U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9016414

Date: JUNE 30, 2020

Motion on Administrative Appeals Office Decision

Form I-129, Petition for Nonimmigrant Worker (H-1B)

The Petitioner seeks to temporarily employ the Beneficiary as a "software engineer" under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The California Service Center Director denied the petition, concluding that the Petitioner had not established an employer-employee relationship with the Beneficiary, and that the proffered position did not qualify as a specialty occupation. After issuing a notice of intent to dismiss (NOID) and reviewing the Petitioner's response to the NOID, we dismissed the appeal. The matter is now before us on a motion to reopen and a motion to reconsider.

We will dismiss the motions.

I. LEGAL FRAMEWORK

To merit reopening or reconsideration, a petitioner must meet the formal filing requirements (such as, for instance, submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1).

A motion to reopen is based on factual grounds and must (1) state the new facts to be provided in the reopened proceeding; and (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider is based on legal grounds and must (1) state the reasons for reconsideration; (2) establish that the decision was based on an incorrect application of law or policy; and (3) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

Section 214(c)(9)(A) of the Act sets the American Competitiveness and Workforce Improvement Act (ACWIA) fee at $1,500 but permits a petitioner with "not more than 25 full-time equivalent (FTE) employees who are employed in the United States (determined by including any affiliate or subsidiary of such employer)" to pay a lower fee of $750.

II. ANALYSIS

In this matter the Petitioner paid the lower $750 fee claiming that it (and any affiliate or subsidiary) did not employ more than 25 full-time employees. Upon our review of the record, we determined that the Petitioner and its affiliates employed more than 25 employees and issued a NOID requesting any evidence the Petitioner had to the contrary. The Petitioner's response did not include such evidence and so we dismissed the appeal. In its combined motion, the Petitioner submits documentation and asserts that it and its two affiliates "are separate legal entities, as such separate legal persons, despite being owned by the same owner who owns and controls these entities." The Petitioner asserts that it is doing business in the United States and as a petitioner should qualify for the reduced ACWIA fee.

A. Motion to Reopen

The Petitioner does not offer new evidence relevant to establishing that it qualifies for the reduced ACWIA fee. Instead the Petitioner reiterates that it and its two affiliated companies are separate entities. We understand that the Petitioner is a separate legal entity from its two affiliated companies. However, the Petitioner continues to acknowledge and the record shows that it is affiliated with the two other companies through the ownership and control of its individual owner.

As determined in the previous decision, ACWIA generally requires every petitioner, unless specifically exempted,[1] to pay the ACWIA fee for each H-1B petition it files. As set out above, a petitioner may qualify for a reduced ACWIA fee if the petitioner, including any affiliate or subsidiary, employs not more than 25 full-time employees. For purposes of the ACWIA fee, U.S. Citizenship and Immigration Services (USCIS) defines the term "affiliates" as: "(1) [o]ne of two subsidiaries both of which are owned and controlled by the same parent or individuals, or (2) [o]ne of two legal entities owned and controlled by the same group of individuals."[2] The Petitioner when considering its two affiliated companies employs more than 25 individuals, thus the $1,500 ACWIA was required.

As the record on motion does not include new, relevant evidence regarding this issue, the Petitioner has not shown proper cause to reopen this matter. The record on motion is insufficient to grant the motion to reopen.

B. Motion to Reconsider

The Petitioner does not assert that the prior decision was based on an incorrect application of law or policy but appears to request that the motion to reconsider be granted because it is a petitioner. However, a petition for this nonimmigrant classification must be properly filed to be considered. The

[1] *See generally* section 214(c)(9)(A) of the Act. None of the exemptions apply here.
[2] *See* USCIS Policy Memorandum PM-602-0147, *Definition of "Affiliate" or "Subsidiary" for Purposes of Determining the H-1B ACWIA Fee* (Aug. 9, 2017).

Petitioner's failure to pay the required filing fees, i.e. the $1,500 ACWIA fee mandates the denial of the petition for this filing deficiency. For the reasons listed above as well as the reasons identified in our previous decision, the Petitioner has not shown proper cause to reconsider the previous decision.

III. CONCLUSION

The Petitioner has not established proper cause to reopen this matter and has not shown proper cause to reconsider the previous decision. The Petitioner has not established it properly filed the petition.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.