U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-H- INC.

DATE: SEPT. 17, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a furniture retailer, seeks to permanently employ the Beneficiary as its president under the first preference immigrant classification for multinational executives or managers. 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 of the Texas Service Center originally denied the petition on four separate grounds and then affirmed the denial on three grounds after reopening the case on the Petitioner's motion. We dismissed the Petitioner's subsequent appeal, finding that the Petitioner did not establish that (1) it has a qualifying relationship with the Beneficiary last foreign employer,[1] or (2) it will employ the Beneficiary in a managerial or executive capacity. The Petitioner subsequently filed four combined motions to reopen and reconsider, which we denied.[2]

The matter is now before us on a fifth combined motion to reopen and reconsider. The Petitioner submits a brief and additional evidence in support of its claim that it meets all eligibility requirements for the benefit sought.

Upon review, we will deny the motion to reopen and the motion to reconsider.

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must 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), and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1).

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[1] We further found that, had the Petitioner adequately substantiated its claim that the Beneficiary solely owns and controls both the Petitioner and the foreign entity, then it would also have to address the issue of whether the Beneficiary had an employer-employee relationship with both entities.

[2] Two of these four combined motions were filed almost contemporaneously (three days apart) in response to our dismissal of the Petitioner's appeal. We denied one as untimely and addressed the merits of the other in separate decisions.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that we based our decision 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. A petitioner must support its motion to reconsider with a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

After considering the Petitioner's brief and additional evidence, we find the Petitioner has not shown proper cause for reopening or reconsideration. The Petitioner has not demonstrated with this motion that we denied its last motion to reopen and reconsider in error, nor has it submitted new facts that demonstrate eligibility for the requested immigrant classification.

A. Motion to Reopen

Although the Petitioner submits a brief and evidence in support of the motion, it has not specifically explained the significance of all of the accompanying evidence (such as documentation of dividend payments made jointly to the Beneficiary and his father in Pakistan in 2009). Further, nearly all of the arguments made and the evidence submitted are not "new," as they appear elsewhere in the record of proceeding. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

We have reviewed the motion in its entirety and will address all relevant claims and evidence below.

1. Qualifying Relationship

To establish a "qualifying relationship" under the Act and the regulations, the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See* § 203(b)(1)(C) of the Act; *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

In determining that the Petitioner did not establish a qualifying relationship with the Beneficiary's foreign employer, [redacted] we acknowledged the Petitioner's claim that the Beneficiary owns [redacted], its claim that [redacted] owns the petitioning U.S. company, and the Petitioner's submission of a stock certificate showing that [redacted] owns its issued shares. However, we found that the Petitioner did not submit requested evidence to establish the foreign entity's purchase of the Petitioner's shares.

As in the prior motions, the Petitioner has not addressed this deficiency. The Petitioner re-submits a copy of its stock certificate, articles of incorporation, and initial registrations to do business in Texas,

and does not address our reasons for denial by submitted new facts or new evidence documenting the foreign entity's purchase of the petitioning entity. The Petitioner also re-submits various business documents for [redacted] dating from 2007 to 2010 and reiterates its claim that the Beneficiary's access to this documentation "is intended to solidify the relationship between [the Petitioner] and [redacted]

The Petitioner has not submitted new facts or evidence to overcome our previous adverse findings regarding this issue.

2. U.S. Employment in Managerial or Executive Capacity

Am immigrant petition for a multinational executive or manager must be accompanied by evidence showing that the Beneficiary will be employed in the United States in a managerial or executive capacity as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44).

We found that the Petitioner provided a vague position description that did not demonstrate what the Beneficiary would actually do on a day-to-day basis, and was thus insufficient to support a finding that his duties would be primarily managerial or executive. We also considered the Petitioner's staffing levels, organizational structure, and the duties performed by subordinate staff, noting that the Petitioner did not provide clear descriptions of duties performed by lower-level staff or clearly delineate the reporting structure within the company. We further noted that the Petitioner claimed that five of its nine employees had managerial job titles, and, given the nature of the Petitioner's business as a furniture retailer with multiple locations, questioned whether the managers and supervisors were actually performing their stated supervisory functions, rather than performing the day-to-day duties associated with operating the individual stores.

While the Petitioner addresses this issue in its brief, many of its arguments are essentially the same as those it made in earlier briefs, are not "new facts," and were already addressed in our prior decisions. Similarly, all supporting evidence related to this issue was previously submitted.

