U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-N-, INC.

DATE: SEPT. 26, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a company operating gas stations and convenience stores, seeks to permanently employ the Beneficiary as chief executive officer 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 denied the petition, concluding that the record did not establish, as required, that the Beneficiary was employed abroad in a managerial or executive capacity. The Director further determined that the Petitioner did not demonstrate that the Beneficiary would be employed in the United States in a managerial or executive capacity. The Petitioner later filed a motion to reconsider the Director's decision, which was denied. The matter is now before us on appeal.

On appeal, the Petitioner states that the Director did not sufficiently articulate the finding regarding the Beneficiary's former managerial capacity abroad. In addition, the Petitioner asserts that in his capacity in the United States the Beneficiary acts as a personnel manager overseeing two subordinate managers.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years

preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

II. MOTION REQUIREMENTS

The issue in this matter is whether the Director properly denied the Petitioner's motion to reconsider. To merit 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).

A motion to reconsider must (1) state the reasons for reconsideration; (2) be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy; and (3) 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).

III. ANALYSIS

A motion to reconsider must establish that the denial 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).

A. Managerial Capacity Abroad

The first issue we will analyze is whether the Director's conclusion that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial capacity represented an incorrect application or law or policy.

In the initial denial decision, the Director concluded that the Petitioner did not establish that the Beneficiary was employed in a managerial or executive capacity abroad because his submitted duties were overly vague and did not demonstrate that he had primarily acted in a managerial or executive capacity abroad. On motion, the Petitioner asserted that the Beneficiary acted in a managerial capacity abroad from December 1999 through February 2001 and indicated that he oversaw supervisory and professional subordinates abroad during this time. It also resubmitted evidence meant to demonstrate that his foreign subordinates abroad held bachelor's degrees.

In denying the Petitioner's motion, the Director again concluded that the Beneficiary's duties were overly vague and noted that it did not submit additional evidence specific to his duties to overcome the previous decision. On appeal, the Petitioner states that the Director did not clearly articulate what was deficient about the Beneficiary's stated foreign duties and again points to documentation it asserts demonstrates that his subordinates abroad held bachelor's degrees.

We concur with the Director's reasoning in denying the motion to reconsider. As correctly noted by the Director, the Petitioner did not sufficiently articulate the Beneficiary's duties abroad.

Based on the statutory definition of managerial capacity, the Petitioner must first show that the Beneficiary will performed certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). The Petitioner must also prove that the Beneficiary was *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the foreign employer's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner stated that the foreign employer was engaged in the sale of footwear and leather products. The Petitioner indicated that the Beneficiary acted as managing director of the foreign employer "for more than nine years before transferring to the United States" in 2001. It also indicated that the Beneficiary's tenure as managing director began in December 1999.

The Petitioner provided a foreign duty description for the Beneficiary stating that the Beneficiary was devoted to some of the following tasks abroad:

- "developing strategic plans," "studying marketing and financial opportunities," and "recommending objectives," including initiating "marketing studies," "identifying new marketing channels," and "new suppliers;"
- "accomplishing objectives by establishing plans, budgets, and results measurements," also consisting of establishing "operating plans and budgets" and instituting "corrective measures;"
- establishing "procurement, production, marketing and services policies and practices" and representing the company at trade shows and industry events;
- improving "sales strategies" and "customer communications," collaborating with "wholesalers, retailers, government, vendors, and employees," and communicating "values, strategies, and objectives" to subordinate managers;
- developing "product pricing standards," enforcing organizational standards, and "determining market needs...and responding with a plan that provides products and services accordingly;" and
- "managing sales incentive programs," "overseeing the legal and financial due diligence process," and "representing the company in all contract negotiations."

