



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

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

MATTER OF H-B-C-, INC.

DATE: OCT. 14, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an operator of dry cleaning establishments, seeks to permanently employ the Beneficiary as its president 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, Texas 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; (2) the Petitioner has the ability to pay the Beneficiary's proffered wage; and (3) the Beneficiary had at least one year of employment with a qualifying foreign employer. The Petitioner appealed that decision to us, and we dismissed the appeal, affirming grounds (1) and (2) and reversing (3).

The matter is now before us on a motion to reopen and a motion to reconsider. On motion, the Petitioner submits tax documents and a list of employees, and asserts that we erred because our decision was not consistent with an adopted decision.

Upon review, we will deny the motions.

I. MOTION REQUIREMENTS

A. Overarching Requirements for a Motion

The regulations limit our authority to reopen the proceeding to instances where the Petitioner has shown "proper cause" for that action.¹ Thus, to merit reopening, not only must the submission 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), but also the Petitioner must show proper

¹ *See* 8 C.F.R. § 103.5(a)(1)(i).

cause for granting the motion. We cannot grant a motion that does not meet applicable requirements.²

B. Requirements for Motions to Reopen and Motions to Reconsider

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.³ A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.⁴

II. MOTION TO REOPEN

By regulation, a motion to reopen must include new facts, supported by affidavits or other documentary evidence.⁵ In this instance, the Petitioner has submitted new documentary evidence, but has not demonstrated new facts that would show proper cause for reopening the proceeding.

The Petitioner filed Form I-140, Immigrant Petition for Alien Worker, on October 6, 2014. The Director denied the petition on October 20, 2015, and we dismissed the Petitioner's appeal on June 9, 2016, based on several findings:

- The Petitioner established that the Beneficiary holds a title of authority abroad at the petitioning company, but did not provide enough details to show that the Beneficiary's activities would be *primarily* executive.⁶ (The Petitioner specified that it seeks to employ the Beneficiary in an executive capacity, rather than in a managerial capacity.)
- The Beneficiary's job description lacked detail and listed some functions that did not appear to conform to the statutory definition of executive capacity.⁷
- The job descriptions for the Beneficiary's subordinates were not consistent with the other evidence in the record.
- The Petitioner had established its ability to pay the Beneficiary's proffered salary in 2015, but not in 2014.⁸

Further details are in the dismissal notice.

² See 8 C.F.R. § 103.5(a)(4).

³ 8 C.F.R. § 103.5(a)(2).

⁴ 8 C.F.R. § 103.5(a)(3).

⁵ 8 C.F.R. § 103.5(a)(2).

⁶ See 8 C.F.R. § 204.5(j)(5), which requires the Petitioner to submit a statement which indicates that the Beneficiary is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe the duties that the Beneficiary will perform.

⁷ See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

⁸ See 8 C.F.R. § 204.5(g)(2).

A. Executive Capacity in the United States

The Petitioner submits a new organizational chart showing 16 employees, and a list of the employees with capsule job descriptions. The Petitioner states that “these employees are in fact performing all the day-to-day work activities required to keep the business operating in the beneficiary’s absence,” and therefore the Beneficiary does not need to perform non-qualifying operational tasks.

The newly submitted organizational chart is largely similar to a chart submitted in response to an earlier request for evidence. It shows developments that occurred after the petition’s filing date, such as the opening of a third store location. The Petitioner must establish eligibility at the time of filing the petition.⁹ USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts.¹⁰

Furthermore, even without the issue of the filing date, the new chart and employee list do not demonstrate that the Beneficiary qualifies for classification as a multinational executive. The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization.¹¹ Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and a beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

The newly submitted materials indicate that the Beneficiary’s immediate subordinate holds the title “Manager,” but she “supervises staff.” Her subordinates are non-professional, non-supervisory, and non-managerial employees. A first-line supervisor of such employees is not a manager by virtue of his or her supervisory responsibilities.

The Petitioner also has a “Junior Manager,” but there is no indication of management responsibility. Rather, the junior manager “Assists Management with dry cleaning activities [and is] Responsible for account work.”

The new employee list and organizational chart add nothing of substance to the record, and therefore they do not represent new facts that show proper cause to reopen the proceeding.

⁹ See 8 C.F.R. § 103.2(b)(1).

¹⁰ See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971).

¹¹ Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

B. Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioning U.S. employer to show its ability to pay the beneficiary's proffered wage at the time the priority date is established (i.e., the petition's filing date) and continuing until the beneficiary obtains lawful permanent residence.

