U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-W- LLC

DATE: NOV. 30, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a real estate development and export business, seeks to temporarily employ the Beneficiary as its chief executive officer (CEO) under the L-1A nonimmigrant classification for intracompany transferees. 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) the Beneficiary had one continuous year of full-time employment abroad in the three years preceding the filing of the petition; (2) the Beneficiary would be employed in a managerial or executive capacity in the United States; and (3) the Beneficiary was employed abroad in a managerial or executive capacity. We dismissed the Petitioner's subsequent appeal and further found that the Petitioner did not establish that it was doing business as defined in the regulations, or that it has a qualifying relationship with the Beneficiary's foreign employer. The matter is now before us on a combined motion to reopen and motion to reconsider.

On motion, the Petitioner asserts that this petition should have been adjudicated as a "new office," and requests that U.S. Citizenship and Immigration Services (USCIS) exercise its discretion to grant the Beneficiary a change and extension of status based on a prior approved new office petition.[1] The Petitioner also briefly addresses each of the substantive grounds for denial in support of its claim that the Beneficiary is eligible for the requested benefit. Upon review, we will deny the combined motion.

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must meet the formal filing requirements (such as, for instance, submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1).

[1] USCIS approved an L-1A petition filed on the Beneficiary's behalf, which was valid from January 5, 2017, until January 4, 2018 . However, the approval did not grant the Beneficiary a change of status to L-1A classification and he did not depart the United States and re-enter with an L-1 visa. Accordingly, he was not in L-1A status when this petition was filed.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that we based our decision 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. A petitioner must support its motion to reconsider with a 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. 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

At issue in this matter is whether any new evidence or any legal arguments made in support of this motion to reconsider overcome our previous findings that the Petitioner did not establish that: (1) the Beneficiary has at least one continuous year of full-time employment abroad in the three years preceding the filing of the petition; (2) the Beneficiary was employed abroad in a managerial or executive capacity; (3) the Beneficiary would be employed in the United States in a managerial or executive capacity; (4) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer; and (5) the Petitioner is doing business as defined in the regulations.

For the reasons discussed below, we will deny the motion to reopen and the motion to reconsider. Although the Petitioner's brief contains citations to the Act and USCIS regulations, the Petitioner has not established that our decision to dismiss its appeal was based on an incorrect application of law or policy, nor has it submitted new facts supported by documentary evidence sufficient to overcome our dismissal of the appeal.

Before turning to the issues discussed in our appellate decision, we note that the Petitioner's brief on motion includes a lengthy explanation of the Beneficiary's immigration status and two prior L-1A petitions filed on his behalf.

As noted, the Beneficiary in this matter was also the beneficiary of an approved new office petition, filed by the same employer, which was still valid at the time this petition was filed. The Petitioner had filed that petition in August 2016 and it was approved with a one-year validity period beginning in January 2017. In that matter, the Petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that the Beneficiary would depart the United States to obtain an L-1 visa at a U.S. consulate overseas and did not request that he be granted a change of nonimmigrant status from B-1 to L-1A. The Petitioner and counsel maintain that the request for consular notification was an error on counsel's part and the Petitioner had intended to request a change of status.

Rather than having the Beneficiary depart the United States to obtain an L-1A visa, the Petitioner filed a second new office L-1A petition , seeking to obtain an amended approval notice granting the Beneficiary a change of status. The Director denied that petition and the requested change and extension of status, finding that the Petitioner did not establish eligibility for L-1A classification. We dismissed the Petitioner's subsequent appeal of that decision, noting that neither our office nor the service center director was bound by the initial approval of the petition.

The Petitioner then filed the instant petition in June 2017, once again explained former counsel's mistake, requested a change of status despite the expiration of the Beneficiary's B-1 nonimmigrant status on September 1, 2016, and requested a three-year validity period beginning in January 2017. The Director again declined to grant the Beneficiary L-1A status based on the prior approved petition and adjudicated this petition on its merits, finding that the Petitioner had not established eligibility for the benefit sought.

