U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19909954

Date: FEB. 02, 2022

Motion on Administrative Appeals Office Decision

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

The Petitioner, an international trade company, seeks to continue the Beneficiary's temporary employment as its chief financial officer (CFO) under the L-1A nonimmigrant classification for intracompany transferees. Section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows an organization to transfer a qualifying 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 that the Beneficiary would be employed in an executive capacity in the United States, or that she had been employed abroad in an executive capacity prior to her transfer to the Petitioner's U.S. operations. We dismissed the Petitioner's subsequent of appeal of that decision and the matter is now before us again on combined motion to reopen and motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss both motions.

I. LAW

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involved specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. 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.*

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. A motion to reopen must state the new facts to be proved in the reopened proceeding and 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). We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

II. ANALYSIS

The issues in this matter are: (1) whether the Petitioner has established that our decision to dismiss its appeal was based on an incorrect application of law or USCIS policy based on the evidence in the record at the time of our decision, and (2) whether the Petitioner has submitted new facts that warrant reopening the appeal.

A. Background and Prior AAO Decision

As noted, the Director denied the L-1A extension petition concluding that the Petitioner had not met its burden to establish that it would employ the Beneficiary in an executive capacity as defined at section 101(a)(44)(B) of the Act. We dismissed the Petitioner's appeal after reaching the same conclusion.[1]

In dismissing the appeal, we considered the Petitioner's statements and evidence regarding the Beneficiary's job duties, the staffing and organizational structure of the petitioning entity, the nature of the business, and the Beneficiary's claimed role within the larger international organization, which includes the Petitioner's Chinese affiliate. This included evidence submitted in support of the petition and in response to a request for evidence (RFE), information obtained during a pre-adjudication administrative site visit conducted by USCIS immigration officers, the Petitioner's response to a notice of intent to deny (NOID), and the Petitioner's appeal.

With respect to the Beneficiary's job duties, we determined that the position descriptions submitted at the time of filing and in response to the RFE were vague, repetitive, and inconsistent, providing little insight into the nature of her actual day-to-day duties. We further emphasized that the Beneficiary, when interviewed by USCIS officers, stated that she performed operational duties that were not included in any of the written descriptions, which led us to question whether those descriptions were accurate and complete. We determined that overall, the record did not sufficiently delineate the

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[1] As this issue was dispositive of the appeal, we reserved, and did not address in our decision, the Director's determination that the Petitioner did not establish that the Beneficiary had been employed abroad in an executive capacity. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("agencies are not required to make findings on issues the decision of which is necessary to the results they reach."); *see also Matter of L-A-C-*, 16 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where a petitioner or applicant is otherwise ineligible).

We also observed that the Director had questioned whether the Beneficiary would be engaged in providing services for the Petitioner's subsidiary company, [redacted]. In a previous petition [redacted], the Petitioner indicated that this company had intended to engage in cannabis cultivation and marijuana manufacturing and distribution, and therefore questioned whether the Beneficiary's activities would comply with federal law. USCIS cannot approve a visa petition that is based on employment that contravenes another federal law. *See Matter of I- Corp.*, Adopted Decision 2017-02 (AAO Apr. 12, 2017). We determined that [redacted]'s intended activities were prohibited by The Controlled Substances Act, 21 U.S.C. § 812, 841(a)(1), but observed that based on the information submitted with this petition, the company was not actively doing business. On motion, the Petitioner has submitted evidence confirming that the company, although still registered as a California limited liability company, is not engaged in any business activities.

Beneficiary's actual duties or the amount of time she allocates to qualifying executive-level tasks, such that we could determine that her duties would be primarily in an executive capacity.

Regarding the company's staffing and organizational structure, we acknowledged the Petitioner's assertions that, in addition to its eight U.S.-based staff, it relies on twelve China-based personnel to perform purchasing, sales and marketing tasks as well as "many outsourced service providers." However, we explained that the Petitioner had not sufficiently documented these personnel and the nature and scope of the services they provide to the U.S. company. With respect to the U.S.-based personnel, we determined that while the Petitioner had documented that it employs the claimed subordinate staff, it did not provide consistent descriptions of their actual duties, nor did it appear to employ any subordinate "finance staff" despite stating in the Beneficiary's job description that she oversees such employees. Therefore, we concluded that, when considered with the vague and inconsistent accounts of the Beneficiary's job duties, the record did not establish that the Petitioner would employ the Beneficiary in an executive capacity as defined at section 101(a)(44)(B) of the Act.