In dismissing the petition, we found that the Petitioner did not pay the Beneficiary in 2014 (the year it filed the petition), and that it had neither the income nor the net current assets to pay the Beneficiary's proffered \$60,000 salary that year.

On motion, the Petitioner submits copies of its 2015 IRS Form 1120, U.S. Corporation Income Tax Return, and the Beneficiary's 2015 IRS Form W-2, Wage and Tax Statement. These documents do not present new information that would change the outcome of the petition. We based our finding on the lack of evidence that the Petitioner paid, or was able to pay, the Beneficiary's proffered wage in 2014. The newly submitted evidence, which relates only to 2015, does not change that conclusion.

In our appellate decision, we acknowledged that the Petitioner began paying the Beneficiary the proffered wage in January 2015. The Beneficiary's compensation apparently declined later in the year, as the total for the year is \$5000 lower than the proffered annual salary of \$60,000. The Petitioner does not explain this shortfall. Instead, the Petitioner claims, incorrectly, that the 2015 IRS Form W-2 shows "full actual payment of his proffered wages for that year (\$60,000)."

The submitted evidence does not establish that the Petitioner has been continuously able to pay the Beneficiary's proffered salary of \$60,000 per year since the petition's filing date of October 6, 2014. Therefore, the newly submitted tax documents do not establish proper cause for reopening the proceeding.

III. MOTION TO RECONSIDER

A motion to reconsider must state the reasons for reconsideration, supported by any pertinent precedent decisions, to establish that the decision was based on an incorrect application of law or USCIS policy. It must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.¹² In this instance, the Petitioner has alleged adjudicative error and cited various precedent decisions in support of the motion. The Petitioner's brief, however, does not establish that our appellate decision was incorrect based on the evidence of record at the time of its issuance. Therefore, the motion does not meet the requirements of a motion to reconsider.

A. Executive Capacity in the United States

Section 101(a)(44)(B) of the Act defines the term "executive capacity" as "an assignment within an organization in which the employee primarily":

¹² 8 C.F.R. § 103.5(a)(3).

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.¹³

The Petitioner cites a precedent decision in which we specified that the Petitioner must prove eligibility by a preponderance of the evidence, meaning that the Petitioner must demonstrate that its claims are probably true, or more likely than not to be true.¹⁴ Identifying this standard of proof, however, does not demonstrate that we failed to follow that standard in our appellate review.

In our dismissal notice, we made several findings regarding the Beneficiary's position as president of the petitioning entity. Those findings included the following:

- The Beneficiary's job description, though more than two pages long, identified few specific duties, and largely paraphrased the statutory and regulatory definition of executive capacity.
- The record contains little information regarding the duties performed by the Beneficiary's subordinates. The individual identified as the manager of the petitioning company stated that she and the junior manager are "responsible for managing the employees who perform the shipping, transportation and distribution activities," but the Petitioner is not engaged in shipping, transportation, or distribution. As a result, the accuracy of the descriptions are in doubt.
- The record shows that the Beneficiary controls the petitioning company, but this control does not, by itself, establish that the Beneficiary devotes his time primarily to executive duties.
- The Director had requested job descriptions for the Petitioner's other employees, but the Petitioner's response did not include the requested information. As a result, the Petitioner did not provide important information about issues such as the distinction between the manager and the junior manager
- We agreed with the Director that the Beneficiary's subordinates earn wages "significantly below the median annual wage of workers in their respective occupations." The Petitioner did not address this issue on appeal.

¹³ See section 101(a)(44)(C) of the Act.

¹⁴ *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

On motion, the Petitioner states that it had previously submitted “[s]ubstantial evidence demonstrating the scope and complexity of the foreign affiliate’s organization, consisting of approximately 170 contracted and subcontracted workers per year.” The Petitioner asserts that our “decision makes no mention of the clearly demonstrated reasonable need that the foreign affiliate has for the beneficiary’s continued executive direction,” and therefore “it appears that this decision contradicts *Matter of Z-A-, Inc.*, Adopted Decision 2016-01 (AAO Apr. 14, 2016).”

In the cited decision, we noted the statutory requirement to “take into account relevant evidence in the record concerning the reasonable needs of the organization as a whole, including any related entities within the ‘qualifying organization.’” We concluded that “it is reasonable for a petitioner to assert that the organizational needs include those of its related foreign components.”¹⁵

There is a critical distinction between the Petitioner in this proceeding, and the employer in *Z-A-*. In the adopted decision, we found that the petitioning U.S. employer:

works closely with its Japanese parent company’s International Department, which employs technical, sales, and administrative staff who are dedicated exclusively to supporting the growth of the group’s business in the Americas. The record amply substantiates the existence of the foreign staff and the nature of and need for the services they provide to the Petitioner and the organization as a whole.¹⁶

In the present case, there is no demonstrated connection between the petitioning U.S. company and the foreign entity, apart from affiliation through common ownership. The U.S. petitioner operates laundry and dry cleaning facilities. The foreign company is a construction firm. There is no evidence that the foreign company supports or provides any services to the petitioning entity. Therefore, taking the foreign company into account would make no difference when determining the reasonable needs of the essentially self-contained U.S. employer.