On motion, the Petitioner once again seeks to rely on the initial approval of its new office petition and requests that USCIS exercise its discretion to "grant an L-1A petition that covers the period until January 4, 2018." The Petitioner emphasizes that "[u]nder 8 CFR 214.1(c)(4), it is within the discretion of the Service to excuse a failure to timely file an extension due to 'extraordinary circumstances beyond the control of the applicant or petitioner.'"

The Director's decision regarding the requested change of status and extension of stay is not appealable, so we do not have jurisdiction to review that decision, nor may we exercise our own discretion to excuse an untimely filing. The regulations state that, while a petitioner's request to classify a beneficiary as an L-1A nonimmigrant and to extend a beneficiary's stay are combined in the Form I-129, a separate determination must be made by the director on each issue. 8 C.F.R. § 214.2(l)(15)(i). The regulations provide that there is no appeal of a denial of an extension of stay filed on a Form I-129. *See* 8 C.F.R. § 214.1(c)(5). Accordingly, the Director's finding that the Beneficiary does not qualify for a change and extension of status cannot be appealed. We will now turn to the grounds for denial addressed in our decision.

A. Motion to Reopen

As noted, a motion to reopen is based on documentary evidence of new facts. 8 C.F.R. § 103.5(a)(2). The Petitioner's motion consists of a brief, a copy of our prior decision, and copies of evidence that it submitted previously. Although the Petitioner states it is filing a "motion to reopen," the brief does not state any new facts, nor is it supported by new documentary evidence.

Therefore, the Petitioner has not satisfied the regulatory requirements for reopening and the motion to reopen is denied.

B. Motion to Reconsider

A motion to reconsider must establish that we based our decision 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).

1. Doing Business

In denying the petition, the Director determined that the Petitioner had commenced business operations more than 12 months prior to filing the instant petition and was doing business at the time

of filing. Accordingly, the Director determined that the Petitioner, which indicated that it was filing a "new office" petition, did not meet the definition of "new office" at 8 C.F.R. § 214.2(l)(1)(ii)(F).

On appeal, the Petitioner claimed that the Director's determination that it was doing business was flawed, because it was based on a finding that the Petitioner had acquired three acres of land. The Petitioner claimed that "purchasing land alon[e] constitutes no income and no contacts with customers, and therefore it was not doing business." The Petitioner argued that the Director erred by not evaluating the instant matter as a new office petition.

In adjudicating the appeal, we explained that the Petitioner could not be granted a second new office approval and, noting that the Petitioner had requested that the petition be approved through 2020, treated the petition as a request to extend the prior new office petition. We dismissed the appeal, in part, based on the Petitioner's claim that it was not doing business, as we had already determined that the Petitioner could not be treated as a new office.

On motion, the Petitioner claims that it previously submitted sufficient evidence to establish that it was doing business, but does not explain why it claimed on appeal that it had not yet engaged in any income-producing business activities.

Nevertheless, upon further review, we will withdraw our finding that the Petitioner was not doing business. The Director's finding that the Petitioner was doing business for more than one year was based on evidence in the record showing that the Petitioner's land purchase made in April 2016 included a commercial office building which had 11 tenants at the time of acquisition. Those tenants' leases were assigned to the Petitioner as the new building owner, and under the terms of the submitted lease agreements, the Petitioner would have collected rent from its tenants for a full twelve months prior to the filing of this petition. In addition, we find that the Director properly determined that this petition could not be treated as a new office petition based on the fact that it had been doing business for more than one year at the time of filing.

2. Beneficiary's Employment Abroad

The Director determined that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity and further found that he did not have at least continuous year of full-time employment abroad in the three years preceding the filing of the petition because he had spent only 272 days outside the United States during that three-year period. We affirmed both of this findings in our decision dismissing the Petitioner's appeal.

On motion, the Petitioner contends that the Beneficiary had at least one full year of employment abroad in the three years preceding its filing of the initial L-1A petition on his behalf in August 2016, and states that the foreign entity has continuously employed him since 2012, even during his lengthy stay in the United States. However, the statute and regulations require that a beneficiary's qualifying employment abroad take place while the beneficiary is physically present outside the United States, and periods spent in the United States do not count towards fulfillment of that one year requirement. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). Further, since the Beneficiary in this matter has

never held L-1A status, the Petitioner's request that we consider the three-year period preceding the date of the initial L-1A petition cannot be granted.

