U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-W-USA INC

DATE: SEPT. 24, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a wine importer and wholesaler, seeks to temporarily employ the Beneficiary as the chief executive officer 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 California Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary was employed abroad in a managerial or executive capacity. The Petitioner filed a combined motion to reopen and reconsider, which the Director denied. The matter is now before us on appeal.

On appeal, the Petitioner contends that the Director improperly denied the motions to reopen and reconsider because additional documentary evidence specific to the Beneficiary's asserted managerial and professional subordinates abroad was not considered and addressed. Further, the Petitioner asserts that the Director also did not address responses and evidence specific to discrepancies noted by the Director in the initial decision.

We will withdraw the Director's decision and remand the matter for the entry of a new decision consistent with the following analysis.

I. MOTION REQUIREMENTS

The Petitioner did not appeal the initial denial of the underlying petition. Rather, the Petitioner appealed the Director's subsequent finding that the motion did not meet the requirements of a motion to reopen, a motion to reconsider, or both. Therefore, the merits of the denial order, and of

[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 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year within the date of approval of the petition to support an executive or managerial position.

the underlying petition, are not before us. The only issue before us is whether the Director properly found that the motion did not meet applicable 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). A motion to reopen is based on factual grounds and must (1) state the new facts to be provided in the reopened proceeding; and (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must (1) state the reasons for reconsideration; (2) be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy; and (3) 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).

II. ANALYSIS

Upon review, we conclude that the Director did not properly consider and address evidence and assertions provided by the Petitioner on motion.

In the initial denial decision, the Director concluded that the Petitioner submitted the same foreign duty description for the Beneficiary in response to the request for evidence (RFE) as that provided in support of the petition despite a request to provide more detailed duties addressing his typical managerial or executive duties and decisions. Further, the Director noted discrepancies in the Beneficiary's stated job title, pointed to investment funds he received from his in-laws, and emphasized an apparent discrepancy in the number of years the foreign employer had been operating. The Director also indicated that the Petitioner did not submit evidence to substantiate that the Beneficiary's subordinates held bachelor's degrees.

In response to the RFE, the Petitioner submitted additional examples of managerial decisions made by the Beneficiary. On motion, the Petitioner further provided additional evidence and attempted to address the discrepancies noted by the Director in the initial decision. Further, the Petitioner provided "Employment Record Books" specific to the Beneficiary's claimed managerial and professional subordinates abroad and these documents listed wages paid to employees in 2015, their specific bachelor's degrees, and their positions with the foreign employer. In addition, the Petitioner discussed the Director's claimed discrepancies on the record, stating that two titles mentioned for the Beneficiary, deputy director and vice director for commerce and sales affairs, were interchangeable and not a material discrepancy. Likewise, the Petitioner contested the Director's conclusion that the Beneficiary had received $150,000 from his in-laws to invest in the new venture, noting that the Director did not specifically address on what evidence this determination was made. Lastly, the Petitioner stated that its vineyard has existed for over 30 years, but that the foreign employer had only been incorporated in 1995, thus explaining this apparent discrepancy emphasized by the Director. It also provided evidence specific to demonstrating that the vineyard had operated for several decades prior to being formally incorporated in 1995.

In denying the Petitioner's motion, the Director stated that the Petitioner merely resubmitted documentation and statements previously provided on the record and concluded that no clear reason was provided for reconsideration. In addition, the Director determined that the evidence provided by the Petitioner on motion did not constitute new facts sufficient to reopen the matter.

Upon review, we conclude that the Director did not properly consider evidence and assertions in its latest motion decision. For instance, the Director indicated in the RFE that the Beneficiary's duties were overly vague and generic and requested that the Petitioner submit additional detail regarding his typical managerial or executive duties and decisions abroad. In the initial decision, the Director stated that the Petitioner did not respond to this request and that it merely resubmitted the Beneficiary's previously provided foreign duties. However, this is not reflected on the record. Although the Petitioner did resubmit the Beneficiary's previously provided foreign duties, it also provided several additional examples of managerial decisions he made abroad. It does not appear that the Director considered these additional examples in the initial decision or on motion.

Furthermore, the Director did not discuss the Petitioner's assertions in response to discrepancies noted by the Director in the initial decision. For instance, the Beneficiary's titles of deputy director and vice director for commerce and sales affairs do not appear to be materially different. The Director did not address this contention in the motion decision. Likewise, the Petitioner submitted additional evidence appearing to indicate that it has been operating for several decades, contrary to the Director's conclusion. The Director also did not articulate in either decision how it was determined that the Beneficiary had received $150,000 to invest in the Petitioner from his in-laws, nor why this was relevant to denying the petition. The Director should have discussed the Petitioner's responses to these noted discrepancies on motion.

We also concur that the Director should have considered and addressed the additional evidence submitted on motion specific to the Beneficiary's claimed managerial and professional subordinates abroad, including documentary evidence of the wages paid to these employees in 2015, their specific bachelor's degrees, and their positions with the foreign employer. Although we agree that this evidence likely existed at the time of the Petitioner's RFE, the Director did not specifically request this evidence at that time, and it should have been considered on motion.

For these reasons, we withdraw the Director's previous decision and remand the matter for consideration of the additional assertions and documentary evidence submitted by the Petitioner on motion.

III. ADDITIONAL ISSUE

Although not addressed by the Director in either decision, we note that the record as currently constituted does not appear to support a finding that the Beneficiary would act in a managerial or executive capacity in the United States within one year of an approval of the petition.

The Petitioner did not provide a detailed description of the duties the Beneficiary would perform in the United States. The Petitioner merely stated that the Beneficiary's duties in the United States would be identical to those he performed abroad. However, the Petitioner asserts that the Beneficiary has several managerial subordinates abroad, including four immediately subordinate managers, while his proposed position in the United States involved launching a wine distribution company with few projected employees during the first year. For instance, the Petitioner's business plan reflected that it would hire only one administrative employee subordinate to the Beneficiary during the first year. Given the limited hiring projections during the first year, it is not clear how the Beneficiary would perform the same duties in the United States as he would abroad. Without further explanation and evidence, it cannot be determined that the Petitioner will be operating sufficiently to support the Beneficiary in a qualifying managerial or executive role within one year. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

IV. CONCLUSION

On remand, the Director should consider the assertions and evidence submitted on motion with respect to the Beneficiary's foreign employment. The Director should also afford the Petitioner the opportunity to submit additional evidence and assertions specific to his proposed employment in the United States.

ORDER: The decision of the Director dated March 6, 2018 is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of T-W-USA Inc*, ID# 1637200 (AAO Sept. 24, 2018)