U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-L-I- INC.

DATE: SEPT. 24, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a DNA and clinical lab testing services business, seeks to continue the Beneficiary's temporary employment as its president and CEO under the L-1A nonimmigrant classification for intracompany transferees. *See* 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 Petitioner did not establish, as required, that it would employ the Beneficiary in a managerial or executive capacity under an extended petition. We dismissed the Petitioner's subsequent appeal and the matter is now before us on a combined motion to reopen and motion to reconsider.

On motion, the Petitioner submits additional evidence regarding its 2018 and 2019 staffing levels and the Beneficiary's proposed job duties. It asserts that we made improper inferences regarding the company's staffing and cited to irrelevant case law in dismissing the appeal. The Petitioner further asserts that our previous decision erroneously relied on the definition of "managerial capacity" rather than "executive capacity."

Upon review, we will deny the motion to reopen and the motion to reconsider.

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 state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider, when filed, must also establish that the prior decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, a petitioner must not only meet the formal filing requirements (such as submission of

a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

II. ANALYSIS

The issue in this matter is whether the Petitioner has submitted new facts that overcome our prior decision, or offered legal arguments establishing that our decision to dismiss the appeal was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy with respect to the facts of this case. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing (in this case, May 2018) and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

While the Petitioner has provided new evidence and a legal brief citing to case law in support of its motion, it has not demonstrated that we incorrectly applied the law and policy to the facts presented. Accordingly, the Petitioner has not shown proper cause for reopening or reconsideration.

A. Previous AAO Decision

In dismissing the appeal, we first addressed the issue of the Beneficiary's job duties, noting that the Petitioner did not provide sufficient position descriptions or supporting evidence to show that the Beneficiary would primarily allocate his time to managerial- or executive-level tasks within the context of the Petitioner's franchised clinical laboratory testing business. For example, we noted that the initial description indicated that Beneficiary would engage in negotiations with customers, but the Petitioner provides lab testing services to individual clients and it was unclear what these "negotiations" would entail. The Petitioner also stated that the Beneficiary would oversee "sales, purchasing and financial operations" but did not claim to have sales or purchasing staff, and the financial "department" appeared to be limited to an external accounting firm to which it makes minimal payments. The Petitioner submitted a different, but still broad, breakdown of the Beneficiary's duties in response to a request for evidence (RFE) issued by the Director. We determined that it generally lacked detail, and observed that the Petitioner did further address the Beneficiary's job duties on appeal.

We also addressed the nature of the business and the company's staffing, noting that the information provided in the Petitioner's organizational chart at the time of filing in May 2018 was not supported by the accompanying payroll evidence, and that the lab director (the Beneficiary's direct subordinate) was no longer on the company's payroll as of June 2018. We acknowledged that the Petitioner submitted an updated organizational chart in response to the RFE, but observed that it included individuals who were not named in the submitted payroll records and individuals who appeared to have left the company earlier in the year. Finally, we acknowledged the Petitioner's claim that it had submitted "voluminous" payroll evidence in support of the petition, but found that the record did not contain an adequate explanation for the discrepancies between that payroll evidence and the submitted organizational charts.

Next, we considered whether the evidence supported a finding that the Beneficiary would be employed as a personnel manager based on his supervision of managerial, supervisory, or professional employees. *See* section 101(a)(44)(A) of the Act.[1] We also considered whether the Petitioner adequately supported its alternate claim that the Beneficiary would be employed in an executive capacity as defined at section 101(a)(44)(B) of the Act. We determined that the submitted duty descriptions were too vague to establish that the Beneficiary would be primarily focused on the company's broad policies and goals, and that the evidence as a whole did not establish how the Petitioner's staff would relieve him from significant involvement in the day-to-day operations of the business. Specifically, we acknowledged the Petitioner's claim that it "has consistently and continuously hired between eight (8) to eleven (11) medical assistants and phlebotomists per quarter through the three years to date," and that they work at variable schedules in different locations according to patient demand. However, we found that these claimed staffing levels were not supported by the record, and that the Petitioner actually employed three phlebotomists (two of whom worked part-time) and no medical assistants at the time of filing.

