U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-W- LLC

DATE: SEPT. 16, 2019

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 the chief executive officer (CEO) of its new office[1] 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 on multiple grounds and, after reviewing the Petitioner's motions to reopen and reconsider, affirmed all of the grounds for denial. On appeal we withdrew two of the Director's findings, but found that the Petitioner did not overcome two other grounds for denial, specifically, that the Petitioner did not establish (1) that the Beneficiary will be employed in the United States in a managerial or executive capacity within one year of the petition's approval, and (2) that the Beneficiary had at least one year of employment abroad in a managerial or executive capacity in the three years preceding the filing of the petition. We also indicated that the Director's decision regarding the Petitioner's request for a change of status and extension of stay for the Beneficiary was not appealable. The Petitioner filed a motion to reopen and a motion to reconsider, which we denied after analyzing the factual and legal arguments presented and concluding that they did not show proper cause for reopening the proceedings or reconsidering our prior decision.

The matter is now before us on a second combined motion to reopen and reconsider. The Petitioner submits a brief and some additional documentation and requests that the petition be approved. Upon review, we will deny the combined motion.

I. MOTION REQUIREMENTS

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 our decision was based on an incorrect

[1] The term "new office" refers to an organization which has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year within the date of the petition's approval to support an executive or managerial position.

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

In our previous decision we determined that the Petitioner had presented no new facts to establish eligibility or identified any incorrect application of law or policy demonstrating that our appellate decision was incorrect on the issues of (1) whether the Beneficiary would be employed in a managerial or executive capacity in the United States within one year of the petition's approval and (2) whether the Beneficiary had been employed abroad in a managerial or executive capacity for one of the previous three years. With respect to the Beneficiary's prospective employment in the United States, we noted that the totality of the evidence must be reviewed – including such factors as the Beneficiary's job description, the U.S. company's organizational structure and the nature of its business, the duties of the Beneficiary's subordinate employees and the extent to which they relieve the Beneficiary from performing operational duties – in determining whether it was plausible the Beneficiary would be employed in a primarily managerial or executive capacity within one year of the petition's approval. We indicated that the Director properly considered the above factors in denying the petition, that we had done so as well in dismissing the appeal, and that the Petitioner had not submitted any probative and credible evidence in its initial motions to reopen and reconsider to overturn our previous decision. With respect to the Beneficiary's employment abroad, in our previous decision we noted the Petitioner's acknowledgement that the Beneficiary was physically present in the United States for more than two of the three years preceding the filing of the instant petition and its argument that the Beneficiary nevertheless fulfilled the one year of employment abroad requirement because he was employed by the foreign entity, regardless of his physical location, for more than the requisite year. We rejected the Petitioner's argument, quoting the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) which states that time spent in the United States while employed by the foreign entity does not count toward fulfilling the requirement that for one of the previous three years the Beneficiary must have been employed abroad.

A. Employment in the United States in a Managerial or Executive Capacity

In its current combined motion the Petitioner reiterates the Beneficiary's job duties in the United States as previously described in the petition, and claims that we erred in finding them overly broad and imprecise because the duties of a chief executive officer can only be described in general terms. The Petitioner submits some online advertisements for CEO positions as evidence that CEOs have broad and general duties rather than specific daily tasks, and that the job duties of the Beneficiary's position are therefore accurately described. According to the Petitioner, U.S. Citizenship and Immigration Services (USCIS) had no authority to "second-guess" its business plan to conduct warehouse business when the Petitioner decided not to purchase a warehouse, but instead utilize existing commercial property for its export business, or to "second-guess" the business plan's staffing and revenue projections and declare them unrealistic without sound analysis. The Petitioner asserts that all of our foregoing findings were arbitrary and capricious.

The online CEO job announcements submitted with the current motion, though new evidence, do not state new facts since the record already included documentary evidence, including an online article about CEOs, about the types of duties that CEOs perform. Regardless of how a CEO's duties may best be described, it is the Petitioner's burden in this proceeding to establish that the Beneficiary's duties will be primarily managerial or executive in nature, as set forth in section 101(a)(44)(A) and (B) of the Act, within a year of the petition's approval. In our prior decision we reviewed all relevant evidence about the Beneficiary's prospective duties in the United States, the nature of the business, and the minimal business activities the U.S. company had conducted at the time the petition was filed, and concluded that the Petitioner did not establish by a preponderance of the evidence that the Beneficiary would be performing primarily managerial or executive duties within a year. While the Petitioner contests the findings in our previous decision as "second-guessing" of its business plan, we correctly pointed out that the Petitioner's business actions had diverged from the business plan with respect to the warehouse, that the staffing and revenue projections for the first year of operation were speculative, and that the totality of the evidence did not demonstrate that the U.S. business would develop enough during its first year after the petition's approval to elevate the Beneficiary's job duties to primarily managerial or executive in nature. The Petitioner has not remedied these evidentiary shortcomings in the current motion to reopen.

In short, the Petitioner submits no new fact(s) in the current motion to alter our previous finding that the record does not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States within one year of the petition's approval. Nor has the Petitioner shown that our previous findings were arbitrary and capricious or that they in any other way represent an incorrect application of law or policy. Accordingly, we will deny the combined motion to reopen and reconsider our finding that the record does not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States within one year of the petition's approval.

B. Employment Abroad in a Managerial or Executive Capacity

In its current combined motion the Petitioner asserts that USCIS did not apply the law correctly in determining whether the Beneficiary had one year of continuous employment with its parent company in China during the three years prior to the filing of the petition, as required in 8 C.F.R. § 214.2(l)(1)(ii)(A). Specifically, the Petitioner alleges that there is no legal ground for linking the requirement of employment abroad to physical presence in the foreign country. The subject regulation, defining "intracompany transferee," provides as follows:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary

> thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

8 C.F.R. § 214.2(l)(1)(ii)(A). According to the Petitioner, the last sentence of this regulation restricts the time periods that will not count toward fulfillment of the one year of employment abroad requirement to "brief trips to the United States for business or pleasure," and that we misapplied the regulation by subtracting the 732 days the Beneficiary was physically present in the United States in B status from the period of his employment abroad because those days did not represent "brief trips" to the United States. We do not agree.

The Petitioner misinterprets the last sentence of the regulation by not reading it as a whole. The Petitioner ignores the first part of the sentence which makes clear that time spent working in the United States in lawful status for an operation related to the foreign entity does not count as employment abroad. The sentence goes on to read: "**and** brief trips to the United States for business or pleasure" do not count as employment abroad [emphasis added]. Thus, all 732 days the Beneficiary was physically present in the United States during the three years prior to the filing of the instant petition do not count as employment abroad for purposes of meeting the requirement in 8 C.F.R. § 214.2(l)(1)(ii)(A). That means, as stated in our previous decision, that the Beneficiary did not have one full year of continuous employment abroad during the three years prior to the filing of the petition.

Thus, the Beneficiary has not shown that we incorrectly applied the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) in our previous decision. Accordingly, we will deny the motion to reconsider our decision that the Beneficiary was not employed abroad for one full year within the three years immediately preceding the filing of the petition. As the petitioner has submitted no new evidence to demonstrate eligibility, the motion to reopen in regard to employment abroad must also be denied.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not shown proper cause for reopening or reconsideration. In visa 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 MOTION: The motion to reconsider is denied.

Cite as *Matter of K-W- LLC*, ID# 5761610 (AAO Sept. 16, 2019)