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**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF E-S-A-S-, INC.

DATE: APR. 22, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, which operates an airport limousine service [REDACTED] and a cupcake bakery [REDACTED], 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) § 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, Texas Service Center, denied the petition. The Director concluded that the Petitioner had not established its ability to pay the Beneficiary's proffered salary. The Petitioner appealed that decision, and we dismissed the Petitioner's appeal.

The matter is now before us on a motion to reopen and a motion to reconsider. In its motion, the Petitioner submits additional evidence and asserts that it has the ability to pay the proffered wage.

We will reopen the proceeding and remand the petition to the Director for further consideration.

I. MOTION REQUIREMENTS

A. Requirements for Motions to Reopen

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Further, the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

B. Requirements for Motions to Reconsider

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

II. DISCUSSION AND ANALYSIS

The motion does not meet the requirements of a motion to reconsider. The Petitioner repeats its prior assertion that we should take general economic circumstances into account, but does not establish that our decision was legally incorrect at the time of its issuance.

The motion does, however, meet the requirements of a motion to reopen at 8 C.F.R. § 103.5(a)(2) because the Petitioner has submitted new evidence that is directly relevant to the issue under discussion. Specifically, the Petitioner has submitted documentation, including a copy of its 2014 IRS Form 1120, U.S. Corporation Income Tax Return, that establishes that the Petitioner had sufficient funds available at the time of filing in 2014 to pay the Beneficiary's salary of \$25,000 per year. We therefore withdraw the prior finding that the Petitioner had not established its ability to pay the Beneficiary's proffered wage. Because this finding was the sole basis for the denial of the petition and the dismissal of the appeal, we also withdraw the denial and dismissal decisions in their entirety.

Review of the record, however, raises another issue of concern. Specifically, the Petitioner stated that the Beneficiary qualifies for classification as a multinational executive, as that term is defined at section 101(a)(44)(B) of the Act, 1101 U.S.C. § 1101(a)(44)(B). The Beneficiary must be eligible for the benefit sought at the time of filing the petition, and must remain eligible throughout the adjudication of the petition. *See* 8 C.F.R. § 103.2(a)(1). The Petitioner filed the Form I-140 petition on February 24, 2014, and therefore the Beneficiary must have been eligible under the circumstances that existed on that date.

The Petitioner claims that it will employ the Beneficiary in a qualifying executive capacity. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

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If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

On Form I-140, asked to specify its “Current Number of U.S. Employees,” the Petitioner answered “7.” With the petition, the Petitioner submitted copies of four IRS Forms 941, U.S. Employer’s Quarterly Federal Tax Returns. The most recent return submitted with the petition (for the third quarter of 2013) showed seven employees on the payroll as of September 12, 2013. The Petitioner also submitted an organizational chart showing seven employees (not including contractors, a consultant, and officials based in the United Kingdom).

Review of the record, including evidence submitted after the initial filing, shows that the Petitioner did not have seven employees at the time it filed the petition on February 24, 2014. Its IRS Form 941 return for the first quarter of 2014 (the quarter that included the filing date) indicated that the Petitioner paid four employees a total of \$6,654.03. Additionally, the Petitioner’s 2014 Form 1120 reflects total salaries and wages paid of \$47,433 .

Due to the evidence described above, the Petitioner’s claim to have seven U.S. employees as of the filing date lacks credibility. Doubt cast on any aspect of a petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. §1101(a)(44)(B). Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. By statute, that the duties of the position must be “primarily” of an executive nature. The Petitioner has not established that the Beneficiary’s actual duties, as of the date of filing, were primarily executive in nature.

Federal courts have generally agreed that in reviewing the relevance of the number of employees a Petitioner has, USCIS “may properly consider an organization’s small size as one factor in assessing whether its operations are substantial enough to support a manager.” *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors,

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such as a company's small personnel size. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner has not shown that its staff of four employees relieved the Beneficiary of non-qualifying duties so that she could primarily carry out executive duties as of the petition's filing date. For instance, the company's organizational chart shows only one employee in the [REDACTED] whom the Petitioner identified as the manager. (All other employees were involved with the [REDACTED]) According to the payroll register, [REDACTED] earned only \$351.64 during March 2014. That amount is not consistent with full-time employment, which suggests that the Beneficiary herself was responsible for the [REDACTED] in [REDACTED] absence. Also, the Petitioner has not shown who was responsible for non-managerial functions in the [REDACTED] including food preparation, cleaning, and counter service.

The record does not establish, by a preponderance of the evidence, that the Beneficiary's duties primarily rose to the level of an executive at the time of filing. Qualifying conditions must exist at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). Later developments cannot retroactively qualify a previously ineligible beneficiary. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Without sufficient evidence of the employment of subordinates to perform non-executive functions, the Petitioner has not provided sufficient evidence to show that the Beneficiary's proposed position in the United States would consist primarily of qualifying executive tasks. For this reason, the Petitioner has not established that the petition can be approved as it now stands.

ORDER: The motion to reopen is granted, and the matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of E-S-A-S-, Inc.*, ID# 16363 (AAO Apr. 22, 2016)