U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27943517

Date: AUG. 2, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a wholesale diamond business, seeks to permanently employ the Beneficiary as its general manager 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 a managerial or executive capacity.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that: (1) the Beneficiary would be employed in the United States in a managerial or executive capacity; (2) the Petitioner has the ability to pay the proffered wage; and (3) the Petitioner has a qualifying relationship with the Beneficiary's last foreign employer. The Director granted the Petitioner's subsequent motion to reopen and reconsider and issued a new decision on the same three grounds after considering the Petitioner's arguments and new evidence. The Petitioner then filed an appeal. Although we withdrew the Director's determination regarding the Petitioner's ability to pay, we dismissed the appeal, reserving any discussion of the qualifying relationship issue and basing our decision on the conclusion that the Petitioner did not establish that the Beneficiary would be employed in an executive capacity in the United States. In addition, we noted that evidence regarding the Beneficiary's enrollment in the United States as a full-time student as well as his record of arrivals into and departures from the United States indicate that the Beneficiary does not meet the one year of foreign employment requirement for this classification. Although we noted that the Beneficiary's employment abroad did not serve as a basis for our dismissal of the appeal, the Petitioner would need to address this issue in any future proceeding in which it seeks the requested benefit. The matter is now before us on combined motions to reopen and reconsider.

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 both motions.

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).

The Petitioner's submissions in support of this motion to reopen include an updated organizational chart, Form W-2 Wage and Tax Statements and other business documents reflecting the Petitioner's staffing, business, and finances in 2022, and new job duty breakdowns for an operations manager, a sales and marketing manager, a sales manager, and a sales associate.[1] The Petitioner did not, however, establish how these documents are relevant to our dismissal of the appeal, which was based on the determination that the Petitioner did not establish eligibility *at the time of filing*. Although we acknowledged the Petitioner's claim that the Beneficiary primarily performs high-level duties described at section 101(a)(44)(B) of the Act, we pointed out that the Beneficiary's job duty breakdown was premised on the existence of subordinate managers and other staff whom the Petitioner had not yet hired as of June 2021, when time this petition was filed. *See* 8 C.F.R. § 103.2(b)(1). Namely, we pointed to evidence in the record which indicates that the Petitioner had only one employee at the time of filing and had no employees during most of the remainder of 2021.

Although the Petitioner also offers a new job offer letter in support of the instant motion, the letter contains a job duty breakdown that is inconsistent with one that was previously submitted and accounts for 95%, rather than 100% of the Beneficiary's time. Namely, the new job offer letter states that the Beneficiary will spend 50% of his time directing the management of the organization, 30% establishing the organization's "goals and policies," and 15% exercising wide latitude in discretionary decision-making. However, the job offer letter that was previously submitted in response to a request for evidence stated that the Beneficiary would allocate 15% of his time to establishing "goals or policies," 45% to directing the management or major component or function of the organization, 30% to exercising wide latitude in discretionary decision-making, and 10% to receiving general supervision from higher-level executives. The record does not contain independent, objective evidence resolving this inconsistency. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In sum, the Petitioner has not offered new facts that address the evidentiary deficiencies we identified and discussed in our prior decision. As such, the Petitioner has not met the requirements of a motion to reopen.

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.

On motion, the Petitioner contests the correctness of our prior decision and points to its current submission of new evidence, which includes employee salaries, an updated organizational chart, and new employee job descriptions. However, offering new evidence that was not part of the record when the disputed decision was issued does not adequately address the requirements of a motion to

[1] The remainder of the Petitioner's submissions included a least agreement executed in July 2022 and financial documents from 2021 and 2022. However, because these documents had been previously submitted in response to the Director's request for evidence (RFE), they do not offer new facts and therefore do not meet the requires of a motion to reconsider.

reconsider. As indicated above, to meet the requirements of a motion to reconsider, the Petitioner must establish that we incorrectly applied the law or USCIS policy given the evidence that was in the record at the we issued our decision. The new evidence submitted in this matter has been duly addressed in our discussion pertaining to the Petitioner's motion to reopen. As such, the Petitioner's reference to a "three-tier organizational structure" and a "middle layer of management," neither of which accurately characterizes the Petitioner's staffing structure at the time of filing, are not relevant to this motion to reconsider. Likewise, the Petitioner's reliance on any new evidence, such as new invoices for the outsourced services of an accountant and a newly executed lease, both pertaining to events that occurred after this petition was filed, are also not relevant to this motion to reconsider, nor do they support the Petitioner's contention that our decision dismissing the appeal was incorrect.

To establish that reconsideration of our decision is warranted, the Petitioner must make a cogent argument explaining how we misapplied the law or USCIS policy in our prior decision dismissing the appeal based on evidence that was before us at the time we made our decision. Here, the Petitioner does not make such an argument and incorrectly relies on new evidence as a means of supporting the motion to reconsider.

Lastly, the Petitioner addresses our additional discussion of facts pertaining to the Beneficiary's period of employment abroad. In our prior decision we stated that the basis for determining whether the Beneficiary met the foreign employment requirement would be the three-year period that immediately preceded his initial entry as an L-1 nonimmigrant for the purpose of working for the Petitioner. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).[2] Because the Beneficiary's entry as an L-1 nonimmigrant occurred on March 10, 2021, we counted back three years and determined that the relevant timeframe during which his year of employment abroad must have occurred was the three-year period between March 10, 2018, and March 10, 2021. We then noted that given the Beneficiary's enrollment as a full-time undergraduate student at [redacted] University and his time spent in the United States (as documented in his arrival and departure records), the Beneficiary was only outside of the United States for 162 during the relevant three-year period, thus falling considerably shy of meeting the requirement of having been employed abroad for at least one year.

The Petitioner does not dispute our calculations of the Beneficiary's time in the United States, but rather argues that his foreign employment need not have taken place outside of the United States in order for him to satisfy the foreign employment requirement. However, the Petitioner's argument is inconsistent with current USCIS policy requiring the Petitioner "to demonstrate that the beneficiary was employed abroad . . . for 1 out of the 3 previous years." 6 *USCIS Policy Manual* F.4(A), https://www.uscis.gov/policy-manual; *see also* 8 C.F.R. § 204.5(j)(3)(i)(B).

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[2] In promulgating the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B), the former Immigration and Naturalization Service stated:

> The Service does not feel that Congress intended that nonimmigrant managers or executives who have already been transferred to the United States should be excluded from this classification. Therefore, the regulation provides that an alien who has been a manager or executive for one year overseas, during the three years preceding admission as a nonimmigrant manager or executive for a qualifying entity, would qualify.

56 Fed. Reg. 30703, 30705 (July 5, 1991).

In sum, although the Petitioner has submitted additional evidence in support of the motion to reopen, it has not established eligibility at the time of filing. 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 combined 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.