U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-H-E-, INC.

DATE: AUG. 18, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an electrical contractor, seeks to temporarily employ the Beneficiary as a "business manager" under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Petitioner appealed the denial, which we dismissed on the basis that the Petitioner had not established that the proffered position qualifies as a specialty occupation. The Petitioner filed a motion to reconsider our decision, which we denied.

The matter is now once again before us on a motion to reconsider. In its motion, the Petitioner asserts that our decision was not in accordance with the law. We will deny the motion.

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, Notice of Appeal or Motion, 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 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.[1]

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

For the reasons discussed below, the motion to reconsider will be denied.

[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, and such instructions are incorporated into the regulations requiring its submission."

The issue here is limited to whether our decision, dated May 4, 2016, to deny the motion to reconsider was incorrect.[2] In that decision, we considered all evidence submitted but concluded that the Petitioner did not articulate how our decision to dismiss the Petitioner's appeal misapplied any pertinent statutes, regulations, or precedent decisions based on the previous factual record.

The Petitioner's stated reasons for reconsideration are insufficient to establish that our decision was incorrect. In the motion brief, the Petitioner asserts that the proffered position qualifies as a specialty occupation for the same reasons stated in prior proceedings. The Petitioner did not articulate how our May 4, 2016, decision that rejected these arguments was based on an incorrect application of law or policy. In support of the motion to reconsider currently before us, the Petitioner submits a lengthy brief with supporting evidence explaining why it believes the proffered position qualifies as a specialty occupation. The Petitioner individually discusses each issue we addressed in our prior decision denying the motion, asserting that our analysis on each issue was incorrect. However, the Petitioner does not support these assertions with examples of how we misapplied any pertinent statutes, regulations, or precedent decisions based on the record before us at the time of the decision.

For example, the Petitioner once again asserts that the proffered position meets the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*). The Petitioner again relies upon the *Occupational Outlook Handbook* (*Handbook*) chapter on "Sales Managers," noting that "most managers have a bachelor's degree" and that "some have a master's degree." The Petitioner asserts that we "conveniently omitted" the discussion about some managers having a master's degree, and once again asserts that we erred by failing to draw proper conclusions from the relevant parts of the *Handbook* and the Occupational Information Network (O*NET). