



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

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

MATTER OF S-USAE- INC.

DATE: SEPT. 8, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an owner and operator of convenience stores and gas stations, 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, concluding that the evidence of record did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity. We dismissed the Petitioner's appeal from that decision, with an additional finding that the Petitioner had omitted information that we required in order to determine its ability to pay the Beneficiary's proffered wage.

The matter is now before us on a motion to reconsider. On motion, the Petitioner asserts that we erred by making an "unfounded determination" despite "overwhelming evidence" of eligibility.

Upon review, we will deny the motion.

I. MOTION REQUIREMENTS

A. Overarching Requirement for Motions by a Petitioner

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states that "the official having jurisdiction may, for proper cause shown, reopen the proceeding." This provision limits our authority to reopen the proceeding to instances where "proper cause" has been shown for such action. Thus, to merit reopening, the submission must not only meet the formal requirements for filing, but the petitioner must also show proper cause for granting the motion.

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.

A motion to reconsider should not be used to raise a legal argument that could have been raised earlier in the proceedings.¹ 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 earlier by the affected party.² 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.³

II. DISCUSSION

On motion, the Petitioner claims that we made errors of both law and fact, leading to dismissal of the appeal when we should have sustained it and approved the petition.

Here, we will not discuss the full merits of the petition or all of the specific factors leading to the denial of the petition or the dismissal of the appeal. Those details appear in our earlier decision dated April 8, 2016. Instead, we will focus on the points the Petitioner raises on motion.

A. U.S. Employment in a Managerial or Executive Capacity

The definitions of the terms “executive capacity” and “managerial capacity” appear at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44), and in the regulation at 8 C.F.R. § 204.5(j)(2). Our conclusion that the Beneficiary did not qualify as a manager or executive at the time of filing on November 21, 2011, rested on the following findings:

- The Petitioner did not provide enough information about the Beneficiary’s duties or those of her subordinates to show that other employees relieved the Petitioner from performing non-qualifying duties; and
- The record did not support the level of organizational complexity that the Petitioner claimed.

On motion, the Petitioner states: “Despite the overwhelming evidence that petitioner was operating three business locations, with up to seventeen (17) employees, and millions of dollars in sales . . . the

¹ 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.”).

² *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).

³ See *Matter of O-S-G-*, 24 I&N Dec. at 60.

AAO still made the unfounded determination that [the Beneficiary] was not serving in an executive capacity with the US Company!"

We are bound by the statutory definition of "executive capacity" at section 101(a)(44)(B) of the Act. That decision does not state or imply that the number of locations, size of staff, or volume of sales income facially demonstrates that the head of the company serves in an executive capacity.

The Petitioner states that the Beneficiary's duties "are clearly executive in nature," but that "the AAO . . . tried to find one or two small instances that it deems not to be executive functions." The Petitioner states that we did not explain how the Beneficiary's duties are not those of an executive.

The Petitioner had previously submitted an unsigned statement showing the approximate percentage of time devoted to each of the Beneficiary's responsibilities:

[The Beneficiary] will confer with the managers and assistant managers to plan business objectives, to develop organizational policies, to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives (35%). She will review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plan in accordance with current conditions (20%). She will direct and coordinate formulation of financial and sales programs to provide new sources of income, to maximize returns on investments, and to increase sales (15%). She will work with suppliers and distributors to obtain the best prices for the products that the business sells (10%). In addition, she will hold regular staff meetings to insure that the above goals are realized, and to evaluate staff performance (5%). In that regard, she is ultimately responsible for the hiring and firing of all employees of the business.

Most importantly, at the present time, she is actively looking for additional investments in the United States (15%). For instance, the company has plans to open one or two more similar businesses that it will operate as truck stops, with full restaurant facilities.

On motion, the Petitioner asserts that "the AAO could only select one of those duties that it considered non-executive in nature," specifically her work "with suppliers and distributors." This, however, is not an accurate reading of our prior dismissal decision. We stated:

The Petitioner asserts that the Beneficiary will review reports and statements and will coordinate financial and sales programs, which are vague and do not include the specific tasks the Beneficiary performs in carrying out such generic duties. Accordingly, it is not possible to conclude that these tasks are primarily managerial or executive duties rather than the daily operational tasks necessary to operate one or more convenience stores. The few tasks more concretely described by the Petitioner suggest that the Beneficiary is actively participating in the performance of non-

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qualifying duties. For example, working with suppliers and distributors is a requisite operational task and is not a duty that is primarily managerial or executive. Likewise, looking for additional investments appears to be the duty of an investor, not an individual primarily engaged in current managerial or executive duties.