Turning to the petitioning U.S. employer, the Petitioner states that our dismissal decision “appears to be based on an incomplete review of the existing record.” The Petitioner states that it had previously provided “[s]pecific examples of the beneficiary’s executive decision- and policy-making duties,” such as:

the already completed expansion of the petitioner’s business operations from two locations to three locations; determining the most cost-efficient ways to incorporate the petitioner’s currently outsourced accounting functions into the petitioner’s existing organizational structure, formulating marketing, sales and diversification strategies while overseeing the expansion, diversification and hiring of additional employees to implement these strategies, as well as many other executive duties.

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 6.

The above language is largely from the Petitioner's response to the Director's request for evidence, already addressed in the denial notice and quoted at length in our dismissal notice. The expansion of the Petitioner's business occurred after the petition's filing date. As we have already noted, the Petitioner must establish eligibility at the time of filing the petition, rather than relying on subsequent developments such as the Petitioner's expansion.¹⁷

With respect to "determining the most cost-efficient ways to incorporate the petitioner's currently outsourced accounting functions into the petitioner's existing organizational structure," every employer has someone in a position with hiring authority. The assertion that the Petitioner plans to employ an in-house accountant or bookkeeper does not provide a meaningful degree of detail. Also, the decision to hire an accountant is a one-time event rather than a continuing demand on the Beneficiary's time.

The assertion that the Beneficiary is "formulating marketing, sales and diversification strategies while overseeing the expansion, diversification and hiring of additional employees to implement these strategies" does not establish that these activities take up a significant portion of the Beneficiary's time. As noted above, the only documented expansion of the company consisted of the purchase of a third location, with minimal accompanying growth in personnel (from 14 employees at the time of filing to 16 at the time of the motion two years later).

The quoted passages do not establish that the petitioning organization is sufficiently complex to warrant executive-level leadership.

The Petitioner has cited adopted and precedent decisions in support of its assertions on motion, but these sources address only general points and do not demonstrate that we erred in our appellate decision. The Petitioner has not shown proper cause to reconsider our earlier finding regarding the Beneficiary's claimed executive capacity with the petitioning entity.

B. Ability to Pay

The Petitioner states that it has "clearly established" its ability to pay the Beneficiary \$60,000 per year from the filing date onwards. The Petitioner cites the newly submitted 2015 tax documentation. As we have already discussed, we did not question the Petitioner's ability to pay the Beneficiary in early 2015 (although the new evidence contradicts the Petitioner's claim to have paid the Beneficiary the full rate of pay for all of 2015).

Regarding 2014, the Petitioner states that it need only establish its ability to pay the Beneficiary from October 6 (the filing date) through the end of the year, and that its \$34,653 in net current assets for that year "are sufficient to pay a salary of \$5,000 per month for three months."

¹⁷ See 8 C.F.R. § 103.2(b)(1); see also *Matter of Katigbak*, 14 I&N Dec. 49.

The Petitioner made the same assertion on appeal, and we addressed it in our dismissal decision:

The Petitioner requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay the proffered wage for a three-month period any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of a beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, in this case the Petitioner has not submitted such evidence.

On motion, the Petitioner does not address or rebut the above conclusions. The Petitioner merely repeats the assertion that the end-of-year net current assets were sufficient to pay the Beneficiary's salary for three months.

We note that the Petitioner began 2014 with only \$8,794 in current assets and \$196,087 in current liabilities. Therefore, it is not evident that the \$34,653 in net current assets were available to pay the Beneficiary's salary starting on October 6, 2014.

The Petitioner identified no error in our discussion of its ability to pay the Beneficiary; it only repeated an argument we had already addressed. The Petitioner has not shown proper cause to reconsider our decision relating to its ability to pay the Beneficiary's proffered salary.

IV. CONCLUSION

The motion to reopen and the motion to reconsider will be denied for the above stated reasons. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner.¹⁸ Here, that burden has not been met.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of H-B-C-, Inc.*, ID# 47549 (AAO Oct. 14, 2016)

¹⁸ Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013).