Accordingly, the relevant three-year period in this case is the period directly preceding the filing of this petition. The Petitioner does not cite to any USCIS law, policy, or precedent decision in support of its claim that we erred in making this finding, nor does it claim that the Beneficiary was employed outside the United States for at least one year during the relevant three-year period. Accordingly, the Petitioner has not established that the Beneficiary meets this eligibility requirement.

Further, with respect to the Beneficiary's employment capacity abroad, the Petitioner simply states that "the Beneficiary's job title is the vice president of [the foreign entity] and the Beneficiary acted in a managerial or executive capacity abroad in [the foreign entity]. [E]vidences [h]ave been submitted previously." This broad statement does not address or overcome the specific findings made in our decision. Even if we determined that the Beneficiary was employed in a qualifying capacity abroad, the Petitioner cannot establish that he was employed in such capacity for at least one year in the three years preceding the filing of the petition. Accordingly, we will not disturb our prior determination with respect to this issue.

3. U.S. Employment in an Executive Capacity

In dismissing the appeal, we determined that the record did not support the Petitioner's claim that it would employ the Beneficiary in an executive capacity as defined at section 101(a)(44)(A) of the Act. In reaching this determination, we acknowledged the Beneficiary's senior position and level of authority, but found that the Petitioner had not provided a sufficiently detailed description of his proposed duties to establish what he would be doing on a day-to-day basis, and as such, had not established that his actual duties would be primary executive in nature. We also addressed the Petitioner's staffing levels in evaluating the totality of the evidence, noting that the record showed that the petitioning company had no employees, and that there was insufficient evidence to support the Petitioner's claim that independent contractors would sufficiently support the Beneficiary in the claimed executive capacity.

In addressing this issue on motion, the Petitioner relies on its argument that it remains eligible for consideration as a new office, and asserts it has demonstrated that the new office will support an executive position within one year. For the reasons already addressed, however, the Petitioner has not established that it remains eligible for consideration as a new office. Therefore, it must show that it was able to employ the Beneficiary in an executive capacity when this petition was filed in June 2017.

The Petitioner also contends that, even if it is no longer a new office, it "meets the standard for continuing to require [the Beneficiary] as an executive in the United States to allow the business to ramp up and follow its viable business plan." The Petitioner states that the CEO "is the highest position in the U.S. entity that leads the managers and employees," and that "there is no merit to the assertion . . . that the U.S. [company] would be able to support an executive position," as there was "abundant evidence" provided. These general claims do not address the specific deficiencies

addressed at length in our prior decision or establish that our decision was based on an incorrect application of law or policy. Accordingly, we will not disturb our prior determination.

4. Qualifying Relationship

Finally, although the issue was not addressed in the Director's decision, we dismissed the Petitioner's appeal, in part, based on a finding that the Petitioner had not established that it has a qualifying relationship with the Beneficiary's foreign employer. To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See* section 101(a)(15)(L) of the Act; *see also* 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate").

The Petitioner claims that it is a wholly owned subsidiary of a U.S. company, which, in turn, is 97% owned by the Beneficiary's foreign employer, a Chinese company. Our determination was based on a finding that the Petitioner indicated in response to a request for evidence (RFE) that was being dissolved. We noted that the Petitioner did not submit additional documentation to establish its ownership following dissolution of its sole owner.

On motion, the Petitioner asserts that we misunderstood the information it provided in response to the RFE, noting that the company that was to be dissolved was " ," an inactive subsidiary of and not the U.S. parent company itself.[2] The Petitioner re-submits evidence related to Based on the Petitioner's clarification, we will withdraw our finding that the Petitioner did not establish a qualifying relationship with the Beneficiary's foreign employer.

III. CONCLUSION

The combined motion will be denied as the Petitioner has not established that: (1) the Beneficiary will be employed in the United States in an executive capacity; and (2) the Beneficiary has at least one year of continuous employment abroad in a managerial or executive capacity in the three years preceding the filing of the petition.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of K-W- LLC*, ID# 1847552 (AAO Nov. 30, 2018)

[2] We note that a search of public records shows that both and are "active" corporations in the Commonwealth of Massachusetts as of this date.