U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-G-G-, LLC

DATE: NOV. 23, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a floor cleaning business, seeks to continue to engage the Beneficiary's temporary services as managing member 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that the former new office could now support a managerial or executive capacity after its first year of operations. The Director declined the Petitioner's request to treat the petition as a new office petition, and instead considered the petition to be a request to extend the validity of the prior new office petition.

The matter is now before us on appeal. On appeal, the Petitioner does not contest the Director's finding that the company cannot yet support a managerial or executive position. Instead, the appeal rests entirely on the assertion that "extraordinary circumstances outside of the Beneficiary's control . . . warrant approval of a second new office L-1A petition," and that a petitioner can file a second new office petition even in the absence of such circumstances.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, 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

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period April 14, 2016, until April 13, 2017. 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.

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.*

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

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).

II. PROCEDURAL HISTORY

To properly understand and address the issues in this proceeding, we must briefly outline the underlying procedural history before proceeding to a discussion of the merits. First, the regulations define two important terms:

> *New office* means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.
>
> *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

8 C.F.R. § 214.2(l)(1)(ii)(F) and (H).

The Petitioner previously filed a petition for a new office in January 2016. The Director approved that petition on April 14, 2016, granting the Beneficiary L-1A status until April 13, 2017. At the time of the approval, the Beneficiary was already in the United States as a B-2 nonimmigrant visitor. At the time, the Petitioner's stated plan was to operate a cleaning service for upscale homes.

The Petitioner filed the present petition on April 11, 2017, and requested another one year period from April 11, 2017 to April 10, 2018. In an attachment to the petition, the Petitioner stated: "This is a new petition. It is not an extension petition, or a request to recapture lost time." The Petitioner asserted its "U.S. operations did not begin the regular, systematic and continuous provision of its services until July 2016," and therefore "the petitioner has been doing business for less than one year as of the date the instant petition is being filed." As such, the Petitioner claimed that "it continues to qualify as a 'new office.'"

In a request for evidence (RFE), the Director stated that the petition could not be considered as a second new office petition. Rather, the Director would consider the petition as a request to extend the Beneficiary's existing L-1A status.

In response to the RFE, the Petitioner "requested that the instant [petition] be amended to request a two year extension of status." The Petitioner added: "In the event that the Service makes a finding that the Petitioner does not qualify for 'extension of a new office' . . . , the Petitioner hereby respectfully requests to renew its initial request for approval of this petition as a second 'new office' petition." In effect, the Petitioner requested two adjudications of the same petition, under two different sets of criteria. The Petitioner also referred to the Beneficiary's intended position as "exclusively managerial," making no claim that the Beneficiary would work in an executive capacity.

In the denial notice, the Director declined to consider the petition as a new office petition because the Beneficiary was in the United States, and able to run the petitioning business, throughout the one-year term of the new office approval. The Director explained that, in its discretion, U.S. Citizenship and Immigration Services may approve a second new office petition in situations where a beneficiary, for reasons beyond his or her control, is unable to work in the United States in L-1A status during the original one-year validity period. Even then, the Director stated, the beneficiary "will typically be granted 'the remaining of the one year' from the date of his or her arrival" rather than another full year of L-1A status.

The Director also found that, at the end of the one-year new office period, the Petitioner had not shown that the company had progressed to a point where it could support the Beneficiary in a primarily managerial capacity. The Director made a further finding that the Petitioner had not shown that it employed the Beneficiary.

On appeal, the Petitioner does not contest the Director's findings regarding the extension of the petition's validity. The Petitioner only disputes the determination that it does not continue to qualify as a new office. Therefore, we will focus on the latter issue.

III. NEW OFFICE

The key issue in this decision is whether the Petitioner can secure a second full year of status as a new office. At various times in this proceeding, the Petitioner has offered various reasons why it qualifies for this benefit. We have paraphrased these reasons below:

- The Beneficiary's L-1A status took effect in April 2016, but the Petitioner did not begin doing business until July 2016. Also, the Petitioner abandoned its original business model and began an effectively new business in March 2017. Therefore, when the Petitioner filed the present petition in April 2017, it had been doing business for less than one year, and therefore still qualified as a new office.

- There is no statute, regulation, or case law to prevent the Petitioner from filing more than one new office petition for the same beneficiary.
- The Director cited no authority requiring a petitioner to show extraordinary circumstances outside the Beneficiary's control to justify a second new office petition.

Further below, we will discuss the Petitioner's claim that it began doing business in July 2016. But first, we will consider the more general and fundamental question of whether a petitioner can secure two years of benefits as a new office.

A. New Office Limitations

The Director acknowledged that, if delays occur which prevent a beneficiary from holding L-1A status for a full year, the petitioning employer may be able to recapture the missing time by filing a new petition on that beneficiary's behalf. In this instance, however, the Beneficiary was in the United States, with approved L-1A status, throughout the year covered by the initial new office petition. The Director found that the Petitioner did not submit "evidence of extraordinary circumstances which prevented the beneficiary from immediately performing his job duties and executing the business plan he presented in the new office filing."

