 6, 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. As noted in our prior decision, although the Petitioner checked "yes" at Section 1, No. 12 of the L Classification Supplement indicating that it was filing the petition as a "new office," the record shows that it was previously approved for a new office petition and therefore no longer qualified as a "new office" when this extension petition was filed.

[3] The Petitioner's business plan states that the foreign entity is owned by the Beneficiary and his brother in equal shares. It does not mention their father. In a letter from the foreign parent company submitted with the Petitioner's initial L-1A petition, the beneficiary's brother stated that in 1998, "our father was too old to handle fast growing business." Therefore, he indicated that the Beneficiary "took over the company" in 1999. Thus, it does not appear that the Beneficiary returned to India to take over the management of the company from his father when his father died in 2017. The Petitioner must resolved this inconsistency with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

months in 2017 to "take the rein of the parent company" and that, as a result, the Petitioner missed the opportunity to "establish itself during the peak season of the company's initial year." The Petitioner requests that we consider the "extraordinary circumstances" and excuse the Petitioner's deviation from its business plan in its first year of operations.

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

I. BACKGROUND AND PRIOR AAO DECISION

In our prior decision, we reviewed the Petitioner's claims that the Beneficiary will be employed in managerial and executive capacities. We discussed evidence regarding the Petitioner's staffing levels, the nature of its business, its organizational structure, and the Beneficiary's job duties. With regard to the Petitioner's staffing levels, we found that the record lacks evidence showing that the Petitioner employed anyone but the Beneficiary or that it had contractors to perform its daily operational tasks at the time this petition was filed. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Thus, regarding the Beneficiary's managerial role, we determined that the Petitioner did not establish that it has the ability to relieve the Beneficiary from having to primarily perform the operational, non-managerial tasks of the organization. Furthermore, we stated that even if the Petitioner were to establish that its staff at the time of filing included the individuals named in a submitted list of employees,[4] the record does not contain evidence establishing that these individuals are supervisory, professional, or managerial. 101(a)(44)(A)(ii) of the Act. We noted that such evidence is critical for the purpose of establishing that the Beneficiary meets the statutory criteria of a personnel manager.

Furthermore, we also noted that the Petitioner did not adequately describe the types of services it offers. Although the petition indicates that the Petitioner intends to provide waterproofing services, the record indicates that the Petitioner builds custom and single-family homes. The Petitioner's business plan does not contemplate residential construction and, therefore, we found that the plan does not account for this type of business activity either in its personnel plan or in its financial allocations. Given the lack of clarity as to the types of business activities the Petitioner planned to engage in at the time this petition was filed, we stated that it is unclear how its organization should be staffed to ensure that the Beneficiary's time is primarily occupied with managerial-level job duties. We found that the record does not establish that the Petitioner had the organizational composition to support the Beneficiary in a position where his time would be primarily allocated to managerial tasks.

Regarding the duties to be performed by the Beneficiary, the Petitioner indicated that 70% of the Beneficiary's time would be spent overseeing a non-supervisory and non-professional employees and performing human resources tasks, such as recruiting and training new employees. However, we found that the Petitioner did not establish that these duties are managerial in nature. Although it is generally understood that a developing business in its initial phase of operation may not require or

[4] The list shows seven employees in addition to the Beneficiary.

have the ability to support an employee who primarily performs managerial-level job duties, the regulations only allow the "new office" operation one year from the date of approval of the petition to support a managerial position. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Beyond that initial one-year time frame, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial capacity. *See, e.g.*, sections 101(a)(44)(B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Church Scientology Int'l*, 19 I&N Dec. at 604.

We determined that the Petitioner provided a job description which indicates that the Beneficiary would continue to carry out non-managerial functions beyond the company's first year of operation. Despite its immediate organizational needs, we found that the Petitioner had not progressed to a developmental phase where it had the capacity to support the Beneficiary in a position that entails primarily managerial-level job duties. Therefore, we found that that the Beneficiary would not be employed in a managerial capacity under an extended petition.

We also found that the Beneficiary would not be employed in an executive capacity under the extended petition. As noted earlier, the Petitioner claimed only one employee at the time of filing and provided no evidence to show that it was paying contract labor to perform its operational tasks. Thus, we determined that the Petitioner had not established that at the time of filing its organization included a tier of employees through whom the Beneficiary can be said to direct the management of the organization and focus on its goals and policies.