In our prior decisions, we questioned whether the Petitioner's staff would be sufficient to perform the operational duties associated with the Petitioner's business, and to relieve the Beneficiary from significant involvement in retail store operations and other non-managerial duties as part of his daily routine. At the time of filing, the Petitioner claimed that it operated three retail furniture stores, each open seven days per week for 60 hours, including one store with a large warehouse also used for wholesale activities. Each store employed one store manager and one sales person. The Petitioner also employed one truck driver and one loader, both part-time employees at the time of filing, who made deliveries for all three stores. Beyond these employees, the Petitioner had a vice president, who is claimed to perform duties similar to the Beneficiary's, and a contracted accountant. We emphasized that it was unclear how two store personnel would be able to handle all day-to-day functions of each large retail furniture store, given the stated operating hours and the Petitioner's claim that the sales persons also perform unloading, packing, cleaning, and inventory duties.
The Petitioner attempts to address our findings by emphasizing that the company operated with even fewer staff in 2007 and 2008, prior to increasing its staffing levels in 2009. This explanation does

not address our concerns regarding the staff in place at the time of filing in 2010. Again, the Petitioner indicated that each of its locations was open for 60 hours per week, and it has not shown how it maintained this operating status with only two staff available to fill these hours, and given the size of the retail stores in question. The Petitioner's unsupported explanation that two staff per store was "sufficient" does not adequately address our findings and it submits no new evidence with respect to this issue.

The Petitioner also states that we did not take into account higher level duties performed by its store managers for their respective store locations, and incorrectly determined that the Beneficiary does not supervise subordinate managers. However, the Petitioner does not address our finding that, based on the store hours, the minimal staffing at each store, and the need for sales staff to perform several ancillary duties unrelated to sales, the store managers would more likely than not be required to primarily perform non-managerial duties associated with each store's day-to-day operations. Further, the Petitioner did not show that each store had sufficient staff to relieve the Beneficiary and vice president from involvement in the stores' operations.

The Petitioner also emphasizes that the salaries paid to the Beneficiary and the vice president (who each earned $36,000 annually at the time of filing) are significantly higher than those paid to the store and warehouse employees. As noted in our previous decisions, we do not doubt that the Beneficiary's position is senior within the petitioning company. However the Petitioner must still establish that his actual day-to-day duties at the time of filing were primarily managerial or executive in nature, and his relatively high salary does not serve as evidence of the nature of his job duties.

For the reasons discussed, the Petitioner has not provided new facts or evidence on motion to show proper cause for reopening and has not established that the Beneficiary would be employed in a managerial or executive capacity.

3. Employer-Employee Relationship

In dismissing the appeal, we emphasized that section 203(b)(1)(C) of the Act states that only beneficiaries who were "employed" abroad and are coming to the United States to "continue to render services to the same employer or to an affiliate or subsidiary thereof" will merit classification as a multinational manager or executive. We further noted that the terms "executive capacity" and "managerial capacity" as defined at section 101(a)(44) of the Act, specifically apply to "the employee" of a "United States employer."

Although we found insufficient evidence to support the Petitioner's claims regarding its qualifying relationship with the foreign entity, we noted that if what the Petitioner claimed is true, then the Beneficiary's ultimate ownership and "exclusive and total control" over the Petitioner would disqualify him from the classification sought.

On motion, the Petitioner once again makes general claims regarding a "distribution of power among the senior managers/executives of both entities," but does not directly address our specific findings that, based on its previous claims, no one is in a position to control the Beneficiary's work, subject

him to firing, or share in the profits, losses or liabilities of either entity. The Petitioner states that its prior motion included a food license renewal granted to [redacted] as "licensee" for [redacted] It asserts that this document was submitted as evidence that [redacted] had been promoted to a management role, and that the Beneficiary "does not hold supreme authority alone." However, the fact that someone else manages the daily operations of the Beneficiary's claimed foreign sole proprietorship in his absence does not mean that he has given up his claimed sole ownership and control over that entity or that his relationship with that entity was ever as an "employee."

In sum, the newly submitted evidence and explanations do not overcome the grounds for dismissal and establish eligibility for the benefit sought. Therefore, the Petitioner has not shown proper cause to reopen the proceeding.

B. Motion to Reconsider

A motion to reconsider must establish that our 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).

As in its previous motion, the Petitioner submits a brief but it does not cite to any relevant statute, regulation, or policy document as required, nor did it otherwise allege an incorrect application of law or policy in our prior decision. The Petitioner has not established that our prior decision was incorrect at the time of that decision.

Therefore, the Petitioner has not shown proper cause for reconsideration.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause to reopen the proceeding or proper cause for reconsideration.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A-H- Inc.*, ID# 1649452 (AAO Sept. 17, 2018)