U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-USA CORP.

DATE: NOV. 23, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a "management, consulting, development" company which operates a gas station and convenience store, seeks to employ the Beneficiary as its vice president under the multinational executive of manager immigrant classification. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C) & 8 U.S.C. § 1153(b)(1)(C). The Director, Nebraska Service Center denied the petition. We dismissed the Petitioner's subsequent appeal and denied its combined motion to reopen and reconsider. The matter is now again before us on a second combined motion to reopen and reconsider, in accordance with 8 C.F.R. § 103.5. The combined motion will be denied.

In dismissing the Petitioner's appeal, we affirmed the Director's finding that the Petitioner did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity. We further found that the evidence of record did not establish that the Petitioner has a qualifying relationship with the Beneficiary's former foreign employer and concluded that the petition could not be approved for this additional reason. We denied the Petitioner's combined motion after determining that the Petitioner's motion did not meet the requirements for reopening or reconsideration.

On this second motion, the Petitioner asserts that "additional evidence that had been submitted was dismissed without analysis or evaluation, notwithstanding that it had been presented for continued historical and substantive context." The Petitioner asserts that the cumulative evidence in the record supports a finding that the Beneficiary is employed in a qualifying managerial capacity, notwithstanding the small size of the petitioning company, and that there is sufficient evidence to establish the Petitioner's qualifying relationship with the Beneficiary's foreign employer.

I. MOTION REQUIREMENTS

For the reasons discussed below, this combined motion will be denied because the motion does not merit either reopening or reconsideration.

A. Overarching Requirement for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a USCIS officer's authority to reopen the proceeding or reconsider the decision to instances where "proper

cause" has been shown for such action: "[T]he official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision."

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that is properly completed and signed, and accompanied by the correct fee), but the Petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), "Processing motions in proceedings before the Service," "[a] motion that does not meet applicable requirements shall be dismissed."

B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), "Requirements for motion to reopen," states: "A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence."

This provision is supplemented by the related instruction at Part 4 of the Form I-290B, which states: "**Motion to Reopen**: The motion must state new facts and must be supported by affidavits and/or documentary evidence demonstrating eligibility at the time the underlying petition or application was filed." [1]

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).

C. Requirements for Motions to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(3), "Requirements for motion to reconsider," states:

> A motion to reconsider must [(1)] state the reasons for reconsideration and [(2)] 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 [(3)], [(a)] when filed, also [(b)] establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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[1] The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

> Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.

These provisions are augmented by the related instruction at Part 4 of the Form I-290B, which states: "**Motion to Reconsider**: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions when filed and must establish that the decision was based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence of record at the time of decision."

A motion to reconsider contests the correctness of the prior decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new facts. *Compare* 8 C.F.R. § 103.5(a)(3) and 8 C.F.R. § 103.5(a)(2).

A motion to reconsider should not be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991) ("Arguments for consideration on appeal should all be submitted at one time, rather than in piecemeal fashion."). Rather, any "arguments" that are raised in a motion to reconsider should flow from new law or a de novo legal determination that could not have been addressed by the affected party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (examining motions to reconsider under a similar scheme provided at 8 C.F.R. § 1003.2(b)); *see also Martinez-Lopez v. Holder*, 704 F.3d 169, 171-72 (1st Cir. 2013). Further, the reiteration of previous arguments or general allegations of error in the prior decision will not suffice. Instead, the affected party must state the specific factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision. *See Matter of O-S-G-*, 24 I&N Dec. at 60.

II. DISCUSSION

The Petitioner's combined motion to reopen and reconsider consists of the Form I-290B, Notice of Appeal or Motion, and a six-page brief.

A. Motion to Reopen

In the instant matter, the Petitioner submitted the Form I-1290B and a brief but did not provide any additional documentation or present any new facts. Accordingly, the motion does not meet the requirements for a motion to reopen.

"There is a strong public interest in bringing [a case] to a close as promptly as is consistent with the interest in giving the [parties] a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988). Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the Petitioner has not met that burden.

B. Motion to Reconsider

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or USCIS 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. *See* 8 C.F.R. § 103.5(a)(3) (detailing the requirements for a motion to reconsider).

In the motion brief, the Petitioner stated that "[i]n the AAO Denial, additional evidence that had been submitted was dismissed without analysis or evaluation, notwithstanding that it had been presented for continued historical and substantive context." In denying the previous motion, we outlined the documentation submitted with that motion but also emphasized that most of the documentation was from 2014, while this Form I-140 was filed on February 7, 2013 and denied on October 30, 2013. Accordingly, we concluded that the documentation submitted on motion could not support a finding that the decision was incorrect based on the evidence of record at the time of the initial decision, nor could it establish eligibility at the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). The Petitioner did not establish that the evidence submitted on the prior motion would change the outcome of this case if the proceeding were reopened. Accordingly, we did not further analyze or discuss documentation which post-dated the filing of the petition.