We also determined that the Petitioner's claim that these staff work variable schedules at different locations "based on client appointments" was not corroborated by other evidence in the record, which indicates that all four of the company's lab testing locations were open six days per week and accepted walk-in customers during their operating hours. Finally, we acknowledged the Petitioner's claim that the Beneficiary was previously granted L-1A status and its assertion that it had maintained the staffing levels and structure described in the business plan submitted in support of that earlier petition. However, we found that the evidence did not reflect that the company had, in fact, maintained those staffing levels, and emphasized that USCIS policy does not require us to give deference to a prior approval for the same classification.

B. Motion to Reopen

In support of its motion to reopen, the Petitioner submits: copies of its organizational charts from two different months in 2018; its monthly payroll journals for the period January 2018 through May 2019; employee lists for 2018 and 2019 which identify the months in which each employee worked; and a "weekly itinerary" for the Beneficiary, which purports to describe his duties as president and CEO during a typical week.

The Petitioner states that our previous decision "improperly inferred incorrect facts" when we determined that the company is not equipped to accommodate walk-in patients, and that this "baseless presumption is not substantiated by evidence." The Petitioner states that it provided probative and credible evidence of its staffing levels, and that "contrary to what the AAO infers, each lab is open to business and at least has 2 employees during its operating hours in all four locations."

[1] On motion, the Petitioner asserts that we erred by applying the definition of "managerial capacity," to the Beneficiary's position so we will not further address our specific findings with respect to that definition. We note however, that in its appellate brief, the Petitioner expressly stated that facts and evidence presented "meet the standard of proof of the preponderance of evidence for the 'Managerial' or 'Executive' requirement under the regulation," and the Petitioner used the terms "managerial" and "executive" interchangeably throughout the brief.

We note that we did not question the credibility of the payroll evidence the Petitioner submitted. We questioned how the number of staff documented by that payroll evidence was sufficient to perform the duties associated with the operation of four locations that were open for business six days per week. We further found that the number of employees documented by the payroll evidence did not consistently support the Petitioner's own claims regarding its staffing levels.

On motion, the Petitioner attempts to address the inconsistencies we noted, stating that a discrepancy in the number of employees per month "may be attributed to Personal Leave of employees or termination and rehire." The Petitioner argues that a temporary fluctuation in staffing should not lead to a conclusion that the company cannot support an executive position.

As noted, the Petitioner claimed to have eight to eleven phlebotomists and medical assistants on staff to operate its four lab locations and claims that it has two staff working at each location at all times. The Petitioner's organizational chart, submitted as initial evidence, identified the following staff working in its labs at the time of filing in May 2018, while the actual dates of employment noted below are confirmed through payroll evidence:

Medical Assistants	Dates of Employment in 2018
[redacted]	January, February and March
	January, February, April
	January and February
Vacancy	-

Phlebotomy Technicians	Dates of Employment
[redacted]	January through December
	April through December
	February through June

Therefore, we determined that the Petitioner had no medical assistants working at the time of filing, that one of the phlebotomy technicians left soon after the petition was filed, and that two of the phlebotomy technicians were part-time workers.[2] The Petitioner has not explained how our determination, which is further supported by the evidence submitted in support of this motion, was erroneous. Nor has it explained how it was able to staff four laboratory testing facilities with two employees each when it had only the equivalent of two full-time phlebotomy technicians to provide testing services as of the date of filing.

