U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33385501

Date: SEPT. 13, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a packaging supplies company, 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 record did not establish that: 1) the Petitioner has the requisite qualifying relationship with the Beneficiary's employer abroad; and 2) that the Beneficiary's proposed employment in the U.S. would be in a managerial or executive capacity. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

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, regarding the issue of a qualifying relationship, the Director acknowledged the Petitioner's claim that it and the Beneficiary's foreign employer are affiliates by virtue of the Beneficiary's sole ownership of each entity.[1] However, the Director determined that the record does not support the existence of the claimed affiliate relationship because the Petitioner filed the Form 1120 S, U.S. Income Tax Return for an S Corporation. To clarify, the Director referred to Internal Revenue Code, § 1361(b), 26 U.S.C. § 1361(b)(1), stating that "an S corporation must have only allowable shareholders (which may not include partnership, corporations or non-resident aliens among others), have only one class of stocks, not be ineligible, allocate profits and losses proportionally to shareholder based on interest in the corporation."[2] Without specifying which of these provisions was perceived as the disqualifying element and despite accepting that evidence in the record shows the Beneficiary to be the Petitioner's sole owner, the Director concluded that the Petitioner did not demonstrate the existence of a qualifying relationship. We disagree with the Director's conclusion.

As a preliminary matter, we note that the Director acknowledges, and the record adequately shows that the Beneficiary is the sole owner of the Petitioner and the foreign employer. The only issue in question is whether the Petitioner is disqualified from demonstrating an affiliate relationship with the Beneficiary's foreign employer by virtue of having elected tax treatment as an S corporation. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See id.* However, possessing these characteristics does not preclude the creation of a qualifying relationship where the petitioning entity and the foreign employer share common ownership and control, elements that are critical to demonstrating the existence of a qualifying relationship. *See, e.g.*, *Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (Comm'r 1988); *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). Because the record contains sufficient evidence demonstrating that the Petitioner and the foreign employer do share common ownership and control, we conclude that a qualifying relationship exists between these two entities. The Director's conclusion to the contrary is therefore incorrect and must be withdrawn.

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[1] To be deemed affiliates, the Petitioner must establish that it and the Beneficiary's foreign employer are owned and controlled by a common individual or parent entity or that they are owned and controlled by the same group of individuals with each owning and controlling approximately the same proportion of each entity. *See* 8 C.F.R. § 204.5(j)(2) (for the definition of the term "affiliate").

[2] The record shows that the Beneficiary currently resides in the United States as the holder of an L-1 nonimmigrant visa based on his employment with the Petitioner as an intracompany transferee.

Next, regarding the issue of the Beneficiary's U.S. employment in an executive capacity,[3] the Director focused exclusively on the Petitioner's staffing, finding that the Petitioner provided different iterations of its staffing composition and therefore precluded a determination of "the number of individuals employed by the organization and their duties and positions." The record, however, shows that the Petitioner submitted ample evidence that lists each employee as well as their respective positions and duties.

On appeal, the Petitioner contends that the Director disregarded the staffing changes that took place since the petition was filed, pointing out that a new employee was hired to fill the position of warehouse manager. The Petitioner explains that adding a warehouse manager to its organization enabled it to reposition the warehouse employee under the warehouse manager's supervision, thereby creating a new staffing structure which was reflected in an organizational chart that the Petitioner submitted in response to the Director's request for evidence. The Petitioner points out that the same organizational chart with the updated staffing structure was later resubmitted in response to a subsequent notice of intent to deny, thereby indicating that the Director's reference to "three different organization charts" was incorrect.

Further, the Director should assess whether the Petitioner was able to support the Beneficiary in an executive capacity based on the staffing composition that existed *at the time of filing*. *See* 8 C.F.R. § 103.2(b)(1) (requiring petitioners to establish eligibility for the requested benefit at the time of filing); *see also* section 101(a)(44)(B) of the Act (requiring that one "primarily" perform the enumerated executive duties). Here, the Director misinterpreted the Petitioner's staffing changes as inconsistencies and did not discuss the Petitioner's staffing at the time of filing or determine whether the Petitioner's staffing at that time was sufficient to relieve the Beneficiary from having to primarily perform non-executive duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in an executive capacity. *See, e.g.*, section 101(a)(44)(B) of the Act; *Matter of Church Scientology Int'l*, 19 I&N Dec. at 604 (Comm'r 1988).

Lastly, the Director concluded that the Petitioner provided insufficient evidence that the Beneficiary receives only general supervision or direction from a higher authority within the organization. However, the Director did not explain the basis for this conclusion or acknowledge that the Beneficiary occupies the top-most position with the petitioning organization.

In determining whether a beneficiary's duties will be primarily executive, we consider the description of the job duties, the company's organizational structure, the duties of a beneficiary's subordinates, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the beneficiary's actual duties and role in the business. Here, however, the denial lacks any mention of the Beneficiary's proposed job duties and only discusses the Petitioner's staffing in broad terms, focusing on a perceived staffing inconsistency rather than addressing whether the Petitioner's staffing at the time of filing was sufficient to support the Beneficiary in an executive position. *See* 8 C.F.R. § 204.5(j)(5) (requiring the submission of a job offer that "clearly describe[s] the duties to be performed" by the beneficiary).

[3] The Petitioner's claim regarding the Beneficiary's proposed U.S. employment is based solely on the definition of executive capacity. The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity.

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.