U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30297180

Date: MAY 29, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, a real estate asset management company, seeks to permanently employ the Beneficiary as its "Chief Asset 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 Petitioner did not establish that the Petitioner had a qualifying relationship with the Beneficiary's foreign employer. We dismissed the appeal and added a second ground for ineligibility, concluding that the Petitioner did not establish that the Beneficiary would be employed in the United States in an executive capacity. We then dismissed the Petitioner's four subsequent motions – first, a combined motion to reopen and reconsider[1] followed by three consecutive motions to reconsider. In response to the second motion, we concluded that sufficient evidence was submitted to establish the existence of a qualifying relationship between the Petitioner and the Beneficiary's foreign employer. Nevertheless, we concluded that the Petitioner did not adequately address our prior adverse conclusion concerning whether the Beneficiary would be employed in an executive capacity and dismissed the Petitioner's motion on that basis. We reiterated similar findings in response to the Petitioner's two subsequent motions to reconsider. The matter is now before us on a fifth motion – this time as 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 the combined motions to reopen and reconsider.

[1] As noted in several of our prior decisions, the record contains a copy of Form I-797C, Notice of Action, notifying the Petitioner that its motion – the one filed following the dismissal of the appeal – was being rejected because the Form I-290B was incomplete. Although the Petitioner cured the defective filing by completing the Form I-290B, the motion was not received within the allowed filing period, thus causing its untimely filing.

I. MOTION TO REOPEN

First, we will address the Petitioner's motion to reopen. 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).

Pursuant to the above cited provisions, only new facts and evidence that pertain to our decision from April 2023 – our latest decision – will be considered. In denying the Petitioner's fourth motion – a motion to reconsider – we addressed the Petitioner's claims that we focused primarily on the Beneficiary's proposed job duties to the exclusion of proper consideration of two asset management agreements – one with the [redacted] and one between [redacted] the Petitioner's U.S. subsidiary, and [redacted] However, as in our decision from June 2021 we again considered the Beneficiary's claimed role in overseeing the Petitioner's operating affiliates, their employees, and the management of two luxury hotels. We indicated that in fulfilling this role, the Beneficiary would likely be engaged in performing primarily non-executive operational duties that are directly related to the Petitioner's provision of management services in an asset management agreement.

We also acknowledged the complexity of the Beneficiary's claimed executive role, which we also previously discussed in our June 2021 decision where we addressed the Petitioner's third motion. In that decision, we noted that the Petitioner's U.S. subsidiary, rather than the Petitioner itself, assumed the role of asset manager in the agreement with [redacted] In addition, we highlighted the passage of time between December 2011, when the asset management agreement between [redacted] and [redacted] was executed, and January 2016, when this petition was filed, reminding the Petitioner of its burden to establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).[2]

In sum, we determined that our prior decision reflects our consideration of the Beneficiary's job duties along with other relevant factors, such as the agreements cited and other factors as noted above. As such, our decision was not exclusively based on the Beneficiary's job duties as the Petitioner claimed, but rather it was the product of a totality of the evidence analysis.

On motion, the Petitioner submits two copies of the 2011 asset management agreement along with evidence that the agreement is currently and has been valid since prior to and including the time of

[2] While not specifically mentioned in our prior decision, the record contains a "Second Amended and Restated Services Agreement" listing [redacted] as "Owner" and the Petitioner together with [redacted] as "Consultant" in a management agreement that was executed in August 2009.

filing.[3] However, the validity of the 2011 asset management agreement notwithstanding, the Petitioner has not offered new facts establishing that the Beneficiary's proposed position with the petitioning entity would be in an executive capacity.

Going back to our original decision from March 2019, we questioned who would perform the underlying tasks that comprise the asset management service that the Petitioner offers its client. We noted that the Beneficiary was the Petitioner's only employee at the time of filing. In that decision we acknowledged that the Petitioner's clients have managers and other employees who work for the properties the Petitioner is paid to manage. However, we nevertheless deemed the Petitioner's claim problematic. We questioned the likelihood that the Beneficiary would be employed in an executive capacity when he was the Petitioner's only employee and thus the only one available to carry out the asset management services the Petitioner was contracted to provide.

In our October 2020 decision, which addresses the Petitioner's second motion, we stated that to establish that the Beneficiary would be employed in an executive capacity, the Petitioner would have to demonstrate that the Beneficiary's role and job duties with the petitioning entity, rather than its U.S. affiliate, would be executive in nature. And in our latest decision, while we acknowledged the "complicated picture" presented in the Petitioner's discussion of the Beneficiary's proposed employment, we once again pointed out that the Petitioner did not "properly address our [prior] conclusions related to the Beneficiary's proposed duties set forth in our prior decisions." The new documents submitted in support of the current motion to reopen do not overcome these prior findings.

The new evidence includes copies of emails that demonstrate the Beneficiary's participation in certain asset management activities between 2020 and 2023 and an affidavit and promissory note which show the continued validity of a 2011 asset management agreement involving the Petitioner's U.S. affiliate. However, the new evidence does not address issues that we previously deemed problematic. Namely, the new evidence does not address the Petitioner's organizational composition at the time of filing or establish that at the time filing the Petitioner was able to support the Beneficiary in a position where he would primarily direct the management of the organization; establish the goals and policies of the organization; exercise wide latitude in discretionary decision-making; and receive only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act. Nor does the new evidence establish that the Beneficiary would have performed primarily executive duties within the scope of operations that existed at the time of filing. *See* 8 C.F.R. § 103.2(b)(1).

As stated earlier, the scope of a motion is limited to "the prior decision" and "the latest decision in the proceeding." 8 C.F.R. § 103.5(a)(1)(i), (ii). Here, the Petitioner has not provided new facts to establish that we erred in dismissing the prior motion. Because the Petitioner has not established new facts that would warrant reopening of the proceeding, we have no basis to reopen our prior decision.

[3] The new evidence includes a May 2023 affidavit from an affiant attesting to the continued validity of the 2011 asset management agreement along with a May 2022 assignment and subordination agreement and corresponding promissory note showing the assignment by [redacted] the assignor, as the condition of a $10 million loan from [redacted] the assignee. The Petitioner also provides email communications that took place between 2020 to 2023 and either involved the Beneficiary as originator or addressee or referenced matters involving properties that the Petitioner or its U.S. subsidiary are claimed to manage.

II. MOTION TO RECONSIDER

Next, we will address the Petitioner's motion to reconsider. 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. To further clarify, the issue to be determined in addressing the Petitioner's fifth motion is whether we incorrectly applied the law or USCIS policy when we dismissed the Petitioner's prior motion to reconsider.

The Petitioner contests the correctness of our prior decision, pointing out that we incorrectly referred to its third motion, which was filed in July 2021, as having taken place ten years *prior* to the date of the 2011 asset management agreement. While we acknowledge the incorrect reference, a contextual reading of the analysis indicates that the error was inadvertent and did not preclude a meaningful understanding of our finding. To be clear, we provided the month and year of the original asset management agreement – December 2011 – as well as month and year of the motion being referenced – July 2021. An objective reading of our decision shows that these dates were cited to highlight the passage of time between the date the agreement was executed and the filing date of the July 2021 motion. The very dates we cited make it clear that the motion was filed after, not before, the asset management agreement, despite our incorrect reference to the motion as the earlier event.

Regardless, the ten-year period between the date of the agreement and the filing of the motion was merely one observation in our analysis and was not the sole or primary basis for our latest decision where we made note of the Petitioner's limited operation and determined that the Beneficiary "would likely be primarily engaged in the provision of professional services, rather than his claimed executive-level role with authority over a multi-layered organization including hundreds of employees." We also determined that "the Petitioner does not properly address our conclusions related to the Beneficiary's proposed duties set forth in our prior decisions." In reaching our decision, we considered both the Beneficiary's proposed job duties and the organizational context within which those duties would be performed. We then concluded that the Petitioner did not establish that we misapplied law or USCIS policy when we dismissed the fourth motion.

In support of the current motion, the Petitioner asserts that we erred in concluding that the Beneficiary would not be primarily performing executive-level duties. The Petitioner contends that the Beneficiary assumes "the essence of an executive's role" by virtue of his position's "primary objective," which is to ensure that each hotel under his purview maintains optimal value and "achieves ownership investment objectives." By its own admission the Petitioner states that "the Petitioner itself has few employees" – in fact, the record shows that only one employee was claimed in the petition at the time of filing.

The Petitioner also states that the Beneficiary's duties include "oversight and management of Hotel Mangers and General Managers" who work for hotels that contracted the Petitioner or its U.S. subsidiary to provide asset management services. As such, the Petitioner apparently recognizes that the employees the Beneficiary would manage are those working for the "asset," i.e., the client, in an asset management agreement, not those working for the Petitioner itself. As stated earlier, the

Petitioner claimed only one employee at the time of filing. And although the Petitioner highlights the Policy Manual's allowance for a small support staff, the Policy Manual does not relieve a petitioner from having to demonstrate that "all other requirements are met," regardless of staffing size, and it ultimately recognizes that "it may be very difficult for a petitioner to establish that the sole employee will be engaged primarily in a managerial or executive function." 4 USCIS Policy Manual, C.4, https://www.uscis.gov/policy-manual.

Furthermore, there is no law or policy that precludes us from considering the Petitioner's staffing levels, so long as we do so alongside other relevant factors. It is appropriate to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company or a company that does not conduct business in a regular and continuous manner. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Nothing in our prior decision indicates that we incorrectly considered the Petitioner's staffing to the exclusion of other factors. In fact, the record shows that the Petitioner's staffing was properly considered alongside the Beneficiary's job duties, and we previously stated that the Beneficiary's management of another entity's employees is problematic and does not support the Petitioner's claim that the Beneficiary's proposed employment would be in an executive capacity.

To be eligible as a multinational executive, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(B)(i)-(iv) of the Act. If the record does not establish that the offered position meets all four of these elements, we cannot conclude that it is a qualifying executive position.

The record shows that we have consistently conducted a totality of the evidence analysis that includes consideration of relevant factors, such as the nature of the Petitioner's business, its organizational composition, and the job duties assigned to the Beneficiary in his proposed employment. For the foregoing reasons, we conclude that our previous decision to dismiss the Petitioner's motion to reconsider was reached pursuant to a correct application of law and policy and was based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). Therefore, the underlying petition remains denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.