B. Motion to Reconsider

On motion, the Petitioner asserts that we did not consider the totality of the evidence and that we failed to apply the preponderance of the evidence standard to the facts presented. For the reasons discussed below, the Petitioner has not established that we incorrectly applied the law or USCIS policy in our decision dismissing the appeal.

In our previous decision, we addressed the Petitioner's claim that it must only establish eligibility by a preponderance of the evidence. *Chawathe*, 25 I&N Dec. at 375-76. 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). On motion, the Petitioner simply maintains that it submitted more than sufficient evidence to meet this standard. However, it does not adequately address the fact that we articulated a reasonable basis for questioning the probative value of certain critical evidence, including the Petitioner's descriptions of the duties performed by the Beneficiary and her subordinates.

With respect to the job descriptions submitted for the Beneficiary, we emphasized that the description submitted for the CFO position at the time of filing, while lengthy, was vague and repetitive and indicated that she oversees "the finance staff," referencing personnel that the Petitioner did not otherwise claim to employ. We further noted that the Petitioner, without explanation, submitted a revised position description in response to the RFE in which it indicated that her role as CFO was not limited to directing the company's financial functions as initially claimed, but rather, extended to human resources, public relations, contract negotiation, and authority for the overall direction, policies, strategies and objectives of the business, responsibilities that overlapped with those of the company CEO. We emphasized that the Petitioner had introduced a significant number of duties into the original description, despite indicating that the first description accounted for 100% of the Beneficiary's time, and therefore was not responsive to the Director's request that the Petitioner clarify the initial job description. When responding to an RFE, a petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. A petitioner must establish that the position offered to

a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See* 8 C.F.R. § 103.2(b)(1).

On motion, the Petitioner explains that the Beneficiary has worked for her family's business (in China and in the United States) for over ten years and that it is reasonable for her duties and responsibilities to be expanded over time and for the most senior staff to share decision-making authority with the younger generation. The Petitioner objects to the suggestion that there were significant changes made to the position. However, the fact remains that the Petitioner stated at the time of filing that 100% of her time as CFO was allocated to financial, accounting, budgetary and cost control matters. While the Petitioner now implies that the company opted to expand her duties after the filing of the petition, it still must establish that she performed primarily qualifying executive duties related to the company's financial functions at the time of filing in January 2019. The Petitioner was provided with an opportunity to clarify these duties and instead submitted a revised description indicating that the Beneficiary performs the original duties in addition to duties that are essentially identical to those performed by its CEO.

The Petitioner also addresses our determination that the record did not establish the company's employment of "the finance staff" that the Beneficiary was claimed to supervise as CFO, or otherwise show who assists her with non-qualifying duties associated with day-to-day financial activities of the company. The Petitioner notes that although there is no independent finance department or manager, the purchasing manager is responsible for providing expenditure reports, the sales manager is required to report sales, income and profit data, and other matters, such as taxes, are handled by professional accountants. It emphasizes that as a small business, it is "not reasonable or typical" to have an independent finance department. However, the Petitioner has claimed that its small business can support an executive-level CFO who allocates all or most her time to developing financial procedures and standards, financial accounting and financial management systems, financial policies and objectives, preparing financial statements for submission to investors, serving as the lead staff on "audit/finance events," and developing finance, accounting, billing and auditing procedures, among other duties. The record confirms that the Petitioner used an external accountant to file tax documentation such as state and federal quarterly wage reports at the time of filing, and we acknowledge that department managers may have some financial reporting responsibilities. However, it remains unclear who was responsible for routine day-to-day financial activities within the company or how the Petitioner would support a dedicated executive-level position for this company function.

