U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-A- LLC

DATE: DEC. 29, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of computer systems design services, seeks to permanently employ the Beneficiary as its chief executive officer 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, Nebraska Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary has been employed abroad in a managerial capacity. The Petitioner appealed the Director's decision, and we dismissed the appeal, with additional findings that the Petitioner had not: (1) shown that it had been doing business for at least one year prior to filing the petition; (2) established its ability to pay the Beneficiary's proffered salary; or (3) documented its job offer to the Beneficiary.

The matter is now before us on a motion to reopen and a motion to reconsider. On motion, the Petitioner submits several exhibits, most of them previously submitted, with others intended to address omissions in the record. The Petitioner asserts that we erred by not accepting the Beneficiary's detailed job description and by overlooking evidence of qualifying business activity from 2013.

We will deny the motion to reopen and the motion to reconsider.

I. MOTION REQUIREMENTS

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen the proceeding to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening, a petitioner must not only meet the formal filing requirements (such as, for instance, 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).

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 state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

For the reasons to be discussed below, we find that the new evidence submitted on motion does not overcome the dismissal or establish that the petition should be approved. Therefore, the Petitioner has not shown proper cause to reopen the proceeding.

Furthermore, we find that the Petitioner has not established that our decision was based on an incorrect application law or USCIS policy, or that our decision was incorrect based on the evidence of record at the time of that decision. Therefore, the Petitioner has not shown proper cause for reconsideration.

II. LEGAL FRAMEWORK

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> . . . .
>
> (C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

III. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director initially denied the petition based on a finding that the Petitioner did not establish that the Beneficiary has been employed abroad in a managerial or executive capacity.

If the Beneficiary is already in the United States working for the foreign employer or its subsidiary or affiliate, then the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) requires the Petitioner to submit a statement from an authorized official of the petitioning United States employer which demonstrates that, in the three years preceding entry as a nonimmigrant, the Beneficiary was employed by the entity abroad for at least one year in a managerial or executive capacity. The definitions of executive capacity and managerial capacity appear at sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B), and at 8 C.F.R. § 204.5(j)(2).

The Petitioner filed Form I-140 on January 20, 2015. The Petitioner identified the Beneficiary's foreign employer as [redacted] Additional details about evidence and procedural issues appear in our dismissal notice, issued August 5, 2016. For context, we will restate certain relevant facts below.

Initially, the Petitioner submitted a copy of an undated letter from [redacted] president of the foreign company, who stated that the Beneficiary had been working as the foreign company's "[a]ssistant general manager since 2005, over seeing [*sic*] the whole company. He manages the administrative services, human resources, operations, policies and procedures, accounting, etc. through the managers under his supervision." An organizational chart and an employee list both showed the Beneficiary's title as "general manager assistant."

In response to a request for evidence (RFE), the Petitioner submitted an eight-page document, containing bulleted lists of claimed job duties corresponding to several managerial titles at the foreign company. The list showed no "assistant general manager" (the Beneficiary's stated title), but it did show the following duties for the "general manager assistant":

- Updates job knowledge by participating in educational opportunities;
- Reading professional publications; maintaining personal networks; participating in professional organizations.
- Accomplishes organization goals by accepting ownership for accomplishing new and different requests;
- Exploring opportunities to add value to job accomplishments.

In our dismissal notice, we agreed with the Director that the above job description does not describe any specific tasks or establish that the Beneficiary had any authority over other employees or any function of the company.

The Petitioner's appeal included a newly submitted letter from [redacted] dividing the Beneficiary's former duties into five categories:

- Establishes and formulates departmental policies, procedures, long-term goals and objectives
- Directs and coordinates the formulation of financial programs to provide funding for new or continuing operations and projects, to maximize returns on investments, and to increase productivity

- Leads the management team in exploring and seeking new business opportunities and establishing business relationship with new vend[o]rs, suppliers and customers
- Evaluates performance and contribution of the managerial personnel for compliance with established policies and objectives of the company
- Reports to the president and the board of directors on a regular basis

In our dismissal notice, we stated: "The job description encompasses elements of a managerial role, such as hiring authority and oversight over lower-level managers. The description, however, is entirely inconsistent with the four-part description submitted in response to the RFE (and again on appeal)." We also noted that the same document that included the four-part description submitted in response to the RFE also included other job descriptions that were clearly inaccurate. The listed duties of the deputy general manager were definitions of the various uses of the word "deputy" (such as "[a] parliamentary representative in certain countries"), and the e-port program manager's job description appears to be promotional copy for human resources software (for example, "[c]reate job descriptions within a formal, automated, HR / [m]anaged process where those most familiar with the job define the content").

On motion, the Petitioner requests that we disregard the job description from the RFE in favor of the longer description submitted on appeal. This request does not address a key conclusion in our dismissal notice, quoted here:

> The foreign job descriptions submitted in response to the RFE are demonstrably unreliable. On appeal, the Petitioner submits another description for the Beneficiary (but not for his subordinates), but the Petitioner does not demonstrate that the newly submitted description is any more accurate than the version submitted earlier and does not explain why it prepared and submitted two completely different job descriptions for the same position. We will not accept the second version as representative of the Beneficiary's actual duties simply because it looks more like a traditional job description.

