U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20737376

Date: MAY 23, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, describing its business as including wine distribution, real estate development, sourcing and export of construction materials to China, and the sale of California lottery tickets, seeks to permanently employ the Beneficiary as president 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 a managerial or executive capacity.

The Director of the Nebraska Service Center denied the petition on multiple grounds. The Director determined the Petitioner did not establish, as required, that the Beneficiary was employed abroad, or currently employed in the United States, in a managerial or executive capacity. The Director also determined the Petitioner did not establish that it was doing business for at least one year before the petition was filed, continued to do business, or the Beneficiary's former foreign employer was doing business, casting doubt on whether a qualifying relationship still existed between the two companies. The Petitioner later filed a combined motion to reopen and reconsider that the Director dismissed.[1]

The Petitioner then filed an appeal we dismissed. We concluded the record did not demonstrate that the Petitioner's foreign employer continued to do business. We reserved the other issues as to whether the Beneficiary was employed abroad and would continue to be employed in the United States in a managerial or executive capacity, and whether the Petitioner had been doing business continuously in the United States for at least one year before the petition was filed. The Petitioner then filed a motion to reopen and a motion to reconsider that we dismissed. The matter is now before us again on a motion to reopen and a motion to reconsider.

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

[1] The Director did determine on motion that the record established that the Beneficiary was employed abroad for at least one year during the three years preceding his entry into the United States, though not in a managerial or executive capacity.

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 the Director's initial decision denying the petition, the Director stated that submitted printouts from the internet did not demonstrate that the foreign employer was doing business. The Director indicated that foreign employer's business licenses and a lease agreement reflected that it was authorized, and had space, to do business, but did not demonstrate it had been providing goods and/or services in a regular, systematic, and continuous fashion.[2] In its later motion to reopen, the Petitioner provided no new evidence to support that the foreign employer was doing business and requested that the Director review the previously submitted evidence. In dismissing the motions, the Director reasoned that the record did not include invoices after 2015 and that submitted sales agreements from 2017 and 2018 did not reflect the actual provision of goods or services. The Director also concluded that little evidence had been submitted to demonstrate business activity by the foreign employer after the date the petition was filed in March 2018.

On appeal, the Petitioner again pointed to the previously submitted evidence and reiterated its claim that it sufficiently established that the foreign employer continued to conduct business after 2015. As with its previous motion, it submitted no new documentation on appeal. In dismissing the appeal, we emphasized that there was still little evidence on the record reflecting the provision of goods or services by the foreign employer since it had submitted customs declarations and invoices from 2014 and 2015. Therefore, we concluded that the Petitioner did not establish that the foreign employer was a qualifying entity doing business.

As noted, the Petitioner later filed a motion to reopen and a motion to reconsider. In dismissing the motion to reopen, we acknowledged that the Petitioner had submitted translated Chinese documentation pertaining to the foreign employer's business, including what appeared to be a maintenance agreement with a Chinese hospital from November 2019, a series of sales invoices dating from April 2018 to December 2019, a business license from March 2020, and a payroll summary from January 2020. However, we declined to accept this documentation, determining that the translations did not comport with the regulatory requirements of 8 C.F.R. § 103.2(b)(3), requiring certifications from the translator that the translations were complete, and accurate, and that the translator was competent to translate from Chinese into English. Further, we concluded that the asserted business license was not credible evidence of the foreign employer conducting business and the claimed payroll summary was not reflective of an official business record, with little evidentiary weight. As such, we determined that the Petitioner did not present sufficient new facts to demonstrate that the foreign employer was doing business and did not meet the requirements of a motion to reopen.

In support of the current motion, the Petitioner asserts that the additional documentation submitted with the previous set of motions included a translator's certification, and that the additional documentary evidence of the foreign employer's business operations was improperly disregarded. The Petitioner points to an exhibit from its last set of motions, contending that the translator did in fact certify the translations. The Petitioner also submits additional documentation meant to demonstrate that the foreign employer continued to do business after 2015, including a handful of foreign employer value added tax (VAT) invoices from 2020 and 2021, a balance sheet and income statement from

[2] Doing business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office. 8 C.F.R. § 204.5(j)(2).

2021, the previously submitted foreign employer payroll summary from 2020, various photographs of the foreign employer's purported operations, and printouts of information about the foreign employer from the internet. The Petitioner contends that this additional evidence, along with the previous documentation provided in support of the previous motions, establishes that the foreign employer was, and is still, doing business as necessary to demonstrate that it is a qualifying organization.