Further, the Petitioner's new explanation that this was a temporary reduction or fluctuation in staffing is not persuasive. During the first six months of 2018, the Petitioner's total headcount varied between five and seven employees; it has not demonstrated that it was experiencing a temporary reduction in staff when it filed the petition with six employees on its payroll. The Petitioner's headcount varied from seven to ten employees in the second half of 2018, but in the first five months of 2019, it employed five to eight employees. As of the date of the motion, in which the Petitioner claims that it has two employees working at each of its four locations at all times, it had six employees on its payroll and two of them worked fewer than 25 hours per week. Therefore, while the Petitioner claims that it

[2] In May 2018, [redacted] worked a total of 32 hours and [redacted] worked 117 hours.

requires eight to eleven medical staff to operate its laboratory testing locations, it has not shown that it ever employed this number of staff at any time between January 2018 and May 2019, with the exception of perhaps one month.

With respect to its claims regarding "temporary fluctuations" in staffing, the Petitioner explains that [redacted] was terminated for cause in February 2018, but does not explain why it included her on its organizational chart when it filed this petition in May 2018 and on its updated organizational chart, submitted later in 2018, when she never returned to the company. In addition, the Petitioner explains on motion that medical assistant [redacted] "has been on religious leave," but this individual has not appeared on the company's payroll since April 2018. The Petitioner's unsupported claim that she has been on religious leave for at least 13 months is not sufficient to explain her continued appearance on the company's organizational chart.

The Petitioner clarifies that another employee who did not appear on the initial organizational chart, [redacted] was on sick leave at the time of filing, but the employee list submitted on motion indicates that [redacted] was not paid during the first six months of 2018. In fact she was identified as a "new hire" on the updated organizational chart submitted in response to the Director's request for evidence.[3] Therefore, these explanations do not account for the inconsistencies between the Petitioner's statements regarding its staffing and its actual documented staffing levels.

The Petitioner objects to our reliance on payroll evidence alone and states that we should also consider the number of positions in the company instead of the "names of employees," again pointing to the claimed fluctuations in staffing levels which it asserts are standard in its industry. However, the Petitioner has not explained who performs the duties that would otherwise be assigned to the vacant positions or explain how a position opening would assist in relieving the Beneficiary from having to engage in the company's day-to-day operations. As discussed above, at the time of filing, the Petitioner had, at most, only one-quarter of the medical technicians it claims it needs to operate its four franchised lab testing locations, and the Petitioner's staffing remained essentially the same at the time it filed this motion.

We acknowledge that the Petitioner has submitted evidence on motion demonstrating that its laboratory director [redacted] did not permanently leave his position shortly after the petition was filed. Based on the evidence provided previously, we determined that he had left the company in June 2018. The record now contains evidence that he returned to the payroll in August 2018 and remained with the company as of the date the motion was filed. However, this new information is insufficient to overcome all of the other issues noted with respect to the Petitioner's staffing. The fact remains that the company had six employees on its payroll when it filed the petition and insufficient staff to work in its laboratory testing locations based on its own claims regarding its reasonable staffing needs.

The Petitioner's claim that the Beneficiary acts in an executive capacity is, in part, based on its claim that the company employs a management advisor, a laboratory director, and laboratory operations

[3] The Petitioner's payroll evidence from 2017 indicates that [redacted] worked for the company at some point during that year (but not at year's end) and earned approximately $6500. Regardless of whether she was on sick leave or left the company and was re-hired, the evidence does not establish that the Petitioner counted her among its employees at the time of filing or that she was available to work in one or more of the company's lab testing locations.

manager who oversee the lower level staff and day-to-day operations of the four business locations. However, the advisor received payments of only $5200 as a contracted worker in 2017 and was not a payroll employee of the Petitioner until August 2018. Further, the additional payroll evidence submitted on motion indicates that the advisor and the laboratory director often earn less than the phlebotomy technicians in any given month. Regardless, given the lack of sufficient staff at the lowest level of the organizational chart, we cannot determine who is actually performing the day-to-day operations of the Petitioner's lab testing facilities. The evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; organizational charts showing tiers of employees and subordinate employees' job titles alone are not probative and will not establish that an organization is able to support an executive position