In dismissing the appeal, we determined the Beneficiary provided information regarding her job duties that further undermined the probative value of the written descriptions submitted at the time of filing and in response to the RFE. Specifically, when interviewed by USCIS officers during the site visit, the Beneficiary stated that her duties include taking sales orders by telephone and e-mail and forwarding them to the appropriate staff for shipping, as well as facilitating the shipment of products with the factory. We emphasized that these duties, which are operational tasks associated with operating an international trade business, were not included in any written job description submitted in support of the petition and that the Petitioner had not offered a rebuttal or explanation. On motion, the Petitioner asserts that the Beneficiary is not fluent in English and that she misunderstood what information the USCIS officer needed when he asked her for additional details, believing that he wanted details about business transactions rather than about her job duties. However, the Petitioner does not deny that she performs the duties stated above or explain how these statements were intended

to provide details about business transactions. Further the record reflects that the Beneficiary also indicated to the USCIS officer that she meets with the sales manage and the company accountants, as well as performing the routine sales and shipping-related tasks mention above, so it is reasonable to conclude that she was in fact describing her own duties.

Finally, the Petitioner emphasizes that we did not give sufficient weight to evidence in the record showing that the Beneficiary has decision-making authority consistent with her executive-level position. However, we did not question that the Beneficiary occupies a senior role in the business and participates in discretionary decision-making. These factors are necessary, but not sufficient, to support a conclusion that a position is in an executive capacity as defined at section 101(a)(44)(B) of the Act; the Petitioner must also establish that the actual duties of the position are primarily executive in nature. We acknowledged that the Petitioner had provided documentation intended to illustrate prior decisions she had made as CFO but found that this evidence did not provide further insight into her expected day-to-day duties under an extended petition. Ultimately, we concluded that the Petitioner had not met its burden to provide a probative description of the Beneficiary's actual duties because the written descriptions it submitted were inconsistent and vague, did not describe the specific tasks she would perform within the context of its business, and were undermined by the Beneficiary's own statements that she performs non-executive tasks that are not included in the job descriptions the Petitioner prepared for submission to USCIS. The Petitioner has not established that we failed to apply the preponderance of the evidence standard when evaluating whether the Beneficiary would perform primarily executive duties.

With respect to the company's staffing, the Petitioner cites *Nat'l Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act primarily in a managerial or executive capacity. The Petitioner, citing section 101(a)(44)(C) of the Act, also emphasizes that we must consider the reasonable needs of the organization and that a company's size alone may not be the only factor in denying a visa petition for classification as an L-1A intracompany transferee. The Petitioner cited this same statute and caselaw in support of its appeal and we addressed its claim, noting that neither the Director's decision denying the petition nor our decision dismissing its appeal were based on the size of the petitioning company or its staffing levels. The Petitioner does not articulate how our prior decision was based on an incorrect application of the cited statute or caselaw.

Our decision reflects that we determined that the job descriptions submitted for the Beneficiary's direct and indirect subordinates in the United States were not consistent and lacked detail regarding the specific functions they perform. On the day of the site visit, the Beneficiary indicated that all company employees were in the field buying and researching products and attempting to acquire new business, information that suggested that the subordinate department managers are likely performing the day-to-day activities of their respective sales, marketing and purchasing departments in addition to overseeing the departments. The position descriptions submitted for the department managers did not indicate that they perform these functions and therefore the Beneficiary's statements raised further questions regarding the probative value of the job descriptions provided for her subordinates.

The Petitioner also asserts that we did not adequately consider the fact that 12 employees based in China are dedicated to supporting the U.S. company's sales, purchasing and marketing activities. Our

prior decision reflects that we acknowledged that when staffing levels are considered in determining whether an individual will act as a manager or executive, we will also consider relevant evidence in the record concerning the reasonable needs of the organization as a whole, including any related foreign entities within the "qualifying organization." *See Matter of Z-A- Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016). If a petitioner claims that it has a reasonable need for foreign staff to perform some of the operational tasks associated with its U.S. business, it has the burden of documenting those foreign employees and the duties they perform for the U.S. entity. *Id.*