However, we disagree with the Petitioner's assertion that it had provided sufficient certified translations of the documentation provided in support of the previous, and current, motion to reopen. For instance, the Petitioner did not submit certified translations of each document, as required, but only a blanket certification it claims applies to all documentation on the record. This undated blanket certification does not credibly confirm the proper translation of the documentation on the record as it is unclear to which documentation it is referring and when such a translation or certification took place. Because the Petitioner did not submit properly certified English language translations of the documents in support of the previous, and current, motion to reopen we therefore cannot meaningfully determine whether the translated material is accurate and supports their claims.

Regardless, the issue as to whether the foreign employer was, and continued to, do business as defined by the regulations was raised with the Petitioner multiple times and requests for sufficient supporting documentation were made during the adjudication of this matter. For instance, the issue as to whether the foreign employer continued to do business after 2015 was first raised by the Director in denying the petition, and again when the Director later dismissed a motion reopen. Once again, the Petitioner had the opportunity to correct this evidentiary deficiency on appeal with us but declined at that time to submit any additional new evidence specific the foreign employer doing business after 2015. We note that this evidentiary deficiency formed the primary basis upon which we dismissed the Petitioner's appeal.

Therefore, we decline to consider the new evidence provided in support of this motion, since U.S. Citizenship and Immigration Services (USCIS) previously requested all evidence necessary to establish this ground for eligibility, and the Petitioner was put on notice of this evidentiary requirement numerous times. We were not, and still are not, required to consider evidence provided on motion if the affected party was put on notice of the specific evidentiary requirement, given a reasonable opportunity to provide the evidence, and the evidence was reasonably available to the affected party at the time it was to have been submitted. The Petitioner provides no explanation or grounds for why the newly provided evidence was not available when responding to the Director's request for evidence, when it filed motions with the Director, and when it filed an appeal with us. For this reason alone, the Petitioner has not met the requirements of a motion to reopen by submitting new facts supported by documentary evidence, and it must be dismissed. Therefore, the motion to reopen must be dismissed.

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 only grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

In our prior decision, we concluded that the Petitioner did not articulate how our previous decision represented an incorrect application of law or policy and dismissed the motion to reconsider. We note again that our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). As the Petitioner does not specifically contest this conclusion that it did not meet the requirements of a motion to reconsider, we will dismiss the current motion to reconsider. Further, the Petitioner's assertions on motion to reconsider related to whether the foreign employer is doing business have been addressed in the previous section. The Petitioner has not demonstrated that our prior decision was based on an incorrect application of law or policy based on the evidence in the record of proceedings at the time of the decision, therefore, the motion to reconsider must be dismissed.

III. ADDITIONAL ISSUES

In our previous decisions dismissing the appeal and the later motions, we reserved the issues of whether the Beneficiary was employed abroad, or in the United States, in a managerial or executive capacity, and whether the Petitioner has been doing business continuously for at least one year before the petition was filed up to the present. We again do so here. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

However, the Petitioner's statements and the new supporting documentation provided in support of the current motion leave substantial question as to whether the Beneficiary would be employed in a managerial or executive capacity under an approved petition.[3] First, it is noteworthy that the Petitioner does not clearly articulate whether the Beneficiary would be employed in either a managerial or an executive capacity, or both, leaving ambiguity as to its assertions.[4]

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[3] The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." *Id.* If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 204.5(j)(2).

The statutory definition of the term "executive capacity" focuses on a person's elevated position. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of an organization or major component or function thereof. Section 101(a)(44)(B) of the Act. To show that a beneficiary will "direct the management" of an organization or a major component or function of that organization, a petitioner must show how the organization, major component, or function is managed and demonstrate that the beneficiary primarily focuses on its broad goals and policies, rather than the day-to-day operations of such. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the organization, major component, or function as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

[4] A petitioner claiming that a beneficiary will perform as a "hybrid" manager/executive will not meet its burden of proof unless it has demonstrated that the beneficiary will primarily engage in either managerial or executive capacity duties. *See* section 101(a)(44)(A)-(B) of the Act. While in some instances there may be duties that could qualify as both managerial and executive in nature, it is the petitioner's burden to establish that the beneficiary's duties meet each criteria set forth in the statutory definition for either managerial or executive capacity. A petition may not be approved if the evidence of record does not establish that the beneficiary will be primarily employed in either a managerial or executive capacity.

In addition, the record lacks supporting evidence to support the Beneficiary's asserted role and includes discrepancies between the Petitioner's assertions and the provided documentation that leave substantial uncertainty as to whether he would be employed in a qualifying managerial or executive capacity under an approved petition.[5]

For instance, on motion, the Petitioner points to an investment made by the foreign employer in 2018 through which it acquired a business called the [redacted] a retail location selling wine, beer, liquor, lottery tickets, and other such similar items. The Petitioner contends that it employed "10 professionals" and further referred to an "export business," "high-end construction products for export," and the provision of "consultation services for the [foreign employer] and other Chinese investors." The Petitioner provided a support letter from February 2021 (submitted in support of the previous set of motions) including the Beneficiary's proposed duties and an asserted organizational chart along with duties for his claimed subordinates as well as monthly salaries for all its employees. The chart included the following employees and monthly salaries: 1) the Beneficiary as president ($5000 per month), a vice president/chief financial officer ($4167 per month), a corporate secretary ($1000 per month), a finance and administrative department manager ($2000 per month), a finance and administrative department accountant/clerk ($1500 per month), an international trade department manager ($2000 per month), an international trade department specialist ($2700 per month), and a business development manager ($1000 per month).