The other new evidence submitted on motion is a "weekly itinerary" for the Beneficiary. While we acknowledge that the Petitioner is attempting to address the deficiencies in the previously submitted position descriptions, this new description is similarly lacking in detail. For example, the listed tasks include "monitoring and assessing work flow in corporate office and having scheduled meeting with Department Directors to assess and direct implantation [*sic*] of financial productivity and corporate planning"; "meet with scheduled appointments either inside or outside corporate offices to meet with third-party vendors or third-party representatives with the purposes of reducing costs while maintaining profitability" and "formulating strategic alliances to increase market awareness." The Petitioner further indicates that he Beneficiary, on most days, must "oversee and assure daily tasks scheduled or assigned" are implemented, review QuickBooks, and respond to email and phone calls "regarding business operations." Overall, this weekly breakdown does not provide any further insight into the nature of the Beneficiary's day-to-day tasks and the Petitioner has not met its burden to clearly describe the duties to be performed. Reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Here, the Petitioner has not provided the necessary detail or an adequate explanation of the Beneficiary's activities in the course of his daily routine.

For the foregoing reasons, the Petitioner has not shown proper cause for reopening and the motion to reopen will be denied.

C. Motion to Reconsider

As noted, 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).

On motion, the Petitioner cites to *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (Apr. 14, 2016), in which we concluded that the petitioner had established "the need for a senior-level employee to manage the essential function of developing its brands and presence in the United States" despite its small staff size. The Petitioner implies that in this matter, we erroneously focused on the size of the

company without considering other factors and the reasonable needs of the organization as a whole, contrary to *Matter of Z-A-*.

The Petitioner, as noted, claims that it has consistently employed between eight and eleven phlebotomists and medical assistants, and states that this number is sufficient "to accommodate and respond to the reasonable need of such industry to operate its day-to-day duties of the laboratory, under the supervision of laboratory managers, and the physicians, all under the executive authority of the CEO." However, as already discussed above, the Petitioner in this matter, unlike the petitioner in *Matter of Z-A-*, did not provide a sufficient description of the Beneficiary's job duties, and did not show how its actual staffing levels are adequate to relieve the Beneficiary from significant involvement in the day-to-day operations of the company. A review of our decision reflects that we considered the evidence in its totality as required by *Matter of Z-A-*.

Again, the Petitioner claims that it has sufficient staff such that each of its four laboratory testing facilities, which are open for six days per week, have two staff present at all times. It maintains that it has a reasonable need for eight to eleven medical assistant staff (plus additional, higher-level staff) in order to operate its business. The Petitioner had a total of three phlebotomists and no medical assistants when it filed this petition. The Petitioner cannot credibly state that it has a reasonable need for eight to eleven technicians and simultaneously claim that a staff of three is sufficient to undertake the same workload. When a petitioner does not have sufficient staff to perform the day-to-day operational tasks of the business, it is reasonable to question who is actually performing those duties. We cannot accept an overly broad description of the Beneficiary's duties and the Petitioner's unsupported assertions regarding its staffing levels.

The Petitioner also claims that we abused our discretion by citing to and relying on *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001), in our prior decision.

We cited to *Systronics* in the following context:

> The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial or executive capacity. S*ee* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

The Petitioner states that the petitioner in *Systronics* was "a fraudulent 'shell company' with no lease and no employees," and therefore the court's finding in that case is irrelevant to the facts presented here. We disagree. In upholding the decision of the former Immigration and Naturalization Service (INS), the court found that "INS did not exclusively rely on Systronics's size as its determining factor," noting that while size was a factor, the INS also noted the irregularities in the evidence and questioned

what the beneficiary's duties would be in light of the company's small personnel size. *Systronics* 153 F. Supp. 2d at 15. Here, there were some unexplained inconsistencies in the evidence submitted to document the Petitioner's staffing levels. Moreover, the Petitioner has consistently claimed that it requires and employs at least eight lower-level employees to perform the non-managerial and non-executive operations of the business but has not substantiated this claim with evidence that it ever employed this number of phlebotomists and medical assistants. Therefore, the lack of staff to perform the day-to-day laboratory functions was a relevant factor in our decision, and both *Systronics* and *Family, Inc.* were applicable to this matter. We also considered other factors, such as the Beneficiary's job duties, the Petitioner's use of contractors, the nature of the business, the scope of the business, and the company's original business plan, and therefore did not rely solely on the size of the company.

