U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-S-I-G- LLC

DATE: MAY 31, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, which operates a dance school through a wholly-owned subsidiary ([redacted] LLC), seeks to temporarily employ the Beneficiary as its "Manager" under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).[1] The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition on multiple grounds. We dismissed the Petitioner's subsequent appeal from that decision, determining that the Petitioner had not established, as required, that it has a qualifying relationship with the Beneficiary's foreign employer and that it would employ the Beneficiary in a managerial or executive capacity in the United States.[2]

The matter is now before us on a motion to reopen. On motion, the Petitioner submits an affidavit with supporting documentary evidence and contends that the new evidence establishes that all eligibility requirements have been met.

Upon review, we will grant the motion in part and withdraw our finding that the Petitioner did not establish a qualifying relationship with the Beneficiary's foreign employer.[3] However, as the Petitioner has not overcome the remaining ground for dismissal of its appeal, the motion to reopen will be denied.

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[1] As noted in our prior decision, the Petitioner has been inconsistent in its statements as to whether it seeks consideration of this petition under the provisions applicable to new offices at 8 C.F.R. § 214.2(l)(3)(v). The term "new office" refers to an organization which has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The Petitioner was organized as a limited liability company approximately 11 months prior to filing this petition, but marked "No" on the Form I-129, Petition for a Nonimmigrant Worker, where asked if the Beneficiary is coming to the United States to open a new office.

[2] We withdrew the Director's finding that the Petitioner did not establish that it had sufficient physical premises to operate its business.

[3] In our prior decision, we determined that the record lacked sufficient evidence of the foreign entity's ownership, and therefore did not demonstrate that the Petitioner has an affiliate relationship with the Beneficiary's foreign employer as claimed. On motion, the Petitioner submits additional evidence of the foreign entity's ownership and has now established that the Petitioner and foreign affiliate are affiliates based on common ownership and control by the same individual. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L) (defining "affiliate.")

I. MOTION REQUIREMENTS

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen the proceeding to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

II. ANALYSIS

The issue before us is whether the Petitioner has submitted new evidence on motion sufficient to establish that it would employ the Beneficiary in a managerial capacity as defined at section 101(a)(44) of the Act. The Petitioner does not claim that the Beneficiary will be employed in an executive capacity.

The Petitioner has submitted some evidence that is new to the record. For the reasons explained below, however, we find that this evidence does not warrant reopening of the proceeding or approval of the petition.

A. Prior AAO Decision

In our prior decision, we evaluated the totality of the evidence, including the Beneficiary's proposed job duties, the nature of the business, and the Petitioner's staffing levels and organizational structure.

After *de novo* review of the record, we agreed with the Director's conclusion that the Petitioner did not meet its burden to provide a detailed description of the Beneficiary's proposed duties in the United States. The Director had further observed that the description provided for the proposed position as the manager of a dance studio "bore an implausible resemblance" to the description of the Beneficiary's role at the foreign entity, where she was claimed to serve as "Investment Center Director" responsible for overseeing investment and foreign trade departments for a pharmaceutical company.

On motion, the Petitioner asserts that it is submitting "a copy of the Beneficiary's job description with greater specificity." However, the newly submitted description closely resembles the descriptions provided at the time of filing and in response to the Director's request for evidence (RFE). While it is not identical to either prior description, the description contains only superficial differences and therefore, like the earlier descriptions, does not explain the Beneficiary's expected day-to-day duties in greater detail as claimed. The Petitioner has consistently stated that the Beneficiary will allocate 45% of her time to "managing the organization," 25% of her time to establishing its goals and policies, and 30% of her time on "discretionary decision-making over the day-to-day operations." However,

the Petitioner, despite having multiple opportunities to do so, has not added additional specificity to its initial description, even after being informed by the Director and by our office that it was too broad to provide insight into the nature of the Beneficiary's expected day-to-day tasks within the context of the Petitioner's business. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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).

Therefore, while the Petitioner has submitted a new letter describing the Beneficiary's proposed duties, the information provided simply re-states or paraphrases the job descriptions that were previously provided without adding the required specificity; it does not present new facts in support of the motion to reopen.

