U.S. Citizenship and Immigration Services

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

In Re: 21880902

Date: AUG. 29, 2022

Motion on Administrative Appeals Office Decision

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

The Petitioner, an owner and operator of a retail grocery store, seeks to temporarily employ the Beneficiary as the general manager and chief executive officer (CEO) of its new office under the L-1A nonimmigrant classification for intracompany transferees.[1] Section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the California Service Center denied the petition. The Director determined that the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity within one year of new office formation. The Director also questioned the Petitioner's eligibility to file a "new office" petition on behalf of the Beneficiary, noting that an affiliate of the Petitioner, which operated the same retail establishment at the same location, had previously employed the Beneficiary under another L-1A new office petition.[2] We dismissed the Petitioner's subsequent appeal, concluding that it was not eligible to file a "new office" petition on the Beneficiary's behalf. We then dismissed the Petitioner's subsequent motion to reconsider, concluding that although the Petitioner disagreed with our determination that it was ineligible to file this petition as a "new office," it did not demonstrate that we incorrectly applied the law or USCIS policy in reaching that determination. More specifically, we pointed out that the Petitioner, despite being incorporated as a separate entity from its former U.S. affiliate, was established by the same foreign parent company for the purpose of managing the same "new operation" (a grocery store) at the same location and with the same employees. We also rejected the claim that the Petitioner is a new office because it has a different business model from its former affiliate; we found that the record does not support this claim, which counsel raised for the first time on appeal. As such, we concluded that the Petitioner was not, in fact, a "new office" and did not warrant treatment as such. The matter is now before us on a second motion to reopen and reconsider.

[1] The term "new office" refers to an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year from the date of approval of the petition to support an executive or managerial position.

[2] The record reflects that the Petitioner's affiliate [redacted] filed a new office petition on the Beneficiary's behalf which was approved and valid from November 16, 2016 until October 31, 2017. The affiliate's petition to extend that petition was denied by the Director of the California Service Center and we dismissed its subsequent appeal of that decision on August 9, 2018. The Petitioner in this matter was incorporated one week later on August 15, 2018. Both U.S. entities are wholly owned by the same foreign parent company.

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 the motion to reopen and reconsider.

## I. MOTION REQUIREMENTS

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).

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 at hand is whether the Petitioner has offered new facts or established that we incorrectly applied the law or U.S. Citizenship and Immigration Services (USCIS) policy to the evidence in the record at the time of our prior decision dismissing the motion to reconsider.

As a preliminary matter, we note that motions for the reopening or reconsideration 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)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

### A. Motion to Reopen

First, we will discuss whether the Petitioner offered new facts supported by evidence to warrant reopening our prior decision to dismiss the original motion to reconsider. We note that the new facts in a motion to reopen must possess such significance that "the new evidence offered would likely change the result in the case." *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). In other words, a motion to reopen should only be granted under a limited set of circumstances where the Petitioner demonstrates that the new evidence would result in a different outcome. *See id.*

As noted earlier, in our prior decision we determined that the Petitioner did not offer evidence to support counsel's claim that it was established for the purpose of operating as a franchisor of Asian food stores. Furthermore, we determined that counsel's claim was inconsistent with the evidence on

record. We noted that the record indicates that the Petitioner was established for the purpose of continuing to operate a [redacted] California grocery store known as '[redacted]' which was previously operated by the Petitioner's affiliate, [redacted], after that entity's attempt to extend the Beneficiary's L-1A status was unsuccessful.

In the matter at hand, the Petitioner does not offer new facts. Rather, it offers evidence in the form of a statement from [redacted], a self-described "seasoned business man [*sic*] and a leader of a prestigious non-profit for successful overseas Chinese business people." [redacted] stated that the Petitioner approached him in August 2018 "regarding its plan to franchise its business." [redacted] claimed that there were "many meetings" during which he and the Petitioner discussed "multiple strategies and specific locations for the franchise."

However, the record contains no evidence to support [redacted] claims, such as dates or locations of the "many meetings" he purportedly had, who attended those meetings, or specific information outlining the "multiple strategies" for carrying out the purported franchise plan; nor has evidence been submitted to show that either the Petitioner or [redacted] took actual steps towards the claimed objective of starting a franchise of the grocery store operation, as the Petitioner continues to operate at the same location as its prior U.S. affiliate and would not operate at a different location in addition to the affiliate. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). [redacted] statement, without actual evidence of the claims made therein, is not sufficient to support the Petitioner's claim regarding its intent to open a new office for the purpose of executing its new business goal of franchising its existing grocery store operation.

For the reasons discussed, the Petitioner has not shown proper cause for reopening our prior decision.

