U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-R-E-A- CO.

DATE: OCT. 6, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a cargo airline, seeks to permanently employ the Beneficiary as its manager of North American operations 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, Nebraska Service Center, denied the petition, concluding that the evidence of record did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity. We dismissed the Petitioner's subsequent appeal.

The matter is now before us on a motion to reconsider. On motion, the Petitioner asserts that we erred by disregarding key arguments and imposing improper requirements. The Petitioner has subsequently submitted new evidence for consideration.

Upon review, we will deny the motion.

I. MOTION REQUIREMENTS

A. Overarching Requirement for Motions by a Petitioner

The regulations state that "the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision."[1] This provision limits our authority to reconsider the prior decision to instances where the Petitioner has shown "proper cause" to do so. Thus, to merit reconsideration, the submission must not only meet the formal requirements for filing, but the petitioner must also show proper cause for granting the motion.

[1] 8 C.F.R. § 103.5(a)(1)(i).

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.[2] A motion to reconsider contests the correctness of the prior decision based on the previous factual record, whereas a motion to reopen seeks a new hearing based on new facts.[3]

II. DISCUSSION

We will deny the motion to reconsider, because the Petitioner has not shown proper cause for reconsideration.

The Petitioner's motion to reconsider rests on four points. Three of the four points on motion follow the Petitioner's assertion that "the prin[ci]pal issues raised in the brief on appeal were not mentioned, let alone discussed," in our decision. First, the Petitioner states:

> The decision did not discuss the primary error made in the decision by the Nebraska Service Center where it . . . stated "The supervision of independent contractors will not permit a beneficiary to be classified as a manager. Only the management of employees may be considered a qualifying managerial duty." This is a serious misunderstanding and mis-statement of the law. It is error for the AAO to ignore this mistake.

We did address the above issue in our decision, stating:

> while the [statutory and regulatory] definition of a manager specifies employees rather than contractors when it indicates that the manager "[s]upervises and controls the work of other supervisory, professional, or managerial employees," the next clause in the definition indicates that the manager can manage a function without directly supervising employees. These points, nevertheless, do not rebut the Director's decision as a whole.

Expanding on what we said in our previous decision, the definition of "managerial capacity" refers specifically to "supervisory, professional, or managerial *employees*"[4] (emphasis added), and contractors are not "employees." To this extent, the Director did not err; the statute and regulations do not discuss contract labor at all. The same statutory and regulatory clauses, however, allow for a function manager who does not directly supervise employees. As shown above, we found the Director to be in error on a specific point, but also found that this error did not undermine the other grounds for

[2] 8 C.F.R. § 103.5(a)(3).
[3] *Compare* 8 C.F.R. § 103.5(a)(3) and 8 C.F.R. § 103.5(a)(2).
[4] Section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii).

denial of the petition. Because we did address this point, the Petitioner's assertion that we did not address it is not grounds for reconsidering our prior decision.

The Petitioner's second point on motion relates to, and expands upon, the first:

> In the [appellate] decision . . . , there was no mention of the controlling decision of the *Irish Dairy Board, Inc.* . . . case which has never been questioned and which is very comparable to the instant case. . . . If this work [performed by contractors] was being done by employees of the petitioning company, there would be no question whether the beneficiary qualified as an executivve [*sic*].

Irish Dairy Board has not been published as a precedent, and therefore it is not, and has never been, a "controlling decision." While AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.[5] The Petitioner has furnished no evidence to establish that the facts of its petition are similar to those in the unpublished decision. In our dismissal notice, we *did* find that management of contract workers could fall within the definition of a function manager. The Petitioner's second point on motion identifies no error that would warrant reconsideration of our earlier decision.

As quoted above, the Petitioner now states that "there would be no question whether the beneficiary qualified as an executi[ve]." At the time of filing the petition, however, the Petitioner consistently referred to the Beneficiary as a manager. On appeal, the Petitioner stated that "[t]he sole issue in this case is whether the beneficiary['s] . . . duties qualify him to be classified as a manager." The Petitioner also stated that the Director made a "mistake in the decision" by citing "the definition of the duties of an 'executive.'" Having stated, on appeal, that the Beneficiary seeks classification as a manager rather than as an executive, the Petitioner reverses course on motion.

The Petitioner's third point on motion is that our dismissal notice:

> relies on a definition of "executive" that requires an executive to have a repeating or routine set of tasks that can be cat[e]gorized and the time that is spent on each can be computed to produce a typical week or month work schedule. That may work for some companies and for the U.S. government but that is not the way many companies are organized and that cannot be done. That is precisely why the need the services of an executive who has the broadest authority to do whatever needs to be done to ensure all of the work gets done. To insist that knowing how many minutes the executive spends each day on various tasks is the only way one can decide if executive duties are being performed makes no sense.