We further questioned the Petitioner's claim to have two levels of management below the Beneficiary, noting that the Petitioner did not submit position descriptions for the claimed general managers and store managers. The lack of position descriptions prevented us from finding that the Beneficiary would oversee subordinate managers as claimed. Additionally, we noted that the Petitioner did not demonstrate that any of its subordinate managers were employed on a full time basis. Because the Petitioner did not demonstrate that the Beneficiary would be supported by subordinate managerial staff as claimed, the Petitioner's claim that the Beneficiary would spend 35% of her time "confer[ring] with the managers and assistant managers" is called into question.

The above discussions in our earlier decision touched on all the elements, not just one, of the Beneficiary's job description. The Petitioner addressed only one element on motion, stating that "work[ing] with suppliers and distributors to obtain the best prices . . . is most assuredly an executive function" that "is definitely not something left to a lower level employee of the company."

To support this assertion, the Petitioner quotes a [REDACTED] story from 2007, which reported that the [REDACTED] that [REDACTED] at a time when other airlines were losing money due to increasing fuel prices. The Petitioner does not establish that the Beneficiary performed similar tasks. In our decision, we found that the Petitioner had provided minimal details about the Beneficiary's specific tasks. The Petitioner, on motion, does not address or rebut that finding.

Elsewhere in the brief on motion, the Petitioner repeatedly states that it had 17 employees at the time of filing.

There is no provision in the statute, regulations, or case law to support the assertion that, if one has 17 subordinates, then one must qualify as an executive or a manager. Furthermore, the Petitioner had not established the extent to which these subordinates were able to relieve the Beneficiary from performing non-qualifying tasks.

The Petitioner's organizational chart indicated that each of its four local gas station/convenience stores employed a manager, assistant manager, and one or two cashier/clerks. Tax documents, detailed in our previous decision, indicate that the store employees earned between \$320 and \$4400 per quarter, and the claimed managers earned \$3600 or less per quarter. In our dismissal notice, we stated:

The quarterly returns show that even the managers earned less than the federal minimum wage for a 40-hour week in 2013, and the cashier/clerks earned substantially less than that amount. This suggests that these managers have operational duties at the stores at times when there are no lower-level employees

present to perform those duties. The Petitioner appears to have one store with no assigned store employees, and has not documented any wages paid to another store's claimed manager. These are businesses which are generally open seven days per week beyond normal 9 to 5 operating hours so it is unclear how the two businesses with only one to three employees are able to maintain one person at a cash register during operating hours, much less operate with a three-tiered structure.

The Petitioner, on motion, has not addressed the above issues.

The Petitioner states that we misapplied case law⁴ in our decision. The Petitioner had opened new stores after the filing date of the petition and, in one instance, the appeal. We had cited *Katigbak* to support the proposition that these new developments could not make the Beneficiary newly eligible if she had not already been eligible when the Petitioner filed the petition.⁵

The Petitioner states that "the holding in *Katigbak* is not at all analogous to this case," because *Katigbak* involved an individual who did not earn a required degree until after the filing date, whereas the Beneficiary "qualified as an executive . . . at all times through the processing of the petition." *Katigbak* does not establish the Beneficiary's ineligibility, and we did not claim otherwise. We cited *Katigbak* for a limited purpose, specifically to state that the Petitioner's recent expansion cannot retroactively establish eligibility. On motion, the Petitioner has not shown that we misapplied *Katigbak* in this regard.

On appeal, the Petitioner had noted the approvals of prior nonimmigrant petitions on the Beneficiary's behalf. In our dismissal notice, we stated: "The denial notice does not indicate whether the Director reviewed the prior approvals of the nonimmigrant petitions. The approved nonimmigrant petitions are not part of the record of proceeding before us, and therefore we cannot determine whether or not the Director approved them in error."

On motion, the Petitioner states: "This is nothing more than another attempt to find some other reason for not approving the petition." The Petitioner states that the Director was aware of the prior approvals and did not explain why they were deficient. The Petitioner concludes that "[i]t must be assumed, therefore, that the three prior approvals were issued appropriately and that the instant decision by the AAO is the one that is improper."

We did not state that the Director was unaware of the approvals. Rather, we stated that there was no indication that the Director had reviewed the approved petitions. Also, the Petitioner cites no statute, regulation, case law, or other authority to show that, where a nonimmigrant petition is approved and an immigrant petition is denied, the denial is presumed to be in error.

⁴ *Matter of Katigbak*, 14 I&N Dec. 45 (Reg'l Comm'r 1971).

⁵ *See id.* at 49.

We had cited case law to support the proposition that “[w]e are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous.”⁶ The Petitioner, on motion, states that *Church Scientology* “is not based on the same set of facts as the instant case.” The Petitioner does not explain how these differences should create a presumption of deference toward the prior approvals of the nonimmigrant petitions.

