U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6176700

Date: SEPT. 23, 2020

Motion on Administrative Appeals Office Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, an event management company, seeks to continue the Beneficiary's temporary employment as its general manager 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 Beneficiary will be employed in the United States in a managerial or executive capacity. The Director granted the Petitioner's combined motion to reopen and reconsider, and affirmed the denial of the petition. We dismissed the Petitioner's appeal from that decision. The matter is now before us on a motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. We will grant the motion in part and dismiss it in part, and affirm the denial of the petition.

I. MOTION TO RECONSIDER

A motion to reconsider must state the reasons for reconsideration and establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

A brief review of the chronology of these proceedings illustrates that we erred in our adjudication of the appeal.

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period May 7, 2015 to May 6, 2016. 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.

The Director initially denied the petition in June 2017. In July 2017, the Petitioner filed a combined motion to reopen and reconsider. This motion did not include any substantive content. Instead, the Petitioner requested an additional 30 days to submit a supplemental brief. In August 2017, the Petitioner submitted a "Brief in support of APPEAL" directly to the Administrative Appeals Office (AAO), rather than to the Vermont Service Center where the motion was pending. (There was no pending appeal in August 2017.) It is not clear when this submission was matched with the record of proceeding. Because the Petitioner filed a motion on the Director's decision, rather than an appeal, the Director had jurisdiction over the motion. *See* 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the file was not forwarded to the AAO.

In a decision dated May 2018, the Director did not address the August 2017 submission. Instead, the Director correctly observed that there is no provision for a petitioner to file a deficient or skeletal motion and then supplement it at a later time.[2] As a result, the Director concluded that the Petitioner's July 2017 filing did not meet the requirements of either a motion to reopen or a motion to reconsider. This conclusion would have justified, and arguably required, dismissal of the motion under 8 C.F.R. § 103.5(a)(4); however, the Director did not dismiss the combined motion. Instead, the Director *granted* the motion, even while explaining why it could not be granted, and affirmed the previous denial.

The Petitioner appealed that decision in June 2018, and submitted a brief and evidence intended to address the merits of the underlying petition. Our appellate decision did not address those merits. We dismissed the appeal in March 2019, stating: "The Director denied the combined motion without disturbing the denial of the petition. . . . Because the Petitioner established no error in the denial of the motions, we will dismiss the appeal."

Our decision, however, was in error. The Director did not "den[y] the combined motion without disturbing the denial of the petition." Rather, the Director *granted* the motion and *affirmed* the denial, thereby effectively incorporating the June 2017 denial into the May 2018 decision. As such, the issues in the June 2017 denial were ripe for discussion in the Petitioner's June 2018 appeal.

Because this error directly affected the content and outcome of our appellate decision, we grant the Petitioner's motion to reconsider for the limited purpose of addressing the issues raised in the initial denial (and affirmed in the Director's second decision). Because we do not withdraw the Director's decision or approve the petition, we also dismiss the motion in part.

II. LAW

To establish eligibility for the L-1A nonimmigrant visa classification, 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 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.*

[2] 8 C.F.R. § 103.5(a)(2) and (3) establish that motions to reopen and motions to reconsider must meet the applicable requirements at the time of filing.

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).

III. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Petitioner describes the Beneficiary's position as managerial. The Director determined that the Petitioner did not establish that it will employ the Beneficiary in a managerial capacity under the extended petition.

"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 be eligible for L-1A nonimmigrant visa classification as a manager, a petitioner must show that the beneficiary will perform all four of the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A) of the Act. If a petitioner establishes that the offered position meets all four elements set forth in the statutory definition, the petitioner must then prove that the beneficiary will be *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether the beneficiary's duties will be primarily managerial, we consider the description of the job duties, the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the beneficiary's actual duties and role in the business.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

On the petition form, the Petitioner indicates that the company had three U.S. employees and gross annual income of $16,845. The Petitioner states that it seeks "to extend [the Beneficiary's] L-1A Visa for another 3 years, so he can complete setting up a new office and starting-up business in the U.S." To qualify for an extension following a new office petition, however, the Petitioner must establish that it has already been doing business, defined as the regular, systematic, and continuous provision of

goods, services, or both.[3] If, at the end of the one-year new office period, the Petitioner is still "setting up a new office and starting-up business," this delay is grounds for denial of the petition, rather than extension of the benefit.