The record also contains an "expert opinion evaluation" of the Beneficiary's position prepared by [redacted] a faculty member at [redacted] University's [redacted] School of Business.[4] [redacted] lists the broad duties outlined in the Petitioner's description of the Beneficiary's proposed position, summarizes the Petitioner's organizational chart, and asserts that he has read the applicable definition of "managerial capacity." He observes that the Beneficiary's position is "one of the highest in hierarchical command for the duties for which she will be responsible in the United States," and that "[g]iven her advanced standing in the company structure, it is evident that [the Beneficiary's] tasks must function at a high-level with very little supervision from any superior" and that "her role most emphatically constitutes managerial-level responsibilities and expectations."

In evaluating whether the Beneficiary will be employed in a managerial capacity, we review the totality of the evidence. In contrast, the expert opinion here was based on an overly broad position description and an organizational chart, without consideration of other evidence, such as position descriptions for subordinate staff, payroll evidence, and other relevant documentation. Further, [redacted] mischaracterized the Petitioner's organizational chart as depicting "five department supervisors" within the company, a statement that is not supported by the chart itself or by the descriptions of duties provided for the subordinate employees.

We may, in our discretion, use as advisory opinion statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we are also ultimately responsible for making the final determination regarding a beneficiary's eligibility. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.* We acknowledge the Beneficiary's proposed authority over the company as its senior employee. However, because the expert evaluation was based only on a broad job description and an organizational chart, rather than on a review of all relevant evidence, we find that it has limited probative value.

Whether the broad duties attributed to the Beneficiary qualify as managerial in nature depends in large part on whether the Petitioner established that she would have sufficient subordinate staff to supervise

[4] The Petitioner submitted this evidence in response to a notice of intent to dismiss issued by our office prior to adjudicating the appeal. The Petitioner's response was timely, but not incorporated into the record of proceeding prior to our issuance of the dismissal decision.

and perform the day-to-day company activities she is claimed to manage. The fact that the Beneficiary will manage a business as its senior employee does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Section 101(A)(44)(A) of the Act. The Petitioner's description of the Beneficiary's position was not sufficient to establish the nature of her primary tasks.

In our dismissal decision, we also evaluated the Petitioner's staffing and structure and concluded that the Petitioner did not establish that the Beneficiary would be overseeing a subordinate staff of managers, supervisors, or professionals, or that she would, in the alternative, manage an essential function of the organization.

The Petitioner claimed to have 12 staff at the time of filing. The initial organizational chart indicated that the Beneficiary would directly supervise an artistic director and a marketing outreach manager. The artistic director was depicted as overseeing an artistic assistant, a lead dance instructor, and lead fitness instructor, who in turn, oversee three dance instructors and one fitness instructor. The chart depicted the marketing outreach manager as supervising a marketing assistant, an administration assistant, and a front desk employee. The chart depicted the dance studio as fully staffed with no vacancies or future hires.[5]

The Petitioner submitted payroll documentation for September 2017, which coincides with the date of filing the petition. During that month, the Petitioner paid salaries and wages to eight employees, but only two worked on a full time basis (the marketing outreach manager and the marketing assistant). Although the Petitioner later stated that its dance and fitness instructors are paid as independent contractors on Form 1099 and therefore are not reflected on its payroll, it did not provide evidence of payments made to them.

At the time it responded to the Director's RFE in December 2017, the Petitioner claimed to have four full-time employees (the artistic director, the marketing outreach directors and their assistants); four part-time employees (the administration assistant, lead dance instructor and two front desk staff); and seven part-time contractors (the lead fitness instructor, five instructors, and a third front desk employee). The Petitioner provided its payroll statement from November 2017 to corroborate the claimed structure, but once again did not provide evidence of payments made to the contracted staff.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's

[5] The Petitioner's business plan states that it would hire additional staff in the future if it opens a second location, but the record does not reflect that the Petitioner has taken steps to open a second location as of the date of the motion, or that any new positions have been created within the existing dance studio since the date this petition was filed.

supervisory duties unless the employees supervised are professional."[6] *Id.* If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

In our dismissal decision, we acknowledged the Petitioner's claim that the Beneficiary would be supervising two subordinate managers – the artistic director and the marketing outreach manager – who manage the staff and operations of their respective departments, which handle the day-to-day activities of the company. We observed that neither position appeared to exist within the dance studio prior to the Petitioner's acquisition of the business and noted that it was unclear whether dance schools of a similar size typically employ full-time workers in these positions. We also found that the Petitioner had not provided sufficient information regarding the duties performed by the Beneficiary's direct subordinates, and we could therefore not determine whether their actual duties are managerial in nature. Finally, we found insufficient evidence to support a finding that the Beneficiary would be supervising subordinate professionals.

