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

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

MATTER OF SK&NKU- INC.

DATE: OCT. 30, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner seeks to employ the Beneficiary as an accountant and extend her classification as an H-1B nonimmigrant worker in a specialty occupation.¹ See section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, denied the petition. The Petitioner appealed the denial to the Administrative Appeals Office (AAO), which we dismissed. The matter is now before us on a combined motion to reopen and reconsider. The combined motion will be denied.

We dismissed the appeal, concluding that the evidence of record was inadequate to establish that the duties of the proffered position comprise the duties of a specialty occupation. In particular, we found that the Petitioner's descriptions of the Beneficiary's proposed duties were overly broad and did not provide sufficient information conveying the substantive nature of duties or the practical and theoretical knowledge that the Beneficiary would have to apply to perform them. We also found that the Petitioner did not sufficiently differentiate the proffered duties – which include communicating with companies regarding purchase orders, sales orders, and inventory, and generating billing and shipping invoices – from routine bookkeeping functions. Furthermore, we discussed in detail why the proffered position did not satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). We also noted that because the Petitioner in this matter is a separate and distinct entity from [REDACTED]

[REDACTED] – none of which filed separate petitions for the Beneficiary – we could not consider the Beneficiary's claimed duties for these other entities.

On motion, the Petitioner asserts three grounds for why it believes our decision was erroneous. First, the Petitioner contends that our decision was incorrect because we did not consider the Beneficiary's duties involving the Petitioner's "commonly owned and controlled group of companies," which would take up 25% of her time. The Petitioner states:

¹ Although the Petitioner did not provide any information on the Form I-129 regarding its type of business, on the Form I-129 H-1B Data Collection Supplement and the Labor Condition Application, the Petitioner provided a North American Industry Classification System (NAICS) Code of 531390, "Other Activities Related to Real Estate." This code is described as for "establishments primarily engaged in performing real estate related services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "531390, Other Activities Related to Real Estate," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Oct. 29, 2015).

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[P]er 20 CFR 655.736 and 26 CFR 1.1563-1, all of our previously documented qualifying commonly controlled organizations are considered by USCIS as part of our organization for H1B purposes, so work done on our companies behalf for our commonly owned companies should be considered qualifying work which we had available for [the Beneficiary]. The decision ignored this entire point, which we had repeatedly tried to explain in the previous H-1B application and in our appeal, that our combined group of companies require[s] our company to manage their operations in varying degrees as a management hub

Second, the Petitioner contends that we “ignored favorable evidence,” including the stated job duties and the opinions of [REDACTED] and [REDACTED] indicating that the proffered position is that of an accountant rather than a bookkeeper.

Third, the Petitioner contends that we “relied incorrectly on the wage level being 1,” and that the wage calculations “should not be considered the sole factor in determining the complexity of [the Beneficiary’s] job duties.”

In support of the combined motion, the Petitioner submits, *inter alia*, a copy of the regulations at 26 C.F.R. § 1.1563-1 and 20 C.F.R. § 655.736.

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 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 . . . was filed.²

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.

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

² 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, and such instructions are incorporated into the regulations requiring its submission.”

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

For the reasons discussed below, the combined motion will be denied.

In support of the motion, the Petitioner submits a brief explaining why it believes our decision to dismiss the appeal was erroneous. The Petitioner has not, however, presented any evidence that could be considered “new facts.” As such, the Petitioner’s motion does not satisfy the requirements of a motion to reopen. Consequently, the motion to reopen will be denied.

Nor does the Petitioner’s motion satisfy the requirements of a 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 must 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) (requirements for a motion to reconsider); Instructions for Motions to Reconsider at Part 4 of the Form I-290B.

Here, the Petitioner’s stated reasons for reconsideration are insufficient to establish that our decision was incorrect.

First, the Petitioner contends that we erred by failing to consider the Beneficiary’s duties for the Petitioner’s “commonly owned and controlled group of companies,” which would take up 25% of her time. The Petitioner cites to the regulations at 20 C.F.R. § 655.736 and 26 C.F.R. § 1.1563-1 in support of its assertion that these companies should be considered “qualifying commonly controlled organizations.”

The Petitioner’s assertions are unpersuasive. The Petitioner has not sufficiently demonstrated that these companies can be considered one and the same entity as the Petitioner, such that we can consider the Beneficiary’s claimed duties on their behalf. As stated in our previous decision, a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50-51 (A.G., BIA 1958); *Matter of Aphrodite Invs. Ltd*, 17 I&N Dec. 530 (Comm’r 1980); and *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Act. Assoc. Comm’r 1980). We observe that these other companies have been separately formed, file their own tax returns, and have different ownership structures. All of these factors support the conclusion that these entities are separate and

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distinct from the Petitioner, and should be treated as such.³ Thus, if the Beneficiary will perform part-time duties for entities other than the Petitioner, each of those entities must file petitions on her behalf.

