



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 27176697

Date: JUL. 20, 2023

Motion on Administrative Appeals Office Decision

Form I-129, Petition for a Nonimmigrant Worker (L-1A Manager or Executive)

The Petitioner describes itself as a trucking and logistics operation.¹ It seeks to extend the Beneficiary's temporary employment as its executive manager 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 record did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity. We dismissed a subsequent appeal. The matter is now before us on combined motions to reopen and reconsider.

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). Upon review, we will dismiss the motions.

I. 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). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

In dismissing the appeal, we determined that the Petitioner had not adequately described the Beneficiary's job duties within the context of a one-person transportation business and did not establish that it was adequately staffed to support the Beneficiary in an executive position at the time the petition was filed. We also cited to inconsistencies in the record regarding the Beneficiary's position title, and determined that the Petitioner had not established that these inconsistencies

¹ At part 5, item 12 of the Form I-129, the Petitioner listed its business type as "import and export of industrial parts/consultation."

regarding the Beneficiary's position title and employment capacity were the result of errors made by the preparer of the petition, as claimed.

On motion, the Petitioner submits a brief, a declaration from the Beneficiary, a felony complaint against the preparer of the petition, its 2020 Federal and State tax returns, weekly payroll reports for December 2022 and January 2023, foreign payroll records for July 2021, and copies of titles for commercial vehicles. It also resubmits a copy of the organizational chart submitted on appeal.

As noted in our prior decision, there are considerable inconsistencies among the Petitioner's claims as to whether the Beneficiary's proposed employment would be in a managerial or executive capacity. On motion, the Petitioner contends that "the discrepancies encountered in the evidence regarding the Beneficiary's title was a result of ineffective legal assistance by a non-licensed individual who was charged with four counts of grand theft and one count of unauthorized practice of law."

The record, however, shows that the Petitioner has referred to the Beneficiary's U.S. position as both that of a manager and an executive, thereby undermining the claim that the petition's preparer was solely responsible for the inconsistencies. Namely, in a July 2020 support letter, which was provided as initial supporting evidence, the Beneficiary referred to his position as executive manager. In a May 2021 letter provided in response to a request for evidence (RFE), he referred to his proposed position as that of a general manager. Both letters were signed by the Beneficiary in his official capacity, thus suggesting that the petition's preparer was not solely responsible for providing inconsistent information about the Beneficiary's U.S. employment capacity. Moreover, the petition was signed by the Beneficiary, who certified, under penalty of perjury that he "reviewed this petition and that all of the information contained in the petition, including all responses to specific questions, and in the supporting documents, is complete, true, and correct." As noted in our appellate decision, the Petitioner bears the burden of resolving any inconsistencies in the record with independent, objective evidence. *See 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.*

Moreover, while we acknowledge the submission of a pending criminal complaint against the petition's preparer, as well as the Beneficiary's declaration outlining the preparer's claimed errors, these documents and allegations do not satisfy the threshold documentary requirements for a claim of ineffective assistance of counsel. The Petitioner did not provide a detailed description of its agreement with the preparer, evidence that the preparer was informed of these allegations and was given an opportunity to respond, or evidence that a complaint was filed with the applicable state bar association (or an explanation as to why a complaint was not filed).²

In addition, the evidence submitted on motion relating to the Beneficiary's job duties and the Petitioner's staffing does not meet the requirements of a motion to reopen as set forth at 8 C.F.R. § 103.5(a)(2). The submitted evidence clarifies and expands on facts that were previously requested

² *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). A claim of ineffective assistance of counsel must contain an affidavit attesting to the relevant facts and providing a detailed description of the agreement with former counsel; evidence that former counsel was informed of the allegation of ineffective assistance and was given an opportunity to respond; and, if former counsel violated his or her ethical or legal responsibilities, evidence that a complaint was filed with the applicable state bar association or an explanation why a complaint was not filed. *Id.* at 639.

by the Director. The Director did not err in denying the petition based on the record before them, and we correctly declined to consider previously requested evidence, such as the organizational chart, when we dismissed the appeal. This evidence was available when the petition was originally filed, and was not provided in response to the RFE despite the Director's request. The Petitioner was also asked to provide evidence of its staffing and the percentage breakdowns listing the Beneficiary's job duties during the Petitioner's first year of operation, but the Petitioner did not comply with this request and provided only job descriptions addressing the Beneficiary's prospective employment and potential staffing structure. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Moreover, we acknowledge the Petitioner's submission of weekly payroll reports and foreign payroll records in support of the assertion that it has sufficient staff to relieve the Beneficiary from performing non-qualifying, operational duties. The Petitioner's submission of foreign payroll documents dated in 2021, weekly payroll records from December 2022 and January 2023, and its claim that the business continues to grow does not demonstrate eligibility in this case, as both the payroll documents and the claims of growth signify a reliance on circumstances that did not exist at the time of filing. The Petitioner has the burden of establishing eligibility for the requested benefit *at the time of filing* the benefit request and continuing until the final adjudication. 8 C.F.R. § 103.2(b)(1).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (*citing INS v. Abudu*, 485 U.S. 94 (1988)). With this motion, the Petitioner has not met that burden.

II. MOTION TO RECONSIDER

A motion to reconsider must establish that our prior 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). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

On motion, the Petitioner contests the correctness of our prior decision. In support of the motion, the Petitioner asserts that we erroneously determined that the Beneficiary would perform its underlying operational duties because the Petitioner had no other staff to perform such tasks at the time of filing. The Petitioner contends that we erroneously applied *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988), which provides that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. Specifically, the Petitioner asserts that we erroneously declined to consider the organizational chart submitted on appeal, which it claimed supported its assertion that the Beneficiary oversaw six employees of the foreign entity who relieved him from performing non-qualifying duties.

As noted in our prior decision, we declined to consider the organizational chart because the Petitioner neglected to provide this evidence when it was first requested in the RFE. We advised that when a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to

respond to that deficiency, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the Petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the Director's request for evidence. *Id.* Nevertheless, even if we had considered this evidence, the mere existence of the foreign employees is insufficient to prove that the Beneficiary was working in the United States works in a primarily executive capacity. When a petitioner claims that employees working for related entities within the same qualifying organization directly or indirectly support the needs of the petitioning entity, it bears the burden to provide probative and relevant evidence demonstrating the existence of such staff and the nature of the services they provide. *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016). Here, the Petitioner did not provide supporting evidence to demonstrate the Beneficiary's oversight and personnel authority over these claimed foreign subordinates, nor did it describe the duties they would perform for the U.S. entity.

We further note that the organizational chart contradicts the Petitioner's RFE response, where the Beneficiary claimed that the Petitioner planned to employ "a team of 4-5 full-time employees" and employed an operations manager, a manager, and a head of brokerage services in the U.S. office at the time the response was submitted. The Petitioner bears the burden of resolving any inconsistencies in the record with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92. As we noted previously, such unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *See id.* The Petitioner did not offer evidence to resolve the noted inconsistencies regarding the Beneficiary's position and subordinate staffing structure and therefore we appropriately questioned the reliability of the Beneficiary's position title, job descriptions, and the availability of employees to relieve him from performing non-qualifying duties.

III. CONCLUSION

Although the Petitioner has submitted additional evidence in support of the motion to reopen, the Petitioner has not established eligibility. On motion to reconsider, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Therefore, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.