



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF Y-Z-Y-(USA) CORP.

DATE: MAY 5, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a wholesale produce distributor, seeks to permanently employ the Beneficiary as its general manager under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) § 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. The Director concluded that the evidence of record did not establish that: (1) the Beneficiary will be employed in the United States in a managerial or executive capacity, or (2) the Beneficiary has been employed abroad in a managerial or executive capacity. We dismissed the Petitioner's appeal from that decision.

The matter is now before us on a motion to reconsider. On motion, the Petitioner submits a brief from counsel, who argues that the record as a whole favors approval of the petition, and that our decision "focused on several trivial issues that do not warrant the denial of this petition."

Upon review, we will deny the motion to reconsider.

I. MOTION REQUIREMENTS

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 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. A motion that does not meet these requirements shall be denied. *See* 8 C.F.R. § 103.5(a)(4).

B. 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.

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 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.” Also, a motion to reconsider must contest the correctness of the prior decision based on the previous factual record. 8 C.F.R. § 103.5(a)(3).

II. DISCUSSION AND ANALYSIS

The submission constituting the Petitioner’s motion to reconsider consists of a letter from counsel, asserting that our prior decision “focused on several trivial issues that do not warrant the denial of this petition.”

We find that the Petitioner has not met the requirements of a motion to reconsider, despite claiming that our prior decision was made in error. The Petitioner has not identified any incorrect application of law or USCIS policy, or established that our decision was incorrect based on the evidence of record when we issued that decision. Accordingly, we must find that the Petitioner’s filing does not meet the requirements of a motion to reconsider. The motion to reconsider must be denied.

We further note that even if Petitioner met the requirements for a motion to reconsider, the Petitioner did not provide sufficient evidence to establish eligibility for the benefit sought for the following reasons.

The first issue on motion concerns our earlier discussion of the Beneficiary’s job description. In our dismissal notice, we stated:

The petitioner’s initial list of the beneficiary’s duties included “[m]aking the US subsidiary’s overall plan such as setting up the company’s goals” and, separately, “[m]aking company strategies, overall plans, and schemes to achieve the company overall plan.” These stated duties appear to overlap, and provide no information about specific activities that the beneficiary performs. Furthermore, the assertion that the beneficiary makes “overall plans . . . to achieve the company overall plan” is circular.

On motion, counsel disputes these findings, but does not show that they were incorrect. Counsel addresses some of the individual elements of our appellate decision, but does not establish that our findings were in error or that the decision, as a whole, was legally or factually incorrect.

The Petitioner's initial job description for the Beneficiary was more than a page long, but contained few details regarding the actual nature of the Beneficiary's work. The Petitioner had indicated that the Beneficiary spent 8-12 hours per week "setting up the company's goals" and "strategies . . . to achieve" those goals, but these assertions do not describe any identifiable task performed by the Beneficiary. Similarly, the claim that the Beneficiary supervises his subordinates for 10-14 hours per week indicates his level of authority, but does not tell us what that supervision entails. The Petitioner stated that the Beneficiary reviewed reports from subordinate managers for 5-7 hours per week, but the record does not show that the Petitioner's business, with six claimed employees, produces enough reports for the "5-7 hours" figure to be realistic.

A second job description, submitted in response to a request for evidence, contained more details about activities performed by the Beneficiary "and her team managers . . . working closely together," but a list of company functions does not show who performs which specific tasks within those functions. A new percentage breakdown, like the earlier version, focuses on oversight and planning without describing specific tasks performed in furtherance of those broad goals. Like the first description, indicated that the Beneficiary devotes several hours per week to hiring decisions and related matters, although the Petitioner has not explained how its small staff and low turnaround rate warrant such duties to that extent.

With respect to the Beneficiary's subordinates, the Petitioner had originally stated that the Beneficiary supervised the work of an office manager, whose responsibilities include "[a]ct[ing] as [the] General Manager's liaison with suppliers and growers." In response to a request for evidence, the Petitioner expanded the office manager's duties and changed the title of the position to office/logistics manager.