In support of its motion to reopen, the Petitioner has submitted:

- Position descriptions for the artistic director and marketing outreach manager
- Internal "key tasks status reports" illustrating duties assigned to the artistic director and market outreach manager
- Interoffice memoranda issued by the artistic director
- Third-party job descriptions and requirements for an "artistic director" position and a "marketing manager" position.
- Payroll summary for the third quarter of 2018
- Its dance recital programs from June 2017 and June 2018
- Letter from [redacted] Arts Department Head at [redacted] High School in [redacted], who states that, based on her experience as a dance educator, "every dance studio maintains a full-time Artistic Director, as well as full-time staff to manage the Front Desk and Marketing Operations."

The Petitioner asserts that the newly submitted evidence demonstrates that the Beneficiary's direct subordinates qualify as both managers and professionals and that that "the presence of four layers of an organization chart is necessary and reasonable to the success of our company."

The new evidence reflects that the Petitioner has been paying the artistic director wages consistent with a full time position since February 2018, and the newly submitted position description indicates that this employee performs some supervisory duties including recruiting and training dance

[6] To determine whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.

instructors, holding staff meetings, observing classes, and conducting performance evaluations. However, the artistic director also choreographs artistic programming and performances, develops in-studio workshops, teaches a regular schedule of classes, acts as a substitute for other teachers, and runs rehearsals. The position, therefore, performs some supervisory duties, but also performs a number of operational and administrative tasks that are necessary for the operation of the business, as well as teaching students alongside the studio's other instructors. Although the Petitioner claims that the artistic director position requires a bachelor's degree, the Petitioner did not provide evidence that the employee has a degree; the Petitioner only provided a copy of the employee's "Professional Certificate in Business Analysis."

The Petitioner indicates that the marketing outreach manager position performs marketing, communications, and administrative oversight duties while also recruiting leading and motivating administrative assistants and front desk staff; the description does not include any artistic or instruction-related duties. The Petitioner indicates that the role requires a bachelor's degree in management, finance, or business. However, the individual who was identified in this position on the company's organizational charts received her last paycheck in May 2018 and it is not clear whether the Petitioner continues to employ anyone in this position. Moreover, the supporting evidence, including the Petitioner's 2017 program, indicates that this individual was employed as a dance instructor and choreographer, and that her degree is in fine arts, rather than management, finance or business. In addition, although the Petitioner has consistently identified a "marketing assistant" position reporting to the marketing outreach manager, the individual in that position is also listed as a dance instructor and choreographer in both the 2017 and 2018 programs, and he last appeared on the Petitioner's payroll in February 2018. Therefore, the record does not establish that the Petitioner continues to employ either full-time marketing employee, that these marketing staff actually performed the duties attributed to them, or that the employees who left were replaced.

Based on the foregoing, while it appears that the artistic director allocates some of his time to supervisory duties, his role appears to involve substantial operational and administrative tasks, while the marketing operations manager is no longer employed by the Petitioner and may have held an instructional role, rather than a full-time marketing role. The newly submitted evidence does not establish that the Beneficiary qualifies as a personnel manager based on her supervision of managerial, supervisory, or professional employees, and the Petitioner has not claimed on motion that the Beneficiary would qualify as a function manager.

While we acknowledge [redacted]'s opinion that "all dance studios" require full-time artistic directors, marketing managers, and front desk staff, the Petitioner no longer appears to have a full-time marketing manager.[7] It is unclear whether the company continues to have front desk staff; the individual identified as a front desk employee at the time of filing is listed in the "teaching" department for payroll purposes and appears to be a dance instructor based on the submitted programs, while the other part-time front desk staff also left the company. The Petitioner's claimed "administration assistant" remains with the company, but is listed among the "teaching" staff on the latest payroll documents and appears in both the 2017 and 2017 school programs as an instructor and choreographer.