The Petitioner listed the Beneficiary's intended duties and the approximate percentage of time to be devoted to each:

- Management of recruiting, selecting and training newly hired managers and employees – 5%
- Adjust work force to comply with social needs and specifics of the local community to maximize the results and generate income – 5%
- Negotiate key contracts and agreements with major suppliers – 5%
- Management of Purchasing Manager on current business flow, events schedule and results on the events recently held and events in progress, receiving results of the work performed by . . . Sales Manager – 45%
- Management of Administrative Manager through meetings to receive . . . feedback on sales, payments by clients, timely invoicing and job performance of . . . Administrative Assistant – 25%
- Management of the events implementation and execution of the business goals by establishment plan, budget, and results management; allocating resources and reviewing progress – 5%
- Building company image by collaborating with customers, suppliers, employers, enforcing ethical business practices – 5%[4]

A new office extension petition must include a statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees. 8 C.F.R. § 214.2(l)(14)(ii)(D). The above job description lists four different subordinates under the Beneficiary's direct or indirect authority. At the time of filing, however, the Petitioner claimed only three employees, and did not identify any employee by name except the Beneficiary, who began receiving semimonthly $1666 paychecks in March 2016.[5]

A business plan, submitted after the Director requested further evidence, indicates that the petitioning "Company is expected to have five employees in 2017," but does not specify who worked for the company at the time of filing in May 2016. The business plan includes a new job description for the Beneficiary, which overlaps with the earlier version but also differs from it considerably. Some of the differences are as follows:

- Time negotiating contracts and agreements increases from 5% to 10% of the Beneficiary's time;
- Time spent in meetings with the administrative manager decreases from 25% to 5% of the Beneficiary's time; and

[3] *See* 8 C.F.R. § 214.2(l)(14)(ii)(B), (1)(ii)(H).
[4] The listed percentages add up to only 95%.
[5] The petition form states the Beneficiary's salary as $60,000 per year, but the salary checks annualize to $40,000 per year, and a subsequent business plan reduces the figure again to $38,000 per year.

- Tasks such as "Preparing financial statements" and "Stay alert to new industry and market trends" have been added.

Perhaps most significantly, the original job description indicated that the Beneficiary would spend 45% of his time working with the purchasing manager and sales manager, but the Petitioner did not submit any evidence to show that it employed individuals in those positions. The new business plan does not indicate that the company employs, or plans to employ, a purchasing manager, and it indicates that "[t]he Company will hire one Sales Manager in 2017," indicating that the position was vacant in 2016 when the Petitioner filed the petition.

The business plan states that the Petitioner "has already hired one Administrative Manager," "one Wedding Planner," and "a Procurement Coordinator." An organizational chart indicates that the latter two positions are subordinate to the administrative manager. In its July 2017 submission, the Petitioner claimed to have employed all three of these individuals since April 2015.

The record, however, does not support this new claim. As noted above, the Beneficiary's initial job description referred mostly to different subordinates. The initial job description did refer to an administrative manager, but that position's only stated subordinate was an administrative assistant.

Also, these individuals received no salary before mid-2016. The Petitioner's 2015 income tax return does not report payment of any salaries. A quarterly tax return for the first quarter of 2016 shows only a single paycheck paid to the Beneficiary in mid-March. The return for the second quarter shows payments to the procurement coordinator and administrative manager starting in June. The wedding planner does not appear on quarterly returns until the last quarter of 2016. The salary information on the Petitioner's 2016 tax return is consistent with the quarterly returns.