II. ANALYSIS

The primary issue to be addressed in this decision is whether the Petitioner has submitted new facts that overcome our prior decision, or offered legal arguments establishing that our decision to dismiss the appeal was based on an incorrect application of law or policy with respect to the facts of this case. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing (in this case, March 2018) and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

A. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). On motion, the Petitioner asserts that due to the death of the Beneficiary's father in April 2017, the Beneficiary returned to India for over three months to manage the foreign parent company. It provides copies of the Beneficiary's passport pages indicating that he arrived in India on April 6, 2017, and that he departed India and arrived in the United States on July 10, 2017. As a result of the Beneficiary's absence from the United States, the Petitioner asserts that it missed the opportunity to "establish itself during the peak season of the company's initial year." The Petitioner requests that we consider the "extraordinary circumstances" and excuse the Petitioner's deviation from its business plan in its first year of operations. We note that the Petitioner did not mention these "extraordinary circumstances" when it submitted the extension petition, when it responded to the Director's RFE, or when it appealed the Director's denial decision. Doubt cast on any aspect of a petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Other than proof that the Beneficiary was outside of the United States between April 6, 2017, and July 10, 2017, the record contains no probative evidence supporting the Petitioner's claims on motion. There is no evidence of the Beneficiary's father's death; no evidence that his father was running the foreign parent company in 2017; no evidence that the Beneficiary oversaw the foreign parent company between April 6, 2017, and July 10, 2017; no evidence that the Petitioner missed the "peak season" of its business; no evidence that the Petitioner "would have established itself pursuant to the company's business plan" but for the Beneficiary's absence; and no evidence of extraordinary circumstances explaining the "deviation from its business plan."[5] 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, and it has not done so here. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Further, the Petitioner's motion does not provide new facts or documentary evidence regarding the Beneficiary's job duties in the United States, the nature of the Petitioner's business, its staffing levels, or its organizational structure. On motion, the Petitioner did not address the Beneficiary's job duties in the United States and, therefore, it has not overcome our decision that the duties are not primarily managerial or executive in nature. Further, at the time of filing the extension petition, the Beneficiary was the Petitioner's only employee, and the Petitioner has not asserted how its staffing has changed at the time it filed this motion. Its tax records show that it had only one employee, the Beneficiary, in 2017, and that he earned only $9,000 that year. USCIS must take into account the reasonable needs of the organization in light of the overall purpose and stage of development of the organization if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity. *See* section 101(a)(44)(C) of the Act. As previously stated, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. If a business does not have the necessary staffing after one year to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible for an extension.[6] Given that the motion does not indicate that the Petitioner had any additional employees at the time of filing, the Petitioner had insufficient staff to operate its business based on its reasonable staffing needs. Further, the Petitioner did not clarify its business services on motion, so it remains unclear how its organization should be staffed to ensure that the Beneficiary's time is primarily occupied with managerial- or executive-level job duties.

For the foregoing reasons, the Petitioner has not shown proper cause for reopening and the motion to reopen will be denied.

[5] The Petitioner's brief submitted on motion alludes to exhibits relating to the father's death and the status of the construction season in the [redacted] but those exhibits were not attached to the brief.

[6] The business plan stated that the Petitioner would hire four employees in year 1, including the Beneficiary, and that it would "increase its headcount to eight by Year 5."

B. Motion to Reconsider

A motion to reconsider must establish that our decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) 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).

On motion, the Petitioner cites a non-precedent Administrative Appeals Office (AAO) decision for the proposition that a second new office petition may be approved for one year to allow a second U.S. business to get started and become operational. However, there is no provision for providing another full year of L-1A eligibility under the terms of a new office petition. The regulations expressly limit a beneficiary to one year of L-1A status relating to a new office. After that one year, the beneficiary may remain in L-1A status with the same employer only through extension of status:

> If the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year, after which the petitioner shall demonstrate as required by paragraph (l)(14)(ii) of this section that it is doing business as defined in paragraph (l)(1)(ii)(H) of this section to extend the validity of the petition.