In sum, the record reflected that the Petitioner employed five managerial or executive level employees and only three operational level employees, including the claimed corporate secretary, a finance and administrative department accountant/clerk, and an international trade department specialist. However, none of the listed employees, most notably those at the operational level, have titles and duties specific to the only regular business the Petitioner has sufficiently substantiated, the [redacted] For instance, the duties of the Beneficiary and his claimed subordinates include no duties related to the operation of such a retail location, such as working a cash register, selling lottery tickets, ordering wine, beer, liquor, and other inventory, restocking shelves, opening and closing the location, and other such similar operational duties inherent to such a business. Beyond this, there is little supporting evidence to substantiate the Petitioner's other claimed business activities, such as its claimed export business, investment consultation services, or real estate investment, notably the businesses mainly discussed in the duties of the Beneficiary and his subordinates and reflected in their job titles.

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[5] To be eligible for immigrant classification as a multinational executive or manager, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A)(i)-(iv) and (B)(i)-(iv) of the Act. If the record does not establish that the offered position meets all four of these elements, we cannot conclude that it is a qualifying managerial or executive position.

If the Petitioner establishes that the offered position meets all elements set forth in the statutory definition, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether a given beneficiary's duties will be primarily managerial or executive, we consider the Petitioner's description of the job duties, the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

In fact, the documentation submitted on motion reflects the Beneficiary and his asserted subordinate managers performing operational duties, including those appearing to relate to the operation of the [redacted] retail location, despite these same tasks not being discussed in their corresponding duty descriptions. For example, the Petitioner provided a 2021 invoice reflecting the company's claimed international trade department manager purchasing nearly $15,000 in bottles of wine. Likewise, an invoice from June 2021 shows the Beneficiary purchasing approximately $29,000 in apparent infant products, and other invoices from 2020 and 2021 reflect the claimed corporate secretary buying beer in wholesale on a few occasions. In sum, this additional supporting documentation leaves substantial question as to the actual daily tasks of the Beneficiary's and his claimed subordinate managers. In contrast, there is little supporting documentation to substantiate the Beneficiary's performance of qualifying managerial or executive-level duties, such as his asserted direction of his claimed managers related to export or real estate activities, oversight of marketing activities, development of financial and budgetary policies, and coordination of "intracompany transactions" and "export technical and post-sale issues." The lack of supporting documentation to substantiate the Beneficiary's performance of qualifying managerial and executive-level duties is noteworthy, since it asserted he acted in this role as far back as 2015.

Further, in support of the latest motion to reopen, the Petitioner submitted its 2020 IRS Form 1120, U.S. Corporation Income Tax Return, reflecting that the Petitioner earned $248,329, paid $36,000 in compensation to officers, and distributed $110,964 in salaries and wages during that year. In contrast, the Petitioner's claimed organizational chart showed $232,404 in asserted annual wages and salaries to its eight claimed employees, while its most recent tax documentation reflected that it paid only $146,964. Further, the 2020 tax return showed the Petitioner paid only $36,000 in compensation to officers, while the Beneficiary and his subordinate vice president are asserted to earn $60,000 and approximately $50,000, respectively. Similarly, an attachment to the 2020 Form 1120 listed limited deductions for the company amounting to only $32,690, costs not including the shipment of goods abroad, costs inherent in an export business, and apparent marketing costs, despite claiming that the Beneficiary his subordinates would devote significant time to these activities. Likewise, it appears unlikely that the Petitioner would require its asserted organizational chart including two executive-level employees and three other managers to support a business earning only approximately $250,000 per year and that appears to only operate one retail wine and liquor store selling lottery tickets. The Petitioner has not sufficiently substantiated its claimed operations and organizational structure, nor the Beneficiary's place therein.

Therefore, in sum, the newly submitted statements and evidence provided on motion present several additional discrepancies and ambiguities leaving substantial doubt as to whether the Beneficiary would be employed in a managerial or executive capacity under an approved petition. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *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.* As a result, the Petitioner has not demonstrated the Beneficiary's eligibility for the benefit sought, and for this additional reason, the motion must be dismissed.

IV. CONCLUSION

The Petitioner has not shown proper cause for reopening or reconsideration of our prior decision.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.