Therefore, contemporaneous tax documents conflict with the Petitioner's 2017 claim that it employed three subordinate workers in April 2015. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

The record does not consistently indicate that the company was adequately staffed at the time of filing to relieve the Beneficiary from having to primarily perform non-qualifying operational tasks. Future hiring plans can help meet the Petitioner's burden of proof in a new office petition, but a new office extension petition must show that the company is already fully operational, with the Beneficiary occupying a primarily managerial position. The Petitioner has not shown that it had sufficient organizational complexity to warrant a primarily managerial position at the time of filing.

The Petitioner's submissions in 2017 presume a company structure that was supposedly in place in April 2015, but that structure does not match what the Petitioner claimed in May 2016.

Aside from the very significant and material changes to the Petitioner's claimed organizational structure, the Petitioner disputes the Director's conclusion that the Beneficiary's subordinates do not qualify as professionals. To determine whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry

into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The Petitioner contends: "It is not required those supervised have degrees, only that their functions be essential, and their duties professional." The Petitioner cites no source for this circular definition of a "professional" being one whose "duties are professional."

The Petitioner contends that the professional nature of the positions is evident from the complexity of the business. The Petitioner states:

> Today, event planning is a complex enterprise. So complicated, that most event planners work in teams of logistics specialist, marketing specialists, and even data analytics specialists. What isn't done by the event team is outsourced to specialists, either elsewhere in the company or to event planning agencies. That's right: We now have a whole industry dedicated to planning events.

The above quotation is a general statement rather than a corroborated assertion specifically about the petitioning entity. The Petitioner has not shown that its business fits the above description. Instead, the petitioning entity appears to be a side venture that the Beneficiary operates from a convenience store owned by a separate company, [redacted] which the Beneficiary incorporated in late 2015. The Petitioner's business cards and stationery both show the same address as the convenience store; the Beneficiary is named as [redacted]s incorporator on state filings; and local licenses and certificates identify the Beneficiary as the owner of the store.

When the Director asked for evidence to establish the connection between [redacted] and the petitioning entity, the Petitioner did not establish a qualifying relationship between the entities or explain the Beneficiary's role with [redacted] Instead, the Petitioner asked the Director "to disregard [redacted] . . . and let us focus solely on growing" the petitioning entity. Nevertheless, the Petitioner submitted the materials showing that the petitioning entity operates from [redacted]'s convenience store. This evidence raises questions regarding the demands that [redacted] makes on the Beneficiary's time, which would clearly affect the degree of his involvement with the petitioning entity. The Petitioner took active steps to link [redacted] with this petition, submitting several unrequested documents about the convenience store with the petition, and these questions do not disappear with the Petitioner's request "to disregard [redacted]

Apart from the issues surrounding the convenience store at the Petitioner's stated place of business in Georgia, the assertion that event planning *can* involve a team of meticulously coordinated professionals does not show that the petitioning entity *has* such a team. The Petitioner does not show that it has engaged the services of logistics specialists, marketing specialists, or data analytics specialists, either as in-house employees or outsourced contractors. The record also does not indicate that the Petitioner's claimed staff brought specialized expertise to their respective positions. The administrative manager's prior experience was as a beautician; the procurement coordinator managed a hotel; and the event planner had no prior employment experience at all.

As explained above, the Petitioner has provided inconsistent information about the structure of the organization, and various inconsistencies in the record raise doubts about the credibility and sufficiency of the Petitioner's evidence and information. We conclude that the Petitioner has not met its burden of proof by a preponderance of the evidence, and therefore the petition cannot be approved.

IV. CONCLUSION

For the reasons discussed, the Petitioner has shown proper cause for reconsideration, but has not overcome the grounds for denial of the petition or established eligibility for the benefit sought. The petition remains denied.

ORDER: The motion to reconsider is granted in part and dismissed in part.