U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-V- CORP

DATE: SEPT. 18, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an e-commerce vendor, seeks to continue the Beneficiary's temporary employment as its president 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 California Service Center denied the petition on the ground that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition. On appeal we found that the Petitioner did not overcome the basis for denial, and dismissed the appeal.

The matter is now before us on a motion to reconsider. Upon review, and for the reasons discussed hereinafter, we will deny the motion

I. MOTION REQUIREMENTS

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

II. ANALYSIS

In reaching our previous decision we reviewed all of the evidence submitted with the petition, in response to the Director's request for evidence (RFE), and on appeal regarding the Beneficiary's job duties and the Petitioner's staffing and organizational structure. We found that the job descriptions provided by the Petitioner were vague, did not adequately convey what the Beneficiary would be doing on a daily or weekly basis, and did not show that her duties would be primarily managerial or executive in nature. We also found that because the Petitioner did not submit evidence to show that any of the six employees it claimed to have at the time of filing actually worked for the Petitioner at that time, the record did not establish that the Petitioner was adequately staffed to relieve the

Beneficiary from having to allocate her time to primarily non-managerial or non-executive job duties. We concluded, therefore, that the record did not establish that the Beneficiary would be employed in a managerial or executive capacity, as defined in sections 101(a)(44)(A) and (B) of the Act, under the extended petition.

In its motion to reconsider the Petitioner makes a series of assertions that we misconstrued all or most of its previously submitted evidence concerning the nature of the Beneficiary's job duties,[1] and incorrectly concluded that they were not primarily managerial or executive in nature. The Petitioner's claims are ill-founded. All of the evidence discussed by the Petitioner on motion was thoroughly considered in our decision dismissing the appeal. The Petitioner objects to our conclusions based on our analysis of that evidence, but has not identified any incorrect application of law or policy in our conclusions that the evidence presented by the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

The Petitioner objects to a footnote in our decision referring to its purchase and operation of a food truck business unconnected to the business at issue in this proceeding. The Petitioner asserts that it did not purchase the food truck business, but instead contracted with the food truck company to design and build a food truck for the Petitioner's use. While the Petitioner may be correct on this point, it was an inconsequential error on our part since it was irrelevant to the issue of whether the Beneficiary will be employed in a managerial or executive capacity by the Petitioner's e-commerce business.

The Petitioner further objects as well to our observation that it did not explain how the Beneficiary's former employment in a medical laboratory context by the foreign parent prepared her for employment in the Petitioner's e-commerce business. The Petitioner points out that the Director did not raise this issue in her RFE or her decision, and asserts that it was improper for us to do so for the first time on appeal. We do not agree. The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Furthermore, our reference to the Beneficiary's prior employment in a medical laboratory context was part of a broader discussion of the Beneficiary's managerial background and capabilities. It was just one of many factors we considered in determining that the Petitioner had not established that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

The Petitioner also alleges that we erroneously stated that no evidence was submitted to show that the employees it identified on an organizational chart were actually employed by the Beneficiary, and listed the pertinent documentation it had submitted for the years 2015-2017. The Petitioner is mistaken, however, since our decision correctly stated that the evidence did not show that the employees identified on the organizational chart were actually employed at the time the petition was filed, which was in May 2018. The Petitioner submits two new charts describing how the Beneficiary performs her job duties and categorizing them within the four criteria of managerial

[1] The Petitioner acknowledges a typographical error in one earlier depiction of the Beneficiary job duties and the percentage of time he spends on one particular duty.

capacity as defined in section 101(a)(44)(A) of the Act. These "new facts" cannot be considered in this motion, however, because the Petitioner has filed a motion to reconsider, not a motion to reopen.[2] As previously indicated, a motion to reconsider must establish that our previous decision was erroneous because it was based on an incorrect application of law or policy. 8 C.F.R. § 103.5(a)(3).

Finally, the Petitioner alleges that we committed such an error by neglecting to acknowledge that two professionals work under the Beneficiary's supervision, which meets the second prong of "managerial capacity" as defined in the statute insofar as the Beneficiary "supervises and controls the work of other supervisory, professional, or managerial employees." Section 101(a)(44)(A)(ii) of the Act. Even if we were to grant the Petitioner's claim that the Beneficiary would be supervising two professionals under the extended petition, that would not necessarily mean that the Beneficiary's position meets all four prongs of managerial capacity, as defined in the statute, or that her overall job duties are primarily managerial in nature.[3] Importantly, the Petitioner must demonstrate that the Beneficiary would primarily perform managerial or executive duties. As discussed above, the Petitioner has not done so here.

In determining whether a position and its particular job duties meet the statutory definition of managerial (or executive) capacity, U.S. Citizenship and Immigrations Services must consider the totality of the evidence that gives context to the job, including such factors as the size and nature of the employer's business, its organizational structure, and the duties of subordinate employees, in addition to the specific job duties described by the Petitioner. We considered all of these factors in our previous decision, and determined that the Petitioner did not establish that the Beneficiary's employment would be primarily managerial or executive in nature. Therefore, regardless of whether two subordinate employees of the Beneficiary may be professionals, the Petitioner has not shown that our previous decision involved any incorrect application of law or policy.

III. CONCLUSION

The Petitioner has not established that we incorrectly applied any law or policy in our previous decision in which we found that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition. Accordingly, the Petitioner has not shown proper cause for reconsideration. In visa proceedings it is the petitioner's burden to establish

[2] As distinguished from a motion to reconsider, "[a] motion to reopen must state new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence." C.F.R. § 103.5(a)(2).

[3] As defined in section 101(a)(44)(A) of the Act: "The term "managerial capacity" means an assignment within an organization in which the employee primarily – (i) manages the organization, or a department, subdivision, function, or component of the organization; (ii) 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; (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional."

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 reconsider is dismissed.

Cite as *Matter of M-V- Corp*, ID# 6178782 (AAO Sept. 18, 2019)