8 C.F.R. § 214.2(l)(7)(i)(A)(*3*).

Additionally, the two AAO decisions cited by the Petitioner were not published as precedents and, therefore, they do not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of an individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.

Further, on motion, the Petitioner asserts that USCIS has "sometimes demonstrated flexibility" when adjudicating new office extensions in extraordinary circumstances. It cites two 1987 non-precedent AAO decisions for the proposition that L-1A extensions have been granted in extraordinary circumstances in "fairness to the petitioner."[7] However, the only provision that allows for the extension of a "new office" visa petition requires a petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii). The Petitioner has not done so here. As detailed above, the Petitioner has not established that it employs subordinate staff to relieve the Beneficiary from performing non-qualifying duties. Further, the Petitioner did not establish, as required, that it had been doing business for the previous year. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B). The phrase "doing business" is defined as the regular, systematic, and continuous provision of goods or services and does not include the mere presence of an agent or office. The Petitioner's initial new office petition was approved in February 2017. The record contains copies of invoices for work the Petitioner purportedly performed, but none are dated prior to July 2017. The Petitioner did not provide supporting evidence to show that it actually was doing business at any time prior to July 2017. In light of the above, the Petitioner has not provided sufficient evidence to show that it was doing business for the previous year.

[7] As stated above, non-precedent decisions are not binding in future adjudications.

On motion, the Petitioner also asks us to consider the requirements of 8 C.F.R. § 248.1(b) which it claims is "an analogous regulation meant to allow equitable consideration in a situation where someone has fallen out of status." It states that section 248(a) of Act and 8 C.F.R. § 248.1(b) give USCIS discretion to excuse an "out of status" period when the prior status expired at the time of filing.[8] However, a set forth above, the regulation allowing for the extension of a "new office" visa petition does not permit equitable consideration where a Petitioner has failed to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. Thus, the Petitioner's analogy is not applicable here.

The Petitioner also cites comments to a Department of Homeland Security (DHS) Office of Inspector General (OIG) report for the proposition that USCIS may compare the new office business plan with the company's track record during the one-year start-up period and require the Petitioner to explain "any deviations from the business plan."[9] However, the comments clearly state that there is "no provision in USCIS regulations that allows for an extension of this one-year 'start-up' period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension of L-1 status." The Petitioner has not established that it is eligible for an L-1A extension based on the regulatory requirements applicable to this case.

The Petitioner also asserts that the Beneficiary "is poised to develop this company and to retain significant US staff within the next week in anticipation of 2019's peak construction season in requesting an extension of his stay." However, to extend the validity of a new office petition for an intercompany transferee in a managerial or executive capacity, a petitioner must establish that a primarily managerial or executive position exists at the time of filing; future plans to create such a position cannot suffice.[10]

In sum, the Petitioner has not established that our previous decision was incorrect based on the evidence of record at the time of that decision. 8 C.F.R. § 103.5(a)(3). For the reasons discussed, the Petitioner has not shown that previous decision involved any incorrect application of law or policy and therefore has not shown proper cause for reconsideration.

Finally, the Director determined that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity. On appeal, we reserved the issue regarding the Beneficiary's foreign employment. On motion, we further reserve the issue regarding the Beneficiary's foreign employment.

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[8] It also cites *Youssefi v. Renaud*, 794 F.Supp. 2d 585 (D. Md. 2011), in support of this claim. However, that case involved a change of nonimmigrant status and is not applicable to this extension of status request. Further, the regulations governing the extension of L-1A new office petitions do not permit discretion in excusing the regulatory requirements.

[9] DHS, OIG, Appendix E, "Comments on OIG Draft Report: A Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program" (Jan. 2006), https://www.oig.dhs.gov/assets/Mgmt/OIG_06-22_Jan06.pdf.

[10] It also states that it will submit additional evidence within 30 days, but no additional evidence has been submitted on motion. The Petitioner also mentions that the Beneficiary and his wife were recently injured in a car accident, but it does not provide any support for that claim.

III. CONCLUSION

The motion to reopen and motion to reconsider will be denied for the above stated reasons. 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* G-E-, Inc., ID# 5463573 (AAO Nov. 14, 2019)