While the Petitioner cites to the regulations at 26 C.F.R. § 1.1563-1, and 20 C.F.R. § 655.736, we are not persuaded that these regulations are pertinent to the issue at hand. More specifically, the regulation at 20 C.F.R. § 655.736 defines what constitutes an “employer” *for purposes of determining H-1B dependency status*. Here, however, the issue is not whether the Petitioner is H-1B dependent. The Petitioner has not cited to any statutes, regulations, and/or precedent decisions to support the proposition that we may consider the Beneficiary’s duties for entities other than the Petitioner, when those entities have not filed separate petitions on the Beneficiary’s behalf.⁴

In any case, even if we could consider the Beneficiary’s duties with respect to these other entities, these duties only comprise 25% of the Beneficiary’s duties, an unknown percentage of which are actually accounting duties. As these duties do not comprise a significant percentage of the Beneficiary’s overall duties, we do not agree with the Petitioner that “[i]gnoring this [unknown percentage of] 25% of important and complex duties led to the denial.”

The fundamental deficiency in this record of proceeding rests with the overly broad and vague descriptions of the proffered duties. The Petitioner’s descriptions did not provide sufficient information conveying the substantive nature of duties or the practical and theoretical knowledge needed to perform them, nor did they sufficiently differentiate the proffered duties from routine

³ According to the Petitioner’s federal tax returns, the Petitioner also does not claim to own or control any corporation, either directly or indirectly, by a substantial percentage. The Petitioner also previously submitted 2012 tax returns for [REDACTED] however, none of those tax returns indicate any common ownership with the Petitioner.

The Petitioner requests that we acknowledge that its operations incorporate the management of several other businesses. More specifically, the Petitioner asserts that it acts as a “management hub” for these other businesses, and that all accounting services for the Petitioner and those business will be made from the Petitioner’s office. The record of proceeding lacks any written contracts or other credible evidence demonstrating the actual, specific terms of agreement, if any, between these companies (including all owners of each company) and the Petitioner. Although the Petitioner explains that no formal contracts have been executed, “going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.” *In re Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). Without more, we cannot consider the Petitioner’s claimed responsibilities for all of these companies.

⁴ Nevertheless, we note that the Petitioner undermines its own position by citing to the regulations at 26 C.F.R. § 1.1563-1, and 20 C.F.R. § 655.736. For instance, the Petitioner did not claim these other entities’ employees on the Form I-129 with respect to its total number of employees. Instead, the Petitioner answered that it has “7 (plus 2 owners)” in response to Part 5, Question 13, “Current Number of Employees in the U.S.” In other documentation, the Petitioner indicated that these other entities employ at least 27 employees. The Petitioner also indicated on the Form I-129 H-1B Data Collection Supplement that it currently employs a total of 25 or fewer full-time employees in the United States, *including all affiliates or subsidiaries of the company/organization*, and paid the lower fees mandated by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Pub. L. 105-277, 112 Stat. 2681 (1998). Therefore, we find the Petitioner’s reliance upon these regulations to be misplaced.

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bookkeeping functions. For instance, we observed in our previous decision that the Petitioner did not demonstrate how the duties of communicating with companies regarding purchase orders, sales orders, and inventory, and generating billing and shipping invoices, are elevated above the duties of a bookkeeper or accounting clerk to those of an accountant. On motion, the Petitioner has not specifically addressed these and other deficiencies we noted in our decision.

With respect to the Petitioner's second contention that we "ignored favorable evidence," including the letters from [REDACTED] and [REDACTED] this contention is unpersuasive as well. In our prior decision, we provided a detailed discussion of why the opinion letters from [REDACTED] and [REDACTED] were insufficient and thus accorded little probative value. For example, we determined that [REDACTED] did not explain or otherwise clarify how the proffered duties relating to inventory, accounts payable and receivable, billing, and shipping invoices require the services of an individual with an accounting, finance, or related degree. We also determined that [REDACTED] did not identify the objective sources he reviewed, and that he listed specific degree requirements that were not provided by the Petitioner. Again, the Petitioner did not specifically address these and other findings we made in our decision.

The Petitioner's third contention that we incorrectly relied upon the wage level as the "sole factor in determining the complexity of [the Beneficiary's] job duties" is not accurate. Our consideration of the Level I wage rate was not the "sole factor," as claimed. Moreover, the Petitioner did not explain why our reliance upon the wage level was incorrect. As we explained in our prior decision, a Level I wage indicates that the proffered position is a comparatively low, entry-level position relative to others within the occupation. Such a wage level also indicates that the Beneficiary is only required to have a basic understanding of the occupation; would perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised, monitored, and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. The Petitioner did not explain and reconcile how its selection of the Level I wage rate is consistent with the claimed complexity of the proffered duties in support of this motion. It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The documents constituting this motion do not articulate how our decision on appeal misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to dismiss the appeal was rendered. Accordingly, the Petitioner's motion to reconsider will be denied.

Finally, the motion does not meet the applicable requirements for an additional reason. More specifically, the motion does not contain a statement pertinent to whether the validity of the unfavorable decision has been or is the subject of any judicial proceeding, which is required by 8 C.F.R. §103.5(a)(1)(iii)(C). Thus, the combined motion must also be denied for this additional reason.

III. CONCLUSION

The combined motion does not meet the requirements for a motion to reopen or a motion to reconsider. Therefore, the combined motion will be denied.

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 SK&NKU- Inc.*, ID# 14825 (AAO Oct. 30, 2015)