U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28965630

Date: DEC. 11, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Multinational Managers or Executives)

The Petitioner is a global marketing, distribution, and project development company that seeks to permanently employ the Beneficiary as its "Global Manager – Compliance & Legal/Assistant General Counsel" under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director of the Texas Service Center initially denied the petition based on three grounds.[1] The Petitioner subsequently filed a motion to reopen and reconsider, which the Director dismissed, concluding that the Petitioner submitted evidence that "does not establish that the requirements for filing a motion to reconsider have been met." The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we conclude that the Director did not fully address the Petitioner's combined motion to reopen and reconsider and did not offer an analysis of the submitted evidence. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

[1] The Director concluded that the Petitioner did not provide credible evidence regarding the Beneficiary's employment abroad and did not establish that the Beneficiary has the requisite period of qualifying employment abroad or that he was employed abroad and would be employed in the United States in a managerial capacity.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

In addition, 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 and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceedings at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

II. BASIS FOR REMAND

As previously indicated, the Director's decision did not offer a complete analysis of the basis for dismissing the motion or explain the deficiencies in the evidence. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

First, although the Director concluded that the Petitioner submitted evidence that "does not establish that the requirements for filing a motion to reconsider have been met," no analysis was provided to explain the basis for this conclusion. Likewise, the Director provided no analysis to explain the basis for concluding that "a majority of the beneficiary's duties" abroad and in the United States "involved and would involve operational activities . . . due to the nature of the business and the description of the beneficiary's duties." Despite indicating that job duties and the nature of the business were considered in dismissing the motion, the Director did not specifically discuss the nature of the business or analyze specific job duties to clarify why the motion was dismissed.

Also, as noted earlier in this decision, the Petitioner's motion before the Director was not exclusively a motion to reconsider, but rather a combined motion to reopen and reconsider. The Director did not, however, include the regulatory provisions that pertain to a motion to reopen, nor did the Director address the merits of and issue a decision on that motion, which the Petitioner supported with evidence and a legal brief.

Additionally, there are other deficiencies that should also be addressed on remand. First, the Director summarized the original denial, stating that "[t]he petition was denied because the beneficiary was not in a managerial executive position both in the United States and Oversea [sic]." However, given the ambiguous reference to the Beneficiary's positions as "managerial executive," it is unclear whether the Director properly assessed the evidence pursuant to the Petitioner's claim that the Beneficiary was and would be employed in a managerial capacity.

Second, in the original denial decision the Director determined that the Beneficiary does not have the requisite period of qualifying employment abroad and also questioned the credibility of the Petitioner's

claim regarding the Beneficiary's foreign employment based on information contained in the Beneficiary's previously filed nonimmigrant visa (NIV) application. Neither of these issues was mentioned in the decision that is currently before us on appeal. However, based on our de novo review of the evidence on record at the time of the previously issued decision, we find that the Petitioner provided sufficient evidence to support the claim that the Beneficiary was employed abroad by [redacted], formerly known as [redacted], for at least one year prior to coming to work for the Petitioner in the United States in the L-1A nonimmigrant classification.[2]

Based on the foregoing, it is not clear that the record was reviewed in its entirety and analyzed sufficiently.

Notwithstanding the lack of a proper analysis, however, the record as presently constituted lacks sufficient evidence to establish that the Petitioner met the ability to pay provisions in 8 C.F.R. § 204.5(g)(2) or that the Petitioner and the Beneficiary's foreign employer have a qualifying relationship under 8 C.F.R. § 204.5(j)(3)(i)(C).

The regulation at 8 C.F.R. § 204.5(g)(2) states that the prospective U.S. employer must meet the following provisions:

> Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petition in this matter was filed in September 2021, thereby requiring the Petitioner to establish its ability to pay the Beneficiary's proffered annual wage of $99,489 from 2021 onward. Because the record currently only contains financial documents that precede the date of filing, we cannot conclude that the Petitioner has met the ability to pay requirement provisions of 8 C.F.R. § 204.5(g)(2).[3]

As noted above, the record also lacks sufficient evidence establishing that the Petitioner and the Beneficiary's foreign employer are affiliates, as the Petitioner claims. To be deemed affiliates, the Petitioner must establish that it and the Beneficiary's foreign employer are owned and controlled by a common individual or parent entity or that they are owned and controlled by the same group of individuals with each owning and controlling approximately the same proportion of each entity. *See* 8 C.F.R. § 204.5(j)(2) (for the definition of the term "affiliate").

[2] Although the Beneficiary referred to the foreign employer by its former name when he filed his NIV application, the record shows that since such filing, the foreign entity underwent a name change, a fact that the Petitioner adequately documented both at the time of filing this petition and in response to a subsequent request for evidence.

[3] The record contains a Form 8854, Information Return of U.S. Persons With Respect to Foreign Disregarded Entities (FDEs) and Foreign Branches (FBs), from 2019 listing the Petitioner as the FDE or FB. The record also contains unaudited consolidated balance sheets and statements for the Petitioner and its subsidiaries for 2017 and 2018.

The record in this instance contains documents showing that the foreign entity is majority owned by [redacted], which is a limited partnership with one general partner – [redacted] – owning .01% of the partnership, and four limited partners – [redacted] – respectively owning 27.56%, 27.28%, 11.11%, and 33.54% of the partnership.

Ownership evidence pertaining to the Petitioner includes a 2018 consolidated financial statement for the Petitioner and its subsidiaries. The financial statement contains a section entitled "Notes to Consolidated Financial Statements." "Note 1" of the statement identifies the Petitioner by name, lists its date and place of incorporation, and states that the Petitioner is "a wholly-owned subsidiary of [redacted]." Because the Petitioner did not provide documents establishing the ownership of [redacted], we cannot conclude that the Petitioner and the Beneficiary's foreign employer are similarly owned and controlled by a parent or individual or by a group of individuals, as required for the formation of an affiliate relationship. *See id.*

In light of the evidentiary deficiencies described above, the record as presently constituted does not establish that the Petitioner is eligible for the benefit sought.

Regardless, because the Director's decision did not adequately analyze the facts of the matter and clearly apply the regulatory standards, we will remand the matter for entry of a new decision. The Director should request any additional evidence warranted and allow the Petitioner to submit such evidence within a reasonable period of time.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.