On appeal, the Petitioner asserts that the "regulations do not specifically prohibit the filing of a second new [office] L-1A petition," and that the Petitioner therefore "should be able to file a second new office petition, and receive another full year of L-1A eligibility, without regard to the need to show extenuating circumstances."

There is no provision for providing "another full year of L-1A eligibility" under the terms of a new office petition, with or without extenuating circumstances. 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*). In response to the RFE, the Petitioner maintained that there is a "distinction between extension of a beneficiary's *status* and extension of the *underlying petition*." The Petitioner asserted that, because the Beneficiary already held L-1A status, that status would be extended, but the Petitioner sought to extend that status through "a new petition" that would reset the one-year "new office" clock. The above-cited regulation clearly states that, if a petitioner seeks to prolong a beneficiary's status beyond the initial "new office" year, then it "shall . . . [seek] to extend the validity of the petition," by following the procedures set forth at 8 C.F.R. § 214.2(l)(14)(ii). The Petitioner, on whom the burden of proof rests, cites no authority that would allow the Petitioner to

decouple the Beneficiary's ongoing L-1A status with the same employer from the petition that first granted that status.

We acknowledge that 8 C.F.R. § 214.2(l)(15)(i) refers to "the petition extension and the alien's extension of stay." But that regulation also indicates that both must be requested simultaneously on the same petition form; it makes no provision for extension of *stay* without an extension of the underlying *petition*. Also, even if the Petitioner could separate the two types of extension, a denial of extension of stay is not appealable. *See* 8 C.F.R. § 241.1(c)(5). We can only review the denial of the concurrent petition extension.

Under the Petitioner's reasoning, companies would routinely qualify for two "new office" periods unless they were fully operational on a given beneficiary's first day in L-1A status. A petitioner could deliberately engineer such a situation simply by delaying commencement of operations after a beneficiary assumes L-1A status (either through entry or, in this case, change of status). The regulations clearly do not contemplate such circumstances, because a beneficiary may come "to the United States to open . . . a new office." This wording plainly indicates an office that is not yet open. If the new office is not yet open upon the beneficiary's arrival, then preparations should at least be underway to open it. For example, the new office must have already secured sufficient physical premises to house the operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). A business is not entitled to a second year of status as a new office because it is running behind schedule or, as the Petitioner asserts in this case, the company made fundamental changes after the original business model proved not to be viable.

For a given beneficiary working for a given petitioner, the regulations provide for only one year of L-1A status in a new office. New office status is contingent on progress towards more fully establishing the business. If, at the end of that year, the new office has not made that progress, then this deficiency is grounds for ending the immigration benefit, not extending it.

B. Doing Business

Although we agree with the Director that new office status cannot be prolonged past one year, we will also address the Petitioner's assertion that it is entitled to special consideration based on when it started doing business. The Petitioner has actually made two claims in this regard, stating that a case can be made that the Petitioner started doing business either in July 2016 or March 2017. The record supports neither of these claims.

Regarding the July 2016 claim, the Petitioner has asserted throughout this proceeding that, while the Beneficiary was in the United States in April 2016, it took several months to purchase equipment and make other necessary arrangements. On appeal, the Petitioner states: "it was not until July 2016, after [the company] obtained a business license, opened its offices and, most importantly, secured liability insurance, that [the Petitioner] began offering its cleaning services to customers."

Receipts in the record show that the Petitioner spent thousands of dollars on cleaning equipment in the earliest months of 2016, before the first petition's approval in April of that year. Also, the

Petitioner submitted copies of 10 invoices for cleaning services performed between March 1 and June 23, 2016. This evidence, on its face, contradicts the claim that the Petitioner "began offering its cleaning services to customers" in July 2016. The record does not specify a particular point when the sporadic, occasional provision of services became regular, systematic, and continuous, but nothing in the record supports the Petitioner's claim of a July 2016 benchmark.

The Petitioner contends that, when it became apparent that its sales figures were falling short of expectations, the company shifted its emphasis from cleaning high-end homes to cleaning and restoring hard-surface floors. In response to the RFE, the Petitioner stated:

> Because the Petitioner did not begin regularly, systematically and continuously providing upscale house cleaning services until July 2016 and, more importantly, because it abandoned the upscale house clean[ing] service business and began the new natural stone restoration business in March 2017, it had been "doing business," as that term is defined in 8 C.F.R. (l)(1)(ii)(H), for less than one year at the time the instant petition was filed. If the Petitioner had closed [redacted] and opened a new company to pursue the stone restoration business, it is submitted that there would be little doubt that a second new petition could be approved. The fact that [redacted] simply terminated one business and began another under the same business entity is not a meaningful distinction, as it simply involves form over substance.