There is no question that the two job descriptions are different, but this does not logically compel us to conclude that the more detailed description is correct or accurate.

Where a discrepancy exists in the record, it is the petitioner's responsibility to resolve it with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner acknowledges that there are differences between the two descriptions, but maintains that "had the generic description not been submitted, there would not have been any discrepancies." The Petitioner cannot sidestep the matter in this way, because the Petitioner *did* submit two different job descriptions for the Beneficiary, and we will not disregard one of them at the Petitioner's behest. The Petitioner's submission of two widely divergent job descriptions for the same position raises broader issues of credibility that the Petitioner has not resolved. *See id.* at 591.

The Petitioner states that we found the job descriptions for the deputy manager and e-port program manager to be "generic," which the Petitioner defends by stating that there is no requirement to submit detailed job descriptions for the Beneficiary's subordinates. We did not, however, find the

descriptions to be "generic." We found the record does not include credible job descriptions for the Beneficiary's claimed subordinates abroad, for reasons discussed in our prior decision and briefly summarized above. The Petitioner maintains that, because the foreign parent company "has exclusive contracts with the government . . . the Deputy General Manager's stated duties can be of a parliamentary representative in certain countries." This entirely unsubstantiated claim does not explain why the Petitioner also claimed that the deputy general manager is "[a] member of the lower chamber of a legislative assembly" who is "authorized to exercise the powers of a sheriff in emergencies." As we observed in our prior decision, those phrases are compatible with dictionary definitions of the word "deputy," but they cannot be reconciled with any realistic job description for a deputy general manager of a company.

The Petitioner has not established that we based our prior decision on an incorrect application of law or USCIS policy, or that the decision was incorrect based on the evidence of record at the time of that decision. Therefore, the Petitioner has not shown grounds for reconsideration with respect to the Beneficiary's former employment abroad.

IV. DOING BUSINESS

The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as 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. In our dismissal notice, we found that the Petitioner had not established that it has been doing business for at least one year prior to the date of filing the petition, as required by 8 C.F.R. § 204.5(j)(3)(i)(D).

The Petitioner organized as a limited liability company on December 2, 2012, more than two years before filing Form I-140 on January 20, 2015, but this action only established the company's legal existence, not that it was actively doing business. In our dismissal notice, we noted that the Petitioner had submitted copies of invoices, but we found that they all dated from October 2014 or later. We found no evidence of qualifying business activity as of January 20, 2014.

On motion, the Petitioner seeks reopening of the proceeding for consideration of new evidence. The Petitioner submits copies of invoices showing that the Petitioner purchased several hundred radio navigation systems between August and October 2013. The Petitioner claims to have submitted these documents before, but we find no such documents in the prior record, and they did not appear on the Petitioner's earlier numbered lists of submitted exhibits.

Whether or not the Petitioner submitted the invoices before, they do not address or overcome the stated basis for dismissal. The 2013 invoices identify the Petitioner as a buyer, not a seller. The act of purchasing another company's products, even for inventory, provides neither goods nor services. In such a case, it is the seller rather than the buyer who is doing business as defined at 8 C.F.R. § 204.5(j)(2).

The Petitioner, on motion, has not shown that it began doing business (i.e., the regular, systematic, and continuous provision of goods and/or services) at least a year before the petition's filing date. The newly submitted receipts are not cause for reopening the petition.

V. ABILITY TO PAY

The Petitioner stated its intention to pay the Beneficiary $60,000 per year. We found that the Petitioner did not establish its ability to pay the Beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires the Petitioner to establish its ability to pay the proffered wage at the time the priority date is established (i.e., the petition's filing date) and continuing until the beneficiary obtains lawful permanent residence. To establish this ability, the regulation requires copies of annual reports, federal tax returns, or audited financial statements. The regulation permits consideration of supplemental evidence, such as bank account records, in appropriate cases.

The Petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, showed that the Petitioner paid the Beneficiary only $15,000 in 2013. A copy of the Beneficiary's pay receipt issued on December 16, 2014, showed a year-to-date total of $42,000. These documents indicate that the Petitioner paid the Beneficiary less than one year's pay over the course of two years.

On motion, the Petitioner alleges no error, but seeks to reopen the proceeding for consideration of new evidence. The Petitioner submits a copy of IRS Form W-2, Wage and Tax Statement, showing that the Petitioner paid the Beneficiary $49,500 in 2015. This amount is $10,500 less than his proffered salary of $60,000 per year.

Counsel for the Petitioner states that the Petitioner paid the Beneficiary less than $60,000 "in part because . . . the parent company paid his salary and bonus" while the Beneficiary was visiting China on business. Counsel concludes: "Regardless, the Petitioner does have the ability to pay the Beneficiary his wages."

