U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-G-S-A- LTD.

DATE: NOV. 30, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a shipping company, seeks to temporarily employ the Beneficiary as its operations director under the L-1A nonimmigrant classification for intracompany transferees. *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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that: (1) a qualifying foreign company had continuously employed the Beneficiary for at least one year out of the three years immediately preceding the filing of the petition; (2) the Beneficiary had been employed abroad in an executive capacity; or (3) the Petitioner would employ the Beneficiary in the United States in an executive capacity. We dismissed the Petitioner's appeal, and also found that the Petitioner had willfully misrepresented material facts relating to the Beneficiary's employment history.

The Director also found that the Beneficiary violated her B-2 nonimmigrant status by engaging in unauthorized employment, and therefore is ineligible for an extension of stay. The Petitioner contests this finding on appeal and again on motion. As we noted in our appellate decision, this finding is administratively separate from the petition and not subject to appellate review. *See* 8 C.F.R. § 248.3(g). Because this issue lies outside our appellate jurisdiction and we have no authority to withdraw the finding, we will not address it here.

The matter is now before us on a combined motion to reopen and motion to reconsider. On motion, the Petitioner submits additional evidence and asserts that we erred when we found that the Beneficiary began working for the Petitioner's foreign subsidiary in 2015 rather than 2013.

We will deny both motions.

I. MOTION REQUIREMENTS

A motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. We will discuss the requirements of each type of

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

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen the proceeding to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening, 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).

II. REQUEST FOR EXTENSION

The Petitioner states that its prior attorney has been "out of the country and unable to help," and therefore it has hired new counsel. The Petitioner states that, as a result, there has been a delay in obtaining additional new evidence, and the new attorney has not had enough time to prepare a comprehensive motion. The Petitioner asks that we "accept this timely appeal and hold adjudication of it in abeyance while Petitioner gathers the remaining documents needed to fully support this motion."

The regulation at 8 C.F.R. § 103.5(a)(1)(i) allows us the discretion to accept the late filing of a motion to reopen if the delay was reasonable and beyond the Petitioner's control. There is no provision, however, to allow the Petitioner to supplement a motion that has already been filed, and there is no regulation requiring us to suspend adjudication indefinitely while the Petitioner seeks additional evidence.[1]

We note that the Petitioner does not identify "the remaining documents," say where they are, estimate the time necessary to obtain them, or explain why the Petitioner needed to obtain them through its previous attorney rather than from the actual sources of the evidence in China or at the petitioning company itself. There is no persuasive basis to conclude that the unidentified documents exist. We note that more than five months have passed since the Petitioner filed the motion, substantially longer than the 30 days ordinarily permitted for the preparation and filing of a motion. To date, the record contains no further submission from the Petitioner. We consider the record to be complete.

III. MOTION TO RECONSIDER

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

[1] The USCIS regulation at 8 C.F.R. § 103.3(a)(2)(vii) permits the petitioner to supplement an appeal after filing it, but there is no parallel provision for motions to reopen. The motion must, therefore, be complete at the time of filing.

pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

In this instance, the Petitioner has not identified any incorrect application of law or policy. Also, the Petitioner disputes our factual findings but does not explain how these findings were incorrect in the context of the evidence in the record at the time of our prior decision. Instead, the Petitioner relies on new evidence – some submitted on motion, and some to be submitted at an unspecified future date. New evidence pertains to motions to *reopen*, and therefore the submission of new evidence is not grounds for *reconsideration*.

The Petitioner has not established that our decision was based on an incorrect application law or USCIS policy, or that our decision was incorrect based on the evidence of record at the time of that decision. Therefore, the Petitioner has not shown proper cause for reconsideration.

IV. MOTION TO REOPEN

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). The Petitioner has submitted some evidence that is new to the record. For the reasons explained below, however, we find that this evidence does not warrant reopening of the proceeding or approval of the petition.

A. 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.*

B. Employment in an Executive Capacity

The Petitioner asserts that the Beneficiary has been employed in an executive capacity abroad, and that it will employ her in an executive capacity in the United States. An executive capacity is 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.

1. One Year of Employment Abroad

The Petitioner must have engaged in qualifying employment, for the Petitioner or a related employer, for at least one continuous year during the three years preceding the filing of the petition in May 2016. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). The Petitioner claimed that the Beneficiary met this requirement by working as the chief financial officer for its foreign subsidiary in [redacted] from May 2013 until she entered the United States in November 2015.

We found that the Petitioner worked for a different company for most of that time, and that the Petitioner had willfully misrepresented material facts regarding the Beneficiary's claimed employment in order to create the appearance of qualifying past employment. Further details appear in our earlier decision dated April 27, 2017.

The Petitioner had submitted the Beneficiary's résumé, indicating that she worked as deputy general manager of an unrelated company, [redacted] from August 2009 to April 2013, and at TPS from May 2013 onward. The résumé did not indicate any employment at [redacted] after April 2013.

