U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27498256

Date: AUG. 01, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a retail store owner and operator, seeks to employ the Beneficiary[1] as its general manager 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).

The Director of the Texas Service Center denied the petition on multiple grounds, concluding that the Petitioner did not establish (1) it has a qualifying relationship with the Beneficiary's last foreign employer; (2) the Beneficiary would be employed in a managerial or executive capacity in the United States; (3) the Beneficiary was employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition; and (4) it had the ability to pay the Beneficiary's proffered wage. We dismissed a subsequent appeal, concluding the record did not establish that the Beneficiary was employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition.[2] The matter is now before us on combined motions to reopen and reconsider.[3]

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[1] The record reflects that the Beneficiary was assigned an alien registration number when the Petitioner filed this petition in May 2019. When the Beneficiary subsequently filed a Form I-485, Application to Register Permanent Residence or Adjust Status in October 2019, a different alien registration number was assigned. While our prior decision referenced the alien registration number assigned at the time of filing the Form I-140, the two filings have since been consolidated under the latter number, which is reflected on the cover page of this decision.

[2] Because this ground for denial was dispositive of the Petitioner's appeal, we reserved its appellate arguments with respect to the three remaining grounds for denial. *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).

[3] The record reflects that, following our dismissal of its appeal on September 21, 2021, the Petitioner filed two consecutive motions. Jurisdiction over a motion lies with the office that made the latest decision in the proceeding. 8 C.F.R. § 103.5(a)(1)(ii). Although the Administrative Appeals Office (AAO) had jurisdiction over any subsequent motion relating to this petition, the Director adjudicated both prior motions, filed in October 2021 and May 2022. Because the Director did not have jurisdiction, the decisions dismissing those motions (dated April 27, 2022 and February 6, 2023) are withdrawn. The instant Form I-290B, Notice of Appeal or Motion was filed as an appeal of the Director's latest decision. However, due to the procedural history of this case, we have accepted it as a combined motion to reopen and motion to reconsider our decision dated September 21, 2021. We will also consider the briefs and additional evidence submitted in support of the Petitioner's prior motions.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motions.

I. LAW

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 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).

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

II. ANALYSIS

We dismissed the Petitioner's appeal because the record did not establish that the Beneficiary was employed outside the United States in a managerial or executive capacity by a qualifying entity for at least one year in the three years preceding the filing of the petition, as required by section 203(b)(1)(C) of the Act and 8 C.F.R. § 204.5(j)(3)(i)(A). The Petitioner filed the Form I-140 on May 13, 2019 and was therefore required to demonstrate that the Beneficiary had accrued at least one year of qualifying employment abroad after May 13, 2016.

The supporting evidence in the record indicated that the Petitioner's claimed foreign affiliate hired the Beneficiary as its sales executive on or about December 1, 2015. The Beneficiary was admitted to the United States in B-2 nonimmigrant status less than nine months later, on July 26, 2016, and had remained here for over 33 months at the time this petition was filed. Therefore, we agreed with the Director's conclusion that the Petitioner could not show that he had one full year of employment abroad during the relevant three-year period.

We acknowledged the Petitioner's submission of foreign payroll records and other documentation intended to demonstrate that the Beneficiary continued to work for the foreign entity as an "agent" while in the United States. However, the applicable regulation at 8 C.F.R. § 204.5(j)(3)(A)(i) requires employment "outside the United States for at least one year." Therefore, even if the Beneficiary remained an employee of the foreign entity while in the United States as a nonimmigrant visitor, he did not continue to accrue qualifying employment "outside the United States" that could satisfy this eligibility requirement. The regulation at 8 C.F.R. § 204.5(j)(3)(1)(B) indicates that U.S. Citizenship and Immigration Services (USCIS) will look at the three-year period preceding a beneficiary's entry as a nonimmigrant, but only in those cases where the beneficiary was admitted to the United States for the purpose of working for a qualifying entity in an employment-based nonimmigrant status. Here, the Petitioner was admitted to the United States as a B-2 visitor for the purpose of tourism and therefore 8 C.F.R. § 204.5(j)(3)(1)(B) does not apply.

In addition, we agreed with the Director's determination that the Petitioner did not demonstrate the Beneficiary's employment abroad was in a managerial or executive capacity as those terms are defined at section 101(a)(44) of the Act. The record lacked a consistent job title for the Beneficiary, a clear explanation of his managerial or executive responsibilities and the specific tasks he performed, and evidence that he directly or indirectly supervised subordinates or had other staff available to relieve him from significant involvement in non-managerial functions.