The Petitioner submits no evidence to show that the Beneficiary was in China during the periods claimed, or that the parent company paid the Beneficiary at the time. Also, the Petitioner submits no evidence on motion to show that it would have been able to make up the $10,500 shortfall in the Beneficiary's 2015 compensation.

A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See, e.g., INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

We note that the regulation at 8 C.F.R. § 204.5(g)(2) provides that, if a company employs 100 or more U.S. workers, then a financial officer of the company can attest to the company's ability to pay the Beneficiary's proffered wage. Counsel's statement on appeal does not meet these requirements, because counsel is not a financial officer of the petitioning company and because the Petitioner has not shown that it employs at least 100 people. The Petitioner's 2014 organizational chart shows nine positions, some of them marked as vacant.

Furthermore, apart from the deficiencies described above, we raised a significant issue in our dismissal notice:

> A Modified Business Tax Return filed with the State of Nevada reported that the Petitioner paid $61,205 in gross wages during the second quarter (April through June) of 2014. The Petitioner's profit and loss statement for the entire year of 2014, however, showed only $29,725 in wages and salaries, considerably less than the $42,000 year-to-date figure shown on the Beneficiary's pay receipt dated December 16, 2014. The profit and loss statement indicated that the company's total expenses for the year were $52,274.15, which is less than the gross wages reported for three months of the same year. These figures are incompatible, and cannot both be correct.

We cited *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), which indicates that the Petitioner must submit verifiable evidence to resolve discrepancies in the record, and that such discrepancies may raise broader issues of credibility. *See id.* at 591-92. The Petitioner has not addressed this issue on motion, and therefore the discrepancies remain unresolved.

The Petitioner has not submitted copies of tax returns, audited financial statements, or annual reports that establish its ability to pay the Beneficiary's full salary of $60,000 per year. The Petitioner has not addressed or even acknowledged the credibility issues outlined above. Therefore, we find that the Petitioner has not shown proper cause for reopening the petition with respect to its ability to pay the Beneficiary's proffered salary.

VI. JOB OFFER

The final issue for which the Petitioner seeks to reopen the petition concerns the requirement of a job offer from the petitioning employer. Under 8 C.F.R. § 204.5(j)(5), each petitioner must submit a statement which indicates that the beneficiary is to be employed in the United States in a managerial or executive capacity, and which clearly describes the beneficiary's intended duties.

In our dismissal notice, we found that the Petitioner had not met the job offer requirement:

> The record contains a copy of an older letter from [redacted] on the foreign entity's letterhead, but the foreign company is not the prospective employer in the United States as the regulation requires. The Petitioner has submitted evidence of the company's existence, but it does not show the U.S. company's staffing and structure at the time of filing. [redacted] letter refers to an organizational chart at "Exhibit 21," but the

> Petitioner did not submit the chart with the immigrant petition. The chart appears, instead, to have been an exhibit submitted with a previous nonimmigrant petition. For these reasons, we find that the evidence of record does not satisfy the job offer requirement set forth in the regulations.

On motion, the Petitioner submits copies of an organizational chart and subordinates' job descriptions that the Petitioner had submitted previously. These documents do not show the Petitioner's "staffing and structure at the time of filing" in January 2015, because they refer to vacant positions that the Petitioner intended to fill at some point between March 2014 and November 2014. The Petitioner did not specify how many, if any, of the vacancies the Petitioner had filled at the time of filing. As noted above, the Petitioner's profit and loss statement indicates payment of only $29,725 in wages and salaries in 2014. If that figure is accurate, then the Petitioner cannot have maintained the staff it claims to have employed since March 2014 at the latest. If the figure is not accurate, then the profit and loss statement has negligible weight as evidence.

The Petitioner submits an "Appointment Letter" which refers to an "offer dated 2012/03," appointing the Beneficiary as the chief executive officer for the petitioning U.S. company. The document is a "form" letter, with names, dates, and titles inserted into blank spaces, and as such it contains no description of the Beneficiary's intended duties in the United States. Like earlier correspondence, signed this document on behalf of the foreign entity.

The agreement states: "All disputes arising out of this letter will be subject to the jurisdiction of the Court." Neither the Petitioner nor the foreign company (in China) are in India, and there is no explanation as to why courts in India, would have jurisdiction over disputes arising from the Beneficiary's employment in Nevada. Thus, this newly submitted document raises new questions without answering existing ones.

The Petitioner has not submitted a job offer with job description *from the U.S. employer*, and the record contains ambiguous and conflicting evidence concerning the Beneficiary's subordinate staff at the time of filing the petition. The staffing information is important because it would show who was able to relieve the Beneficiary from having to primarily perform non-qualifying operational and/or administrative tasks. The material submitted on appeal does not show that we erred in our prior decision, and it does not address or remedy any of the points raised in our dismissal notice. Therefore, it does not show proper cause for reopening or reconsidering the proceeding.

VII. CONCLUSION

The motion to reopen and the motion to reconsider will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen and the motion to reconsider are denied.

Cite as *Matter of Y-A- LLC*, ID# 145487 (AAO Dec. 29, 2016)