We did not dismiss the appeal based simply on the lack of a minute-by-minute work schedule for the Beneficiary. Rather, we stated:

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[5] *See* 8 C.F.R. § 103.3(c).

> In this instance, the Petitioner has not provided specific information that would establish the exact nature of the Beneficiary's duties from day to day. Instead, the Petitioner has essentially listed a variety of airport support functions and claimed that the Beneficiary is responsible for them. The Director asked the Petitioner to specify the percentage of time devoted to each task, but the Petitioner did not do so. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. . . .
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> . . . It may not be possible to provide a complete account of each of the Beneficiary's various functions, but the information that the Petitioner has supplied has been so vague and general that it gives little, if any, idea as to the nature of the Beneficiary's work on a typical day. We cannot determine whether the Beneficiary's duties are primarily managerial or administrative. This is a crucial distinction because administrative tasks do not qualify as managerial.

The Petitioner's statements on motion do not directly address the above points, and therefore the Petitioner's third point does not warrant reconsideration of our decision.

The Petitioner's fourth and final point on motion is that "the petitioner has transferred most of its operations to the [redacted] and the job duties of the beneficiary have changed. Documentation regarding this job is being gathered and will be forwarded within 2 weeks."

A motion to reconsider contests the correctness of the original decision based on the previous factual record. To seek consideration of new evidence, one must file a motion to reopen.[6] The Petitioner had the opportunity to file a motion to reopen, or a combined motion to reopen and reconsider, but did not do so.

Furthermore, a motion to reconsider "must, when filed . . . establish that the decision was incorrect based on the evidence of record at the time of the initial decision."[7] The new assertion that "the job duties of the beneficiary have changed" cannot meet this requirement, for two reasons. First, the new facts were not part of the evidence of record at the time of the initial decision. New facts cannot show that an earlier decision was legally incorrect at the time of that decision. A petitioner must establish eligibility at the time of filing the petition.[8] USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts.[9]

Second, the Petitioner did not submit this evidence with the motion, instead including it in a supplementary submission. The regulations permit a petitioner to supplement an appeal after filing

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[6] *See* 8 C.F.R. § 103.5(a)(2) and (3); *see also Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).
[7] 8 C.F.R. § 103.5(a)(3).
[8] *See* 8 C.F.R. § 103.2(b)(1).
[9] *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

it,[10] but there is no such provision for motions to reconsider (or motions to reopen). A motion to reopen must meet all applicable requirements "when filed." Any supplementary submission cannot meet that requirement.

The new evidence that followed the filing of the motion would not have provided good cause to reopen the petition, even if the Petitioner had submitted it properly with the filing of a motion to reopen. A new letter from the Petitioner indicates that "because [of] a shortage of aircraft . . . all of the company's flight operations in the United States are handled only in ' but the company plans to acquire another airplane and begin passenger service between and . The Petitioner provides some information about what the Beneficiary's responsibilities will be once this passenger service begins, but it had not yet begun when the Petitioner wrote this letter on December 8, 2015, and the Petitioner was not a passenger airline when it filed the petition on May 29, 2014. The new evidence shows that the has authorized the Petitioner to carry passengers, but this authorization was not in effect until , 2015.

The Petitioner states that it relies on "four ground service providers," and that "[l]etters are attached from each provider explaining what services they provide." The submitted letters, however, do not detail the services provided. One letter refers to "General Cargo Sales services"; the other three state that their companies "provide ground support services."

The newly submitted evidence does not overcome the grounds we stated for dismissing the appeal. Also, the new evidence does not relate to the Petitioner's operations at the time of filing, and therefore cannot establish eligibility as of the filing date. Finally, as explained above, the Petitioner did not properly submit the evidence concurrently with a timely motion to reopen.

For the above stated reasons, the Petitioner's filing does not meet the requirements of a motion to reconsider, and the Petitioner has not shown good cause to reconsider our dismissal decision or to reopen the proceeding.

III. CONCLUSION

The motion will be denied for the above stated reasons. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner.[11] Here, that burden has not been met.

ORDER: The motion to reconsider is denied.

Cite as *Matter of Y-R-E-A- Co.*, ID# 11956 (AAO Oct. 6, 2016)

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[10] *See* 8 C.F.R. § 103.3(a)(2)(vii).

[11] Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013).