As noted, the Petitioner filed two subsequent motions which were adjudicated by the Director, contrary to the regulation at 8 C.F.R. § 103.5(a)(1)(ii). In the motion to reopen filed October 29, 2021, the Petitioner addressed the Beneficiary's date of hire by the foreign entity, noting that "due to our misunderstanding, we mentioned the date the beneficiary was promoted to his executive position rather than his original hire date." The Petitioner submitted a new affidavit from the foreign entity's president, who stated that the Beneficiary was hired as a sales manager in March 2013 and promoted to the position of executive sales and marketing director in December 2015.

In a motion to reconsider filed May 6, 2022, the Petitioner's president (the same individual who signed the above-referenced affidavit on behalf of the foreign entity), stated that he "inadvertently listed the date the beneficiary assumed his position as the Sales and Marketing Executive which was on December 1, 2015." He claimed that the Beneficiary's actual date of hire with the foreign entity was June 1, 2015 and that he completed six months of paid training before fully assuming the duties of his position in December 2015. Based on this information, which conflicted with the information provided in the earlier motion, the Petitioner claimed all issues addressed in our September 21, 2001 decision had been resolved.

The Petitioner has now provided three different hire dates for the Beneficiary in an effort to establish that he accrued the required one year of employment outside the United States. The foreign entity's payroll records indicate he started with the company on December 1, 2015. In a letter submitted at the time of filing, the foreign entity's president expressly stated "I hired [the Beneficiary] in December 2015." The Beneficiary indicated this same start date in the employment history section of his Form I-485 and in his resume, with no prior employment listed other than summer internships in 2014 and 2015. Therefore, the preponderance of the evidence indicates that the Beneficiary more likely than not joined the foreign entity in December 2015, and not in May 2013 or June 2015, as alternatively claimed in the motions that followed our dismissal of the appeal.

Further, even if the Petitioner documented that the Beneficiary commenced employment with the foreign entity more than one year prior to his admission to the United States in B-2 status in July 2016, it still could not establish that he meets the foreign employment requirement for this classification. As discussed above, the relevant period is the three years preceding the filing of this petition in May 2019. Therefore, documenting an earlier starting date with the foreign entity would not change the outcome of our decision.

With the current combined motions to reopen and reconsider, the Petitioner asserts "USCIS confirms that they denied the I-140 on July 13, 2020 and this was far more than 180 days after the I-485 was filed." The Petitioner claims that it was forced to temporarily close the business "within the 180 days following the filing of the I-140" due to a loss of business during the Covid-19 pandemic." It further states:

> I-140 petitions remain valid for the sponsored employee (beneficiary) to use in order to adjust status to lawful permanent resident . . . if the sponsoring employer goes out of business or withdraws the petition 180 days after USCIS approved the petition or 180 days after the employee submitted an adjustment application.

The Petitioner appears to reference the automatic revocation provision at 8 C.F.R. § 205.1(a)(3)(iii)(D), which states that a petition approval is automatically revoked if a petitioner terminates its business less than 180 days after petition approval, unless an associated adjustment of status application has been pending for 180 days or more. If a petitioning employer's business terminates 180 days or more after petition approval, or 180 days or more after an associated adjustment of status application has been filed, the petition remains approved (unless its approval is revoked on other grounds) and the beneficiary may remain eligible for adjustment of status under section 204.5(j) of the Act and in accordance with 8 C.F.R. § 245.25. Here, the petition was not approved, and the Petitioner does not explain its reliance on the cited provision as a basis for requesting reopening or reconsideration.

Section 204.5(j) of the Act provides that employment-based immigrant visa petitions "shall remain valid" for certain beneficiaries who obtain new job offers from the same or different employers. Under 8 C.F.R. § 245.25(a)(2)(ii)(B)(*2*), if a beneficiary's immigrant petition is pending when they notify USCIS of a new job offer on Form I-485 Supplement J, and such notification is made at least 180 days after the date the beneficiary filed an adjustment of status application, the pending petition will be approved if it was eligible for approval at the time of filing and until the beneficiary's adjustment of status application has been pending for 180 days, unless approval of the qualifying immigrant visa petition at the time of adjudication is inconsistent with a requirement of the Act.

The record does not reflect that the Beneficiary notified USCIS of a new job offer on a Form I-485 Supplement J at any time and therefore the provision at 8 C.F.R. § 245.25(a)(2)(ii)(B)(*2*) does not apply. The Petitioner's new claim that it temporarily closed or terminated its operations at some unidentified point during the Covid-19 pandemic does not provide proper cause for reopening or reconsidering our prior decision and would not warrant reversal of Director's reasons for denying the petition. A petition that was denied and did not meet the statutory requirements of this classification when filed cannot "remain valid" for any purpose. With the current motion, the Petitioner has not provided any other new facts or otherwise challenged the correctness of our appellate decision.

III. CONCLUSION

Although the Petitioner has asserted new facts in support of the motion to reopen, the Petitioner has not established eligibility. On motion to reconsider, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Therefore, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.