U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28456207

Date: NOV. 21, 2023

Appeal of Texas Service Center Decision

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

The Petitioner is a restaurant that seeks to permanently employ the Beneficiary as its chief executive officer (CEO) 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 an executive or managerial capacity.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish the Beneficiary's eligibility. The Director concluded that the Beneficiary does not have the requisite period of qualifying employment abroad. She further concluded that the Petitioner did not establish that the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity. The matter is now before us on appeal.

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). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we conclude that the Director did not offer a complete and accurate analysis of the submitted evidence. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

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. BASIS FOR REMAND

As previously indicated, the Director's decision did not offer a complete analysis of the denial grounds listed above, nor did it adequately explain the deficiencies in the evidence. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

First, under the section heading "Executive or Manager – Overseas," the Director sought to address the Beneficiary's foreign employment. However, a number of references blurred the content of the decision so that it was unclear whether the Director was addressing the foreign position, or the U.S. position. For example, multiple verb tenses were used when referring to the Beneficiary's position, thereby making it unclear whether the evidence the Director relied on to conclude that the Beneficiary was not employed abroad in a managerial capacity truly pertains to the Beneficiary's foreign employment. For instance, the Director contemplated whether "the beneficiary *will* be employed in a managerial capacity" and questioned whether the Beneficiary's duties "*will* be primarily managerial" and how he "*will* contribute" to management of "the business." (Emphasis added to the original). Under the same subsection heading, the Director referred to the contents of a request for evidence (RFE). The RFE is also incorrectly referred to as a notice of intent to deny, mentioned several types of U.S. tax documents as well as "[a] statement from an authorized official of your organization which indicates that you will employ the beneficiary in the United States in a primarily managerial or executive capacity." Given that these documents do not pertain to the foreign company, it is unclear how or if they are relevant to a discussion of the Beneficiary's employment abroad. Although the Director later determined that "the new job letter was different from submitted [sic] with Form I-14"[1] and contained a "new job description," it is unclear whether this observation was based on a review of documents that pertain to the Beneficiary's foreign employment.

The Director's determination that the record lacks details about "what the Beneficiary actually did on a day-to-day basis" and "who the beneficiary was 'overseeing' or 'leading,'" also raises concerns. Given the Director's prior references to U.S. tax documents and the Beneficiary's employment "in the United States," it is unclear that this portion of the analysis, despite being placed under the heading for overseas employment, actually pertains to the issue of the Beneficiary's position abroad. The decision is also confusing where it ambiguously refers to one of the Beneficiary's job duty breakdowns as "[t]he description of the beneficiary's foreign employment and U.S." It then paraphrases the job duty breakdown included in a document containing the Petitioner's name in the heading and which referred to "the business in [redacted] Texas" when listing one of the Beneficiary's proposed job duties. This entire analysis was also included in the section heading "Executive or Manager – Overseas."

Despite the Director's references to the Beneficiary's "foreign position" and "managerial role abroad," the errors described above preclude us from ruling out the possibility that the Director relied on some

[1] The Director's reference to "Form I-14" appears to be a typographical error. The Director was likely referring the Form I-140, Immigrant Petition for Alien Workers.

evidence pertaining to the Beneficiary's proposed employment with the U.S. entity, rather than his prior employment with the overseas entity, as the basis for concluding that the Beneficiary's employment abroad was not within a qualifying managerial or executive capacity. Accordingly, we will remand this matter for the Director to more clearly outline potential issues with the Beneficiary's foreign employment and/or the Beneficiary's U.S. employment. The decision should carefully examine each position and relevant evidence separately and distinctly.

We further note that the Petitioner has maintained that the Beneficiary's foreign and proposed positions both fit the definition of executive capacity. Although the Petitioner mentioned "managerial duties" when describing the Beneficiary's foreign employment, it later referred to the Beneficiary as a "key executive member of our business" and clearly stated that the Beneficiary was employed abroad "in a qualifying executive capacity prior to his entry into the United States as a nonimmigrant." Likewise, in the same supporting cover letter, the Petitioner stated that it was offering the Beneficiary "a permanent executive position" and later reasserted that claim by stating that the Beneficiary "qualifies as a multinational executive." The Petitioner maintained these claims in its RFE response, where it stated that "the Beneficiary was employed in an executive capacity with the qualifying foreign company" and further noted that the RFE response includes "a statement describing the high-level responsibilities that the Beneficiary will be performing in his executive capacity." The Petitioner's statements convey with sufficient clarity the Petitioner's claim that the Beneficiary's positions abroad and in the United States both fit the definition of executive capacity. However, despite the Petitioner's claims, the decision repeatedly refers to elements of the statutory definition of managerial capacity, thereby indicating that the Petitioner's supporting evidence, such as job duty breakdowns and organizational charts, was assessed pursuant to this definition. On remand, the Director should examine the Beneficiary's foreign employment, and proposed U.S. employment under the executive framework as requested by the Petitioner.