The Petitioner had, on appeal, stated that the original and subsequent versions of job descriptions for the Beneficiary's subordinates are consistent. As an example, the Petitioner stated: "[t]he updated job description also emphasized how the Office manager will act as a liaison with suppliers and growers." In our dismissal notice, we noted: "The updated job description, however, did not mention this duty. Furthermore, the petitioner had initially stated that 'maintaining personal networks with growers' was one of the beneficiary's own duties."

On motion, counsel states: "the updated job description does list and mention the duty of 'liaison with supplier[s] and growers.'" To support this point, counsel quotes several compatible elements from a job description in the record. Counsel, however, quotes not from the office/logistic manager's updated job description, but from the Beneficiary's own job description. Elsewhere on motion, counsel refers to the Beneficiary as the Petitioner's "office/logistics manager," but that is not the Beneficiary's stated title (which is "general manager"). It is, as stated above, the title of one of the Beneficiary's claimed subordinates. The record is inconsistent as to who performs liaison

(b)(6)

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functions, and counsel does not resolve this inconsistency on motion by attributing to the Beneficiary the title of one of her subordinates.

In dismissing the appeal, we cited inconsistencies relating to the documentation of Petitioner's staffing. Most significantly, the name of ██████████ identified as sales and marketing manager, appears on an organizational chart dated August 2014, and on tax and payroll documents from 2013 and 2014, including an IRS Form W-2, Wage and Tax Statement, indicating that the Petitioner paid ██████████ \$30,000 (which is more than most other employees received) in 2013. An "Employment History" chart, however, shows that ██████████ left the company in December 2012.

On motion, counsel calls these discrepancies "a frivolous issue." Counsel does not claim that ██████████ remained an employee, and that the "Employment History" chart erroneously indicated otherwise. Instead, counsel states: "Counsel wants to clarify that it is common that the payroll documentation is different with [*sic*] 'employment history' chart. Salary can be paid to staffs [*sic*] after their leaving." The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaighena*, 19 I&N Dec. at 534 n.2. Counsel cannot overcome or resolve this issue by speculating about possible explanations for the cited discrepancies, or by asserting, without evidence, that "it is common" for payroll records to show continued payments to former employees more than a year after their departure. This discrepancy, by itself, may not warrant denial of the petition or dismissal of the appeal, but it was not the sole basis for either the denial of the petition or the dismissal of the appeal. It remains an unresolved discrepancy that affects the overall credibility of the Petitioner's evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

██████████ stated job duties as sales and marketing manager included establishing sales plans; tracking sales records; visiting suppliers; sending orders to suppliers; and writing correspondence and promotional materials. Counsel, on motion, essentially stipulates that ██████████ has left the company, but the Petitioner has not shown who performs those functions in ██████████ absence.

The remaining statements and arguments on motion relate to the Petitioner's earlier claims and evidence regarding the Beneficiary's prior employment in Singapore. The Director's denial notice cited various inconsistencies and insufficiencies, which the Petitioner did not address or rebut on appeal. In our appellate decision, we cited relevant case law to support the conclusion that the Petitioner had abandoned this issue by not addressing it on appeal. Counsel, on motion, cites no authority that would permit the Petitioner to revisit the issue at this late date.

Unlike an appeal, the filing of a motion to reconsider does not entitle the Petitioner to *de novo* review of the entire record of proceeding. 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 the Petitioner could not have addressed previously. *See Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). The petitioner 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.

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The present matter before us is not a new hearing on the merits of the petition, or of the Director's denial of that petition. After the dismissal of an appeal, the only permissible purpose of a motion to reconsider is to establish error in the appellate decision. New allegations of error at earlier stages in the proceeding cannot establish proper cause for reconsideration.

For the above reasons, we find that the Petitioner, on motion, does not articulate how our appellate decision misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record when we dismissed the Petitioner's appeal. The Petitioner has therefore not met the requirements of a motion to reconsider.

III. CONCLUSION

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 motion will be denied, the proceedings will not be reconsidered, and our previous decision will not be disturbed.

ORDER: The motion to reconsider is denied.

Cite as *Matter of Y-Z-Y-(USA) Corp.*, ID# 16530 (AAO May 5, 2016)