Here, we explained that the Petitioner did not meet that burden, noting that the record did not include evidence that it or affiliate pays the salaries of the China-based employees identified on the U.S. organizational chart or submit other corroborating evidence related to the claimed overseas staff. The Director addressed this issued in the RFE, emphasizing that the Petitioner did not demonstrate how the foreign staff support the U.S. operation or how they do so. In its response, the Petitioner stated that "as an international trade company mainly engaged in imports and exports to China it is very reasonable and typical to have employees in the U.S. and China." The Petitioner stated that the staff "will definitely relieve [the Beneficiary] from performing operational daily duties," but did not provide additional evidence. We acknowledged that the Petitioner submitted brief job descriptions for the overseas staff on appeal but noted that we need not consider evidence submitted for the first time on appeal when such evidence was previously requested in an RFE.[2] Further, we noted that, despite the Petitioner's claim that employees based in China make up 60% of its staff, it still had not provided corroborating documentation of their employment or other evidence of the support they provide to the U.S. company. The Petitioner submits additional evidence regarding these staff in support of its motion to reopen but has not established that we incorrectly applied *Matter of Z-A- Inc.* or established that our determination that it had not adequately documented its foreign-based staff was incorrect based on the evidence of record at the time of our decision.

Although the Petitioner disagrees with our determination that it did not meet its burden to establish, by a preponderance of the evidence, that it would employ the Beneficiary in an executive capacity under the extended petition, for the reasons discussed above, it has not demonstrated that we incorrectly applied the law or USCIS policy in reaching that determination. Accordingly, the motion to reconsider will be dismissed.

C. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Although we review new evidence submitted in support of a motion to reopen, the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

The new evidence submitted in support of the motion to reopen does not overcome our reasons for dismissing the Petitioner's appeal. The Petitioner's new evidence includes, in part, documentation related to the Beneficiary's residential address. At the time USCIS conducted a site visit at the [redacted] California location listed as the Beneficiary's worksite, the officers found no one present at the premises. The officers then visited the [redacted] California address provided on the Form I-129 as

[2] *See Matter of Soriano*, 19 I&N Dec.764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

the Beneficiary's "current residential address." The evidence submitted in support of the motion reflects that the Beneficiary was leasing a residence in [redacted] California in 2019, and includes photographs showing that the [redacted] California residential location is equipped with office equipment and meeting spaces. While this new evidence clarifies where the Beneficiary was residing at the time of the site visit and demonstrate that the company may have more than one operating location, it does not address our reasons for dismissing the appeal.

The Petitioner also submits new evidence of invoices issued by its accountant in 2019 and 2020, subsequent to the date of filing the petition, as well as IRS quarterly federal tax returns for the first two quarters of 2021 showing that the company had five employees on its payroll. In dismissing the appeal, we determined that the Petitioner did not establish the nature and scope of services provided by its external accountant at the time of filing. The new evidence indicates that the accountant prepared some city, state and federal tax filings, filed a statement of information, provided payroll services in 2019, and billed the Petitioner for bookkeeping in 2020. It does not illustrate whether or to what extent the Petitioner relied on external service providers for accounting and related services when the petition was filed.

The Petitioner also submits additional evidence related to the China-based staff identified on its January 2019 organizational chart. This evidence consists of a 2019 salary report for each Chinese employee, indicating the amount each employee earned monthly (in Chinese currency) during that year. Each employee's chart is internally generated, printed on the Petitioner's stationery and includes an English translation. The Petitioner does not further address which entity is responsible for paying these employees, provide evidence of actual salary payments made to them, elaborate on the employees' job duties, provide corroborating evidence of the services they provide to the U.S. company, or explain whether they work exclusively for the U.S. entity or divide their time between the Petitioner and the Chinese affiliate. As discussed in our prior decision, we will consider evidence that other staff in the Petitioner's international organization contribute to the operation of the U.S. affiliate, but it is the Petitioner's burden to document these employees and the services they provide to the U.S. entity. After considering the new evidence submitted on appeal, the Petitioner still has not met this burden.

Therefore, for the reasons discussed above, the motion to reopen will be dismissed.

IIII. CONCLUSION

The Petitioner has not submitted new evidence that would warrant the reopening of its appeal, nor has it established that our decision to dismiss its appeal was based on an incorrect application of law or USCIS policy. Accordingly, the motions will be dismissed. Further, because, the Petitioner has not overcome our basis for dismissing the appeal, we need not address the separate issue of whether it established that the Beneficiary was employed in an executive capacity abroad.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.