Lastly, the Director incorrectly focused on the Beneficiary's status as an E-2 nonimmigrant treaty investor as the basis for concluding that the Beneficiary does not have the requisite qualifying period of employment abroad. First, the Director conflated the dates of the Beneficiary's U.S. entry as a B-2 nonimmigrant visitor, which occurred in November 2018, with his subsequent change of status to an E-2 treaty investor, which occurred in August 2019, following the Petitioner's filing of Form I-129, Petition for Nonimmigrant Worker, on the Beneficiary's behalf. The Director incorrectly noted that the Beneficiary's U.S. entry in November 2018 was in the status of an E-2 treaty investor. Second, the Director incorrectly stated that "USCIS regulations was [sic] specific that a beneficiary who is being petitioned under [section] 203(b)(1)(C) [of the Act] must have an L-1A visa." Pursuant to this erroneous assessment of the cited statute, the Director concluded the following: "Since the beneficiary held an E-2 treaty investor visa and not a managerial or executive position abroad before coming to the United States, the beneficiary does not have the qualifying period of managerial or executive employment abroad to qualify for the classification." However, the Director's statements are not consistent with the relevant provision in the statute and presiding case law.

According to the statute, the relevant period during which a beneficiary must have had one year of managerial or executive employment abroad is the three years "preceding the time of the alien's application for classification and admission into the United States under this subparagraph." Section 203(b)(1)(C) of the Act; *Matter of S-P-, Inc.*, Adopted Decision 2018-01 (AAO Mar. 19, 2018). If the beneficiary is *outside* the United States at the time of filing, the petitioner must demonstrate that the

beneficiary's one year of qualifying foreign employment occurred within the three years immediately preceding the *filing* of the petition. 8 C.F.R. § 204.5(j)(3)(i)(A). On the other hand, if the beneficiary is already working *in* the United States for the petitioner, or its affiliate or subsidiary, at the time of filing, here, October 19, 2021, the petitioner must demonstrate that the beneficiary's one year of foreign employment occurred in the three years preceding his or her *entry as* a nonimmigrant. *See* 8 C.F.R. § 204.5(j)(3)(i)(B); *Matter of S-P-, Inc.* In this matter, the August 2019 approval of the Petitioner's E-2 nonimmigrant visa petition resulted in the Beneficiary's change of status at which time he started working for the Petitioner.[2]

The Beneficiary's last employment date abroad appears to be in November 2018. And because the Beneficiary's change of status from a B-2 to an E-2 nonimmigrant in August 2019 was for the purpose of working for the petitioning entity, we rely on the three-year period that preceded that change of status – August 2016 to August 2019 – as the relevant reference point for purposes of calculating the one year in the three-year period of foreign employment. *See* 8 C.F.R. § 204.5(j)(3)(i)(B); *Matter of S-P-, Inc.* Although the Petitioner must still establish that the Beneficiary's employment abroad was in qualifying managerial or executive capacity and lasted at least one year to qualify for the immigrant petition as a multinational manager or executive, the mere fact that he was an E-2 treaty investor since August 2019 and at the time this petition was filed in October 2021 does not disqualify the Beneficiary from meeting the foreign employment requirement.

Based on the foregoing, it is not clear that the record was reviewed in its entirety and analyzed sufficiently. Notwithstanding the lack of proper analysis, however, the record lacks sufficient evidence to establish that the Beneficiary was employed abroad in and would be employed in the United States in an executive capacity, as claimed.

The statutory definition of the term "executive capacity" focuses on a person's elevated position. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of an organization or major component or function thereof. Section 101(a)(44)(B) of the Act. To show that a beneficiary will "direct the management" of an organization or a major component or function of that organization, a petitioner must show how the organization, major component, or function is managed and demonstrate that the beneficiary primarily focuses on its broad goals and policies, rather than the day-to-day operations of such. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the organization, major component, or function as the owner or sole managerial employee. A beneficiary must also 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." *Id.*

Here, the Petitioner provided several similar job descriptions for the Beneficiary's foreign and proposed U.S. positions, highlighting his top-level placement within each entity's organizational

[2] Further, according to *Matter of S-P-*, only "a break in qualifying employment *longer than two years* will interrupt a beneficiary's continuity of employment with the petitioner's multinational organization." Applying that reasoning to the facts in this matter, the Beneficiary's stay in the United States as a B-2 nonimmigrant was not for a period of longer than two years. As noted above, the Beneficiary entered the United States as a B-2 nonimmigrant in November 2018 and only remained in that status for approximately eight months. Therefore, the Beneficiary's eight-month stay in the United States as a B-2 nonimmigrant did not interrupt his "continuity of employment" with the multinational entity.

hierarchy and underscoring his discretionary authority over each entity's operations, personnel, and finances. However, the job descriptions were vague and did not offer meaningful content as to the Beneficiary's actual job duties either within the scope of the foreign entity, which operated as food and beverage distributor and employed the Beneficiary, two full-time drivers, and four contractors, nor within the scope of the U.S. entity, which operates as a restaurant and employs an eight-person staff.

In addition, information discovered in a recent search of the corporate database in Texas, where the Petitioner was incorporated, shows the Petitioner's business status as "franchise tax involuntarily ended." *See* https://mycpa.cpa.state.tx.us/coa/coaSearchBtn. This new information leads us to question whether the Petitioner conducts business and is able to offer a position in accordance with the terms of the petition and within the scope of the regulatory requirements.

In sum, the record as presently constituted does not establish that the Petitioner is eligible for the benefit sought.

Regardless, because the Director's decision did not adequately analyze the facts of the matter and clearly apply the regulatory standards, we will remand the matter for entry of a new decision. The Director should request any additional evidence warranted and allow the Petitioner to submit such evidence within a reasonable period of time.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.