The Petitioner quotes “[t]he most serious error in the AAO decision”:

The Director acknowledged the Beneficiary’s discretionary authority over the business, but found that the Beneficiary’s primary responsibility appeared to be “first-line supervision of nonmanagerial, nonsupervisory, nonprofessional personnel.” The Director stated that the Petitioner had not shown that it employs sufficient subordinate staff to “relieve the beneficiary from performing the day to day duties required to operate the business.”

The language in quotation marks comes from a notice of intent to deny that the Director issued before denying the petition, and therefore does not represent our own findings on appeal.

The Petitioner states: “It is difficult to see how the AAO could possibly find that [the Beneficiary] was a first line supervisor as opposed to an executive with the company.” Here, the Petitioner confuses the Director’s statements in a pre-decision notice with a finding by the AAO. Also, the Petitioner incorrectly states that we must choose between only two possibilities: either the Beneficiary was a first-line supervisor or she was an executive. This dichotomy ignores the middle ground, in which the Beneficiary may have the same discretionary authority as a manager or executive, but the Petitioner has not shown that managerial or executive duties make up the majority of her activities with the organization. As stated in our prior decision, the fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be “primarily” of an executive or managerial nature.⁷ While the Beneficiary may exercise discretion over the Petitioner’s day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the evidence in the record is insufficient to establish that her actual duties, as of the date of filing, would be primarily executive in nature. Rather than address the specifics of our finding, the Petitioner has repeated the assertion that anyone running a business with 17 employees and four locations must qualify as an executive.

For the above reasons, we find that the Petitioner has not shown cause for reconsideration of our prior decision. The Petitioner has not identified any errors of law, policy, or fact that would establish that the decision was incorrect based on the evidence of record at the time of our decision

⁶ *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm’r 1988).

⁷ Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

to dismiss the Petitioner's appeal. The motion does not establish proper cause to reconsider our decision of April 8, 2016.

B. Ability to Pay

Our appellate decision included an added finding:

Part 6, line 8 of Form I-140 instructed the Petitioner to specify the Beneficiary's intended wages. The Petitioner left this line blank. Without this information, we cannot compare the Petitioner's available income or assets to the Beneficiary's proffered wage, and thus we cannot find that the Petitioner has established its ability to pay that wage.⁸

On motion, the Petitioner stated that the petition included a letter from the Beneficiary, stating that "[s]he receives a salary of \$4,000 per month plus company bonuses." IRS Forms W-2, Wage and Tax Statements, showed that the Beneficiary earned \$46,440 in 2012. The Petitioner, on motion, claims that the Beneficiary's "salary increased slightly to \$48,000 at the beginning of 2013." The Petitioner concludes that "the finding by the AAO that there was insufficient evidence to show that petitioner had the ability to pay beneficiary's wage is totally without merit."

We did not find "insufficient evidence" of ability to pay. Rather, we found that the Petitioner had provided insufficient *information*, because the Petitioner had left part of the petition form blank. Without a statement of the Beneficiary's proffered wage, we have nothing to compare to the Petitioner's financial information. We acknowledge the statement regarding the Beneficiary's then-current salary, but that is not necessarily the same as the proffered salary that the Beneficiary would earn upon approval of the petition. A statement of the Beneficiary's then-current salary, with no indication of future compensation plans, does not overcome our finding.

Also, the record does not support the claim that the Beneficiary's annual "salary increased . . . to \$48,000 at the beginning of 2013." IRS Form 1125-E, Compensation of Officers (included with the Petitioner's 2013 IRS Form 1120, U.S. Corporation Income Tax Return), showed that the Beneficiary earned \$42,750 in 2013. This is a decrease, not an increase, in her annual compensation compared to 2012.⁹

The Petitioner has not specified what it intends to pay the Beneficiary in the future, and the record contradicts the Petitioner's assertions on motion regarding the Beneficiary's rate of pay in 2013. The Petitioner identified no error of fact, law, or policy in our prior decision. Therefore, the Petitioner has not overcome the supplemental finding in our dismissal notice.

⁸ The regulation at 8 C.F.R. § 204.5(g)(2) requires this information.

⁹ An automobile accident on December 17, 2013, documented in the record, occurred too late in the year to account for the \$5,250 gap between the Beneficiary's documented earnings and the claimed \$48,000 figure.

III. CONCLUSION

The motion will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner.¹⁰ Here, that burden has not been met.

ORDER: The motion to reconsider is denied.

Cite as *Matter of S-USAE- Inc.*, ID# 10053 (AAO Sept. 8, 2016)

¹⁰ Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013).