The Petitioner submitted "wage lists" purporting to show that the Beneficiary received a monthly salary from [redacted] from May 2013 to February 2016. Several wage lists were printed on the same page, demonstrating that the lists were printed after the fact; they were not contemporaneous documents prepared at the time of payment. Bank records showed that the Petitioner gave the Beneficiary a $20,000 "travel advance" in January 2016.

We found that the wage lists were not persuasive evidence of employment, for two principal reasons. First, they showed payment for several months after the Beneficiary arrived in the United States. Therefore, the payments could not have been necessarily contingent on continued work for the foreign company. Second, other documents in the record did not corroborate the Beneficiary's claimed employment at [redacted] before June 2015. These documents included an employment contract and a [redacted] We also noted that, when the Beneficiary applied for nonimmigrant visas in 2014 and 2015, the Beneficiary identified her then-current employer as [redacted] rather than [redacted] We found that the Petitioner had not corroborated the claim that the Beneficiary had worked for [redacted] since 2013.

In an affidavit submitted on motion, the Beneficiary states that, since early 2013, she has simultaneously held executive positions with [redacted] and [redacted] with the latter position being "a less hands-on role focused on corporate governance." When weighing the credibility and sufficiency of this new affidavit, we must consider corroborating evidence or the lack thereof, as well as how consistent the new claims are with the Petitioner's prior assertions.

The Petitioner submits copies of municipal documents consistent with continued employment in [redacted] after 2013. These materials are entirely consistent with our finding that the Beneficiary continued

working for [redacted]-based [redacted] after 2013. It would serve no purpose for us to reopen the proceeding based on documents that confirm a finding we have already made.

As we noted in our April 27, 2017 decision, the Petitioner has not claimed or established that [redacted] has a qualifying relationship with the petitioning U.S. employer as a branch, affiliate, parent, or subsidiary. Therefore, the Beneficiary's employment with [redacted] cannot establish eligibility for the benefit sought in this proceeding.

The newly submitted materials show that the Beneficiary worked for [redacted] in [redacted] after 2013, but they do not show that the Beneficiary began working for [redacted] in [redacted] before 2015. This is significant because the Beneficiary's eligibility relies on past employment with [redacted] not with [redacted] The Petitioner was demonstrably able to obtain and submit copies the [redacted] documents with a timely motion. The Petitioner states that it "has not had an opportunity to collect sufficient evidence" relating to the Beneficiary's claimed employment with [redacted] in [redacted] The Petitioner does not explain why one type of evidence is harder to obtain than the other, when both concern claims of employment during the same period of time. The Petitioner does not explain what evidence it is trying to obtain, or provide documentation showing that it has begun making inquiries to obtain it.

As we noted in our prior decision, the Beneficiary's employment contract with [redacted] is dated June 1, 2015, with a 30-day "probationary period." The Petitioner has not explained how this document is consistent with a May 2013 hiring date.

The Petitioner states that the [redacted] "showed the government benefits paid to Beneficiary for part of her employment with [redacted] The document shows the "Starting Time of Payment" as June 2015. The unsupported claim that the document represents only "part of her employment" has no weight as evidence.

The Petitioner has not overcome our finding that the Beneficiary appears to have begun working for [redacted] in 2015, not 2013, as claimed. The Petitioner has not shown proper cause to reopen the proceeding in this regard.

The Petitioner disputes our finding of willful misrepresentation of a material fact, but offers no other substantive response. The Petitioner repeats the assertion that it is seeking additional evidence to rebut the finding, but no further evidence is in the record. The new documents submitted on motion are consistent with the finding that [redacted] not [redacted] employed the Beneficiary in 2013-2015. The Petitioner's assertion that it will submit unidentified evidence at an unspecified future time is not a valid basis for granting the motion or for indefinitely suspending its adjudication.

2. U.S. Employment in an Executive Capacity

In our appellate decision, we agreed with the Director's finding that the Petitioner had not established that it would employ the Beneficiary in a primarily executive capacity.

As detailed in our April 2017 decision, we found that "the Petitioner has not consistently described the Beneficiary's duties or shown them to meet the requirements of an executive capacity." With respect to the Petitioner's claim that the Beneficiary's executive authority would extend to foreign subsidiaries, we found: "The Petitioner has not provided enough information about the larger organization to support the claim that the Beneficiary would direct the management of the subsidiaries and establish their goals and policies."

On motion, the Petitioner contends that this finding was in error, but the Petitioner offers no substantive support for this assertion. Instead, the Petitioner repeats the assertion that it requires more time to prepare supporting documents. Neither the Beneficiary's affidavit nor the new evidence submitted on motion relate to this ground for the dismissal of the appeal. Therefore, the Petitioner has not shown proper cause to reopen the proceeding in this regard.

V. CONCLUSION

The Petitioner did not submit new evidence which overcame our prior findings or otherwise established eligibility. The Petitioner also did not establish that our earlier decision was in error when we issued it.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of S-G-S-A- Ltd.*, ID# 811112 (AAO Nov. 30, 2017)