First, in apparent contradiction, the Petitioner states that the Beneficiary's tenure with the foreign employer began in December 1999 and that he worked there until his entry into the United States in 2001, but also states that he worked as managing director "for more than nine years before transferring to the United States." This material discrepancy leaves question as to the Beneficiary's claimed position abroad. The Petitioner must resolve this discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, we concur with the Director's conclusion that the Petitioner did not submit a sufficiently detailed foreign duty description describing the Beneficiary's day-to-day managerial-level tasks. The Beneficiary's foreign duty description includes several generic duties that could apply to any manager acting in any business or industry and they do not provide insight into the actual nature of his role. In fact, the Beneficiary's asserted foreign duties do not specifically mention the foreign employer's asserted business, the sale of footwear and leather products. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The Petitioner provided insufficient examples and little supporting documentation to demonstrate the Beneficiary's performance of qualifying duties, such as strategic plans he developed, objectives he recommended, marketing studies he initiated, new suppliers he identified, operating plans and budgets or established, or corrective actions he instituted. Likewise, the Petitioner did not articulate or document procurement, production, marketing or services policies and practices the Beneficiary established or updated, trade shows or industry events he attended, sales strategies he set, or wholesalers, retailers, or vendors he collaborated with. In addition, it did not detail or document values, strategies, or objectives the Beneficiary communicated to his subordinates, product pricing standards he developed, organizational standards he enforced, sales incentive programs he managed, or contract negotiations he handled.

Therefore, we concur with the Director's conclusion that the Beneficiary's foreign duties are overly generic. In addition, the Petitioner provides insufficient reasons on motion or appeal to demonstrate that the Director's conclusion was inconsistent with law or policy.

Furthermore, the Petitioner did not sufficiently document the Beneficiary's asserted foreign employment during the qualifying three year period prior to his entry into the United States in 2001. As noted, the Petitioner must demonstrate that the Beneficiary was employed abroad in a managerial or executive capacity for at least one year in the three years preceding his coming to work in the United States. *See* 8 C.F.R. § 204.5(j)(3).

The Petitioner asserts that the Beneficiary oversaw subordinate managers and professionals indicating that he acted as a personnel manager abroad. 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." 8 C.F.R. § 204.5(j)(4)(i). 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. § 214.2(l)(1)(ii)(B)(*3*).

The Petitioner submitted an undated foreign organizational chart indicating that the Beneficiary oversaw a purchase manager, a chief accountant, a store manager, and a marketing director. Further, the chart indicated that the purchase manager supervised a quality controller overseeing a store office employee, a dispatch officer, and a designer, while the chief accountant was shown to supervise a junior accountant. Further, the chart reflected that the store manager supervised a cashier and a helper, while the marketing director oversaw a sales manager supervising an assistant sales manager and sales representatives. The Petitioner also submitted 2015 foreign payroll documentation specific to these employees. In addition, on motion and appeal, the Petitioner provided foreign bachelor's degrees for the Beneficiary's immediate managerial subordinates and asserted that they qualified as professionals.

The Petitioner did not submit evidence relevant to his qualifying foreign employment prior to 2001. The Beneficiary's qualifying foreign employment is asserted to have taken place from December 1999 to February 2001; however, the evidence provided by the Petitioner appears to be relevant to the foreign employer's organizational structure in 2015. Further, United States Citizenship and Immigration Services (USCIS) records reflect that the Petitioner filed several other I-140 petitions, including one in 2005 that set forth a foreign organizational chart. However, the foreign organizational chart provided along with the 2005 petition reflected that the Beneficiary worked as a joint partner overseeing a store manager who supervised a cashier, sales representatives, and a helper. This prior organizational chart, closer in time to the Beneficiary's entry into the United States in 2001, did not include the several managerial subordinates listed in the chart provided in support of the current petition. As such, it appears that the Petitioner has submitted a current foreign employer organizational chart that is not relevant to establishing the Beneficiary's foreign employment in a managerial capacity prior to his entry into the United States in 2001.

For the reasons set forth above, we concur with the Director's conclusion that the Petitioner did not demonstrate that the Beneficiary acted abroad in a managerial capacity. The Petitioner has not submitted a sufficiently detailed duty description for the Beneficiary nor has it provided evidence of the foreign employer's organizational structure during the time of his asserted qualifying foreign employment.

As the Petitioner was required to overcome all grounds for denial for the motion to reconsider to be granted and the Director thoroughly and adequately addressed the Beneficiary's proposed employment in a managerial capacity in the United States in his initial denial decision, we decline to address this issue on appeal. Therefore, the Petitioner did not meet the requirements of a motion to reconsider.

IV. CONCLUSION

The appeal must be dismissed because the Petitioner did not establish that the Director's denial of the motion to reconsider was improper.

ORDER: The appeal is dismissed.

Cite as *Matter of K-N-, Inc.*, ID# 1592670 (AAO Sept. 26, 2018)