U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-M-O-F- INC.

DATE: JULY 11, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a maintenance and cleaning service, seeks to permanently employ the Beneficiary as its "Executives & Managers"[1] 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 Beneficiary "does not meet the qualification requirement of this classification" because he would not be an "employee" of the United States employer. The Director determined that the Petitioner is a corporation, which "claims is majority owned and ultimately controlled by the beneficiary, who purports to assume a role as the petitioner's principal."

On appeal,[2] the Petitioner asserts that it is a legal corporation that is majority owned and controlled by a board of directors, not by the Beneficiary. It further states that the Beneficiary is not the employer and will not set the rules that will govern his work or share in the company's profits and losses.

Upon *de novo* review, we find that the Director offered an analysis that did not accurately reflect the evidence on record regarding the Beneficiary's ownership of the U.S. entity. As the Director's analysis was premised, in large part, on the incorrect determination that the Beneficiary is a majority owner of the Petitioner, we will withdraw the Director's decision and remand the matter for further proceedings consistent with our discussion below.

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[1] The Form I-140, Immigrant Petition for Alien Worker, lists the Beneficiary's proposed position title as "Executives & Managers." The Petitioner's filings do not provide a specific position title for the Beneficiary's prospective employment. We also note that the form does not provide the Beneficiary's complete name. According to a copy of the Beneficiary's passport, his full name is [redacted] The form lists his name as only [redacted]

[2] Although the Petitioner provided a signed and completed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, the attorney who signed the form, [redacted] indicated at Part 3, No. 5 of the form that she was entering her appearance as a representative of the "Applicant," not the "Petitioner," which is the party that filed this appeal. A beneficiary is not the "party affected" in a visa petition and therefore does not have standing to file an appeal in these proceedings. *See Matter of Dabaase*, 16 I&N Dec. 720 (BIA 1979); *Matter of Sano,* 19 I&N Dec. 299 (BIA 1985).

I. LEGAL FRAMEWORK

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 noted earlier, we find that the Director's decision did not accurately reflect the facts and the evidence presented with regard to the Beneficiary's ownership of the U.S. entity, which the record shows is majority owned by the foreign entity, not by the Beneficiary himself. Further, the record contains evidence showing that the Beneficiary has no ownership interest at all in the foreign entity, which is 90% owned by [redacted] and 10% by [redacted] As such, the determination that the Beneficiary is not an "employee" of the Petitioner because he owns and controls that entity is incorrect.

Notwithstanding the Director's error, the record as presently constituted does not establish that the Petitioner met all applicable eligibility requirements. Namely, the Petitioner's electronic filing of this petition was not followed by the submission of any supporting evidence. Despite indicating that it seeks to classify the Beneficiary as a manager or executive, the Petitioner did not disclose the title of the position being offered or provide the required job offer clearly describing the Beneficiary's proposed job duties. 8 C.F.R. § 204.5(j)(5). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The Petitioner also did not provide the required supporting statement demonstrating that the Beneficiary was employed abroad in a managerial or executive capacity and that the Petitioner had been doing business for at least one year as of the date this petition was filed. *See* 8 C.F.R. § 204.5(j)(3).[3]

Although a request for evidence (RFE) was issued with regard to the Petitioner's most recent filing, that RFE did not address the deficiencies specified above and no further evidence has been submitted to establish that the Petitioner had been doing business for at least one year prior to filing this petition

[3] The record shows that the Petitioner filed a Form I-140 (with receipt no. [redacted]) in October 2010, approximately 20 months prior to filing this petition. However, that petition was denied and no appeal was filed. That petition, along with the supporting evidence and the Petitioner's response to a request for evidence issued regarding that filing, indicates that the issue pertaining to the Beneficiary's foreign employment was not adequately addressed. As such, even if we were to rely on evidence associated with the previously filed petition, that evidence still would not be sufficient to establish that the Beneficiary was employed abroad in a managerial or executive capacity.

or that the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity.

III. CONCLUSION

Although the Petitioner did not submit sufficient evidence to meet its burden of establishing that the Beneficiary will be employed in a managerial capacity and that the U.S. operation had been doing business for the one year prior to filing this petition, the Director's decision did not adequately analyze the facts of the matter and apply the law. As the Director did not satisfy this condition, we will remand the matter for entry of a new decision. The Director should request any additional evidence deemed warranted and allow the Petitioner to submit such evidence within a reasonable period of time.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of C-M-O-F-, Inc.*, ID# 4380004 (AAO July 11, 2019)