The Petitioner also refers to *Matter of G- Inc.,* Adopted Decision 2017-05 (AAO Nov. 8, 2017), but it has not articulated an argument as to how that decision applies to the facts presented here. The Petitioner summarizes our findings in *Matter of G-* and states:

> In this case, AAO erroneously relies in its decision on managerial duties rather than executive duties. [The Beneficiary] has been working for the same Petitioner as an L-1A nonimmigrant in a position with the same title and the same duties as the proffered position per [the California Service Center's] prior L-1A approval since 2015.

The Petitioner has not made a connection between these claims and our findings in *Matter of G-*, in which we sought to clarify the term "essential function" and to clarify how a petitioner may demonstrate that a given beneficiary is employed in a managerial capacity as a function manager.

In dismissing the Petitioner's appeal, we did not evaluate the Beneficiary's position solely under the definition of "managerial capacity." We determined that the Petitioner had made a claim that he would be employed in a managerial capacity based on his supervision of subordinate personnel, and also made a claim that he would be employed in an executive capacity. As a result, we fully addressed both claims in our decision dismissing the appeal.

Further, we fully acknowledged that the Beneficiary had been granted L-1A status previously for the same position and cited to relevant case law and USCIS policy explaining why we were not bound by the prior decision of a service center or required to give deference to that decision. We also noted that the Petitioner did not support its claim that it had maintained the staffing levels and structure described in its 2015 business plan, which had been submitted in support of the prior petition and was resubmitted with this filing. Specifically, the organizational chart that was included in the business plan identified four medical assistants and four phlebotomy technicians by name, while the Petitioner, as of the date of filing this petition, had zero medical assistants and three phlebotomy technicians on its payroll.

Moreover, the staff projections provided in the business plan indicated that the company anticipated having 18 employees by 2018, including a marketing manager and an administrative assistant, two positions that were never filled. The Petitioner had six employees on its payroll when it filed this petition in 2018 and therefore did not show that it had maintained the staffing levels it claimed at the time it filed the prior petition. Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. In making a determination of statutory eligibility,

USCIS is limited to the information contained in that individual record of proceeding. 8 C.F.R. § 103.2(b)(16)(ii).

Finally, the Petitioner suggests that we failed to apply the preponderance of the evidence standard to the facts presented. In dismissing the appeal, however, we acknowledged that the Petitioner submitted over 4500 pages of documentation in support of this petition and observed that the Petitioner must prove eligibility for the requested immigration benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). To determine whether a petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). Here, the Petitioner's 4500 pages of documentation did not include the necessary clear description of the Beneficiary's actual day-to-day job duties. Further, the record still contains unexplained inconsistencies with respect to the company's staffing levels, as the Petitioner persists in claiming that it both requires and has consistently employed at least eight and as many as eleven phlebotomists and medical assistants when the evidence demonstrates that it typically employs only three to four mostly part-time staff in these roles.

For the reasons discussed, the Petitioner has not shown that previous decision involved any incorrect application of law or policy and therefore has not shown proper cause for reconsideration.

III. CONCLUSION

The motion to reopen and motion to reconsider will be denied for the above stated reasons. In visa petition 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 ORDER: The motion to reconsider is denied.

Cite as *Matter of B-L-I-, Inc.*, ID# 6353509 (AAO Sept. 24, 2019)