[7] We note that [redacted] is listed on the Petitioner's payroll as a part-time teaching employee who joined the company in 2018, although she does not mention having any employment relationship with the Petitioner.

Overall, while the Petitioner appears to have sufficient current staff to relieve the Beneficiary from performing tasks related to developing the school's curriculum or delivering dance instruction, the structure and staffing of the marketing and administrative department is not sufficiently documented given the departure of the department's full time manager and assistant, and in light of evidence in the record indicating that the department's claimed staff were actually employed as dance instructors. The latest payroll evidence, from September 2018, shows that the Petitioner has a few part-time employees in its "general administration" department; all other staff are classified as "teaching" employees. The Petitioner did not provide an updated organizational chart and we cannot determine that it would have staff to relieve the Beneficiary from performing non-managerial duties associated with the company's day-to-day marketing and administrative activities. Further, as discussed, the new evidence submitted on motion does not provide any further insight into the nature of the Beneficiary's proposed day-to-day duties.

Therefore, the evidence submitted on motion does not overcome our prior decision and the Petitioner has not established that it would employ the Beneficiary in a managerial capacity.

III. ADDITIONAL ISSUE

Although it was not a basis for our dismissal of the Petitioner's appeal, we wish to inform the Petitioner of one additional issue that should be addressed in any future proceeding. Specifically, there is a discrepancy in the record with respect to the Beneficiary's claimed employment history with the Petitioner's foreign affiliate which raises questions as to whether the Beneficiary had at least one year of full-time employment abroad in a managerial or executive capacity in the three years preceding the filing of the petition on September 8, 2017. *See* 8 C.F.R. § 214.2(l)(3)(iii)-(iv).

The record contains a letter from the foreign affiliate which indicates that the Beneficiary was employed abroad in a managerial capacity as "Investment Center Director" from June 1, 2014 until September 11, 2015. The Beneficiary entered the United States in F-1 nonimmigrant student status on September 12, 2015 and her period of time as a student does not count towards her employment abroad even though the foreign entity states that it continued to pay her salary. The Petitioner must therefore establish that her full-time employment abroad occurred between September 2014 and September 2015.[8]

[8] A recent policy memorandum clarified the agency's policy that USCIS will reach back three years from the date of his or her admission to determine whether he or she had the requisite one year of employment in instances where the beneficiary entered the United States to work for a qualifying entity as a nonimmigrant (for example in H-1B status or another work-authorized status). USCIS Policy Memorandum PM-602-0167, *Satisfying the L-1 1-Year Foreign Employment Requirement; Revisions to Chapter 32.3 of the Adjudicator's Field Manual (AFM)* 4 (Nov. 15, 2018), https://www.uscis.gov/legal-resources/policy-memoranda ("*L-1 1-in-3 Policy Memo*"). However, "if a beneficiary was admitted as an F-1 nonimmigrant . . . , the time spent in F-1 nonimmigrant status will not result in an adjustment to the three-year period, because the purpose of admission was for study and not to work 'for' the qualifying organization." *Id.* And even if a qualifying organization financed the F-1 nonimmigrant's studies, the time spent in F-1 status does not result in an adjustment. *Id.* Therefore, "[an] F-1 student would be ineligible for L-1 classification if the last period of qualifying employment with the L-1 qualifying organization abroad was more than two years prior to the time of filing of the instant L-1 petition." *Id.* at n. 9.

Although the Petitioner claims that the Beneficiary held the "Investment Center Director" position for over one year, the record also contains an "Employee Information Registration Form" from the foreign entity which indicates that the Beneficiary held the position of "General Manager Assistant" with a related foreign entity [redacted] Ltd.) from February 2013 until September 2015. U.S. Department of State records reflect that the Beneficiary listed this same employer and job title when applying for her F-1 visa at the U.S. Consulate in Beijing in August 2015. The record does not contain a description of the "General Manager Assistant" position or an explanation for the apparent discrepancy in the Beneficiary's employment history. While we are not denying the petition based on this issue, the Petitioner should be prepared to address this information in any future proceeding.

IV. CONCLUSION

The motion to reopen will be denied as the Petitioner has not overcome all grounds for dismissal of its appeal. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The motion to reopen is granted in part and denied in part.

Cite as *Matter of S-S-I-G- LLC*, ID# 3438903 (AAO May 31, 2019)