B. Motion to Reconsider

Next, we turn to the Petitioner's motion to reconsider. In our prior decision, we addressed the Petitioner's argument that it was "legally incorrect" for USCIS to preclude a "new office" designation to a newly formed corporation whose "business model and purpose" would be different from that of its previously formed U.S. affiliate. Namely, we questioned the validity of the purportedly new business model and purpose, given that the Petitioner did not disclose any intent to operate under a new "business model and purpose" at the time of filing, but rather that counsel made this claim and did so for the first time on appeal. We also pointed to the lack of evidence in support of counsel's claim, noting that neither the Petitioner's business plan nor the previously submitted letters from the Petitioner and its foreign parent company mentioned any plans to franchise. Meanwhile, we noted that the record contains "ample evidence" that the Petitioner was established for the purpose of continuing to operate the same grocery store as was operated by its U.S. affiliate, whose attempt to extend the Beneficiary's L-1A status was unsuccessful. We determined that the foreign parent company's statement that the Petitioner "would take over the whole business from [the former subsidiary]" was indicative of the Petitioner's intent to continue operating the same retail store.

Also, while we again acknowledged that the Petitioner and its former affiliate are separate legal entities with separate tax identification numbers, we looked beyond these factors and focused on the fact that the Petitioner and its U.S. affiliate were established by the same foreign parent company for the

purpose of managing the same "new operation" (a grocery store) at the same location and with the same employees. We pointed out that the Petitioner did not claim that we erred in determining that the applicable L-1 regulations do not afford the foreign company another opportunity to seek a new office petition on behalf of the same Beneficiary with respect to the same "new operation," regardless of the petitioning entity. Rather, we noted that the Petitioner instead put forth a new claim, arguing that its business model is different from that of its former affiliate, a claim that we noted was made by counsel on appeal and was not supported by the record. In sum, while we recognized that the Petitioner disagreed with our determination that it was ineligible to file this petition as a "new office," we concluded that the Petitioner did not demonstrate that we incorrectly applied the law or USCIS policy in reaching that determination.

On current motion, the Petitioner again argues that it merits consideration as a new office because it is a new legal entity and asserts that there is no legal basis for concluding otherwise. However, the Petitioner offers no evidence to support this argument, nor does it offer sufficient evidence to refute our finding that despite incorporating as a new legal entity with a new name, the Petitioner continues to operate the same grocery store at the same location and with the same employees, thereby undermining its designation as a "new office." The Petitioner also asserts that the AAO has "tried to define the 'new office'" as one that has no employees. We disagree and point to the lack of evidence supporting the contention that the Petitioner would, in fact, operate as a new office, as it claims. We find it note-worthy that despite seeking to file this petition as a new office, the record does not show that Petitioner plans to start a new operation or follow a new hiring plan that is consistent with that operation; instead, the record indicates that the Petitioner will continue its affiliate predecessor's operation with the assistance of staff that were already in place to accommodate that existing operation. Given these specific circumstances, we were correct in our conclusion that the parent company had exhausted its opportunity to launch the same operation under the "new office" regulations.

Further, the Petitioner claims in support of the current motion that its designation as a "new office" was the result of a "clerical error of [*sic*] previous attorney." Not only does this claim undermine the prior arguments the Petitioner put forth in an attempt to establish that, in fact, it is a new office, but it is also inconsistent with previously submitted evidence, including the Petitioner's proposed organizational chart and corresponding five-year recruitment plan, which specifically name only the Beneficiary, while designating all other positions as "to be hired."[3] As these documents support the Petitioner's original claim that it was a new office at the time of filing, checking the "new office" box on the petition does not appear to have been the result of a "clerical error," as the Petitioner now claims.

In essence, the Petitioner has put forth two competing and inconsistent claims: On the one hand, the Petitioner claims that it is a new office and relies on regulations that pertain to a "new office," offering evidence to support that claim; on the other hand, the Petitioner claims that checking the "new office" box in the petition was unintentional and that in fact it was a "clerical error." A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Furthermore, the Petitioner must resolve these inconsistencies in the record with independent, objective evidence

[3] Evidence in the record shows that the Petitioner would take over the staff of its U.S. affiliate and continue to operate in much the same way as that affiliate.

pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Material inconsistencies such as those listed, may, if unresolved, lead to reevaluation of the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Lastly, the Petitioner urges that we focus on the "key point" of whether the Petitioner would sufficiently develop within one year to support the Beneficiary in a managerial or executive capacity. However, this "key point" is only relevant in a new office determination and given the multiple inconsistencies surrounding the Petitioner's claim that it is a new office and its inability to resolve those inconsistencies, the Petitioner has not overcome our basis for dismissing the appeal. As such, we need not address the remaining issue concerning the Beneficiary's employment in a managerial or executive capacity.[4]

In light of the above, we conclude that the Petitioner has not established that our prior decision dismissing the motion to reconsider was incorrect based on the evidence in the record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). As previously stated, the Petitioner also has not shown proper cause for reopening our prior decision.

**ORDER:** The motion to open and reconsider is dismissed.

[4] Because the identified basis for denial is dispositive of the Petitioner's appeal, we declined to reach and therefore reserved the Petitioner's arguments regarding the Beneficiary's proposed employment. *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).