The issue is not simply one of "form over substance," as the Petitioner claimed. The Petitioner speculated about what would have resulted "[i]f the Petitioner had closed [redacted] and opened a new company," but the Petitioner *is* [redacted] A limited liability company is a separate legal entity from its owner or owners, and it is that entity, not its owner(s), that files petitions on behalf of prospective employees. If the Beneficiary had established multiple separate entities, operating independently, then each entity could have filed its own new office petition, but that did not happen in this case. The outcome of this proceeding rests on what actually happened, rather than hypothetical situations that could have occurred but did not.

The definition of "doing business" refers generally to the provision of goods, services, or both, rather than specifically to any one type or category of goods or services; a business does not begin "doing business" anew every time it introduces a new product or service. Therefore, a change in the goods or services offered does not reset the one-year "doing business" clock for purposes of a new office petition. When the Petitioner shifted its focus to floor restoration, the change did not erase the company's prior history of house cleaning services. By the Petitioner's logic, the company could remain a "new office" indefinitely, simply by abandoning each activity after less than a year and moving on to a different one.

For the above reasons, the Petitioner did not qualify as a new office when it filed the present petition in April 2017.

IV. PETITION EXTENSION

The Director did not accept the Petitioner's request to consider the petition under the new office provisions. Instead, the Director adjudicated the petition under the requirements for extending the validity of a new office petition, and concluded that the company cannot yet support a managerial or executive position. On appeal, the Petitioner identifies no alleged error of fact or law in that finding. Instead, the appeal rests entirely on the assertion that "extraordinary circumstances outside of the Beneficiary's control . . . warrant approval of a second new office L-1A petition." The implied (but not stated) argument is that, if the petition now before us were to qualify as a new office petition, then the stated ground for denial would not apply, because it pertains only to extensions of new office petitions.

Because the Petitioner does not directly contest the actual basis for denial, we consider the Petitioner to have abandoned this issue. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *see also, Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned because he did not raise them on appeal to the Administrative Appeals Office).

Given the Petitioner's abandonment of the sole basis for denial of the petition, we need not discuss the issue in detail. To warrant a discussion on the merits, an appeal must identify specifically any erroneous conclusion of law or statement of fact in the underlying decision. *See* 8 C.F.R. § 103.3(a)(1)(v).Nevertheless, we agree with the substance of the Director's findings, and we concur that those findings are sufficient grounds to deny the petition.

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.

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

To address the above requirements, a new office seeking an extension must submit information about the Beneficiary's duties and the company's staffing. *See* 8 C.F.R. § 214.2(l)(14)(ii)(C) and (D).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A) of the Act. Personnel managers are required to

primarily supervise and control the work of other supervisory, professional, or managerial employees. *Id.*; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*4*).

An organizational chart showed that the Beneficiary oversaw a supervisor who, in turn, had authority over four subordinate workers. The Petitioner acknowledged that all these workers were contractors rather than employees. The Director found that the Petitioner had not established that the Beneficiary is a personnel manager, because the statutory definition of manager refers to the supervision and control "of other supervisory, professional, or managerial employees" rather than contractors.

The term "function manager" applies generally when a beneficiary's managerial capacity derives not from supervising or controlling a subordinate staff, but instead from primarily managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function.

A function manager's responsibility can include overseeing the work of contractors, but the Director found that the Petitioner had not shown that the Beneficiary is a function manager. A list of duties submitted in response to the RFE indicated that the Beneficiary "works at the top level of the organization," "has unlimited latitude in day to day discretionary decision making," and "has the ultimate authority for all personnel decisions."

The Petitioner indicated that the Beneficiary oversaw "general administration of operations, budgeting, accounting and finance, purchasing, marketing, professional services, and banking relationships." The Petitioner asserted that one of the Beneficiary's subordinates supervised workers, scheduled appointments, and purchased supplies, but the Petitioner did not establish the extent to which the Beneficiary had delegated to subordinates the operational and clerical activities relating to accounting, marketing, and business development.

Although the Petitioner claimed that the Beneficiary has no operational duties with the company, the Director observed that the Beneficiary personally took a "Hard Surface Cleaning Course" from the [redacted] in August 2016. A March 2017 letter from a customer appeared to indicate that the Beneficiary himself traveled to the job site and performed some of the cleaning service; the customer stated that the Beneficiary "recently performed work for us . . . . He and his co-worker were professional and effective."

The Director concluded that the Petitioner had not shown that the Beneficiary's duties with the company were primarily managerial rather than operational. Therefore, the Director concluded that the Petitioner had not established that the Beneficiary is a function manager. The Director also noted the absence of evidence (such as payroll records) that the Petitioner actually employed the Beneficiary during his prior time in L-1A status.

Based on the deficiencies and inconsistencies discussed above, we agree with the Director's finding that the Petitioner has not established that the Beneficiary would be employed in a managerial capacity under the extended petition.

V. CONCLUSION

The Petitioner did not substantively contest the basis for denial of the petition and it did not show eligibility for extension of the petition's validity. The Petitioner has not shown that it qualifies for a second year of new office status, or that it is even possible to grant that benefit.

ORDER: The appeal is dismissed.

Cite as *Matter of K-G-G-*, ID# 1661914 (AAO Nov. 23, 2018)