The Petitioner also asserts that we made an incorrect finding in our decision by stating the organizational charts submitted by the Petitioner were inconsistent. The Petitioner states that the first organizational chart listed all employees, the second organizational chart listed only management, and the third chart, submitted in support of the previous motion, was updated to show that a new employee had been hired to fill an existing position. The Petitioner asserts that proper weight should be given to the fact that it has consistently paid wages to employees, while less weight should be given to "discrepancies" in organizational charts that are "virtually nonexistent."

At the time of filing, in February 2013, the Petitioner stated on the Form I-140 that it had four employees, but submitted an organizational chart listing seven employees. The Petitioner's state and federal quarterly returns for the first quarter of 2013 show that the Petitioner had four, not seven, employees at the time of filing. In response to the RFE, the Petitioner also submitted copies of its weekly work schedules which show that it had only three employees working for the entire first quarter of 2013. It was not unreasonable to question the accuracy of the submitted organizational charts in light of this evidence. While the subsequently submitted organizational charts may have reflected the petitioner's staffing levels as of the dates they were submitted, it is evident that the initial organizational chart included employees who were not with the company as of the date of filing. Further, the record does not include evidence that the Petitioner ever employed seven workers as indicated on its original organizational chart.

In addition, while the Petitioner claimed in its previous motion that "[i]f a position no longer exists, it is no longer on the Chart," it has not provided an adequate explanation as to why the positions claimed at the time of filing were eliminated, specifically those associated with the store's restaurant operations. The Petitioner operates a store with a sandwich/fast food counter and has not claimed that these products have been eliminated from its product offerings. Absent evidence to the contrary, it is reasonable to believe that someone must still perform the duties formerly attributed to the former assistant restaurant manager and cook positions which the Petitioner claims were eliminated.

The Petitioner asserts that the proffered position qualifies as managerial or executive and that "there was not proper weight accorded to the actual descriptions and responsibilities to be performed by the Beneficiary." The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, we examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

The petitioner correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

Here, the Petitioner's claim that the Beneficiary performs primarily managerial duties is simply not supported by the evidence. The latest sample weekly work schedule provided, which shows a staff of four employees, rather than the three employees identified on the work schedules that coincide with the date of filing, has the Beneficiary spending 21 hours of the week as the only person working in the Petitioner's store, during which he would reasonably be required to perform the duties of a cashier or clerk in order for the store to operate during these hours. The Petitioner has not established by a preponderance of the evidence that he primarily allocates his time to the duties attributed to him in the job description, such as developing the company's overall goals and objectives, representing the company in legal matters and investing funds, researching and developing new business opportunities, or directing marketing and public relations activities, particularly in light of the Petitioner's claim that it also employs an employee senior to the Beneficiary, its President, who performs similar duties. The Petitioner's description of the

Beneficiary's duties does not take into account the significant amount of time in which he is the sole worker available to staff the Petitioner's store and thus has limited probative value with respect to establishing how he actually allocates his time. 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. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The remaining ground of ineligibility in this case was the lack of sufficient evidence to establish that the Petitioner maintains a qualifying relationship with the Beneficiary's foreign employer. The Petitioner claims that 51 percent of its shares are owned by the Beneficiary's former employer in India. In dismissing the Petitioner's appeal, we observed that the only stock certificate submitted indicated that owns all of the Petitioner's stock and that the Petitioner's evidence was not sufficient to show subsequent transfer of 510 shares to the foreign entity.

On motion, the Petitioner asserted that it had provided documentation other than the stock certificate to establish the qualifying relationship. We addressed this documentation in our prior decision and explained why it did not establish by a preponderance of the evidence that the Petitioner is majority owned by the foreign entity.

In the current motion, the Petitioner asserts that "[t]here is sufficient cumulative evidence documenting the affiliated relationship between the U.S. and Indian entities, which has not been properly considered." The Petitioner does not reference any specific evidence that was not considered nor does it acknowledge our discussion of the Petitioner's evidence in the previous motion decision. Further, although we indicated that the Petitioner's stock ledger and copies of all stock certificates issued to date would be needed to support its claims that the transfer of stock from to the foreign entity actually took place, the Petitioner has not provided any additional documentation in support of the current motion.

Finally, we observe that the record contains copies of the Petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for both 2012 and 2013 which identify the Petitioner's Secretary/Manager, as the Petitioner's sole owner. This information contradicts the Petitioner's claim that it is jointly owned by the foreign entity and

We conclude that the documents constituting this motion do not articulate how our decision on motion misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to dismiss the motion was rendered. Accordingly, the motion to reconsider will be dismissed.

III. CONCLUSION

The Petitioner should note that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the combined motion will be denied, the proceedings will not be reopened or reconsidered, and our previous decision will not be disturbed.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of M-USA Corp.*, ID# 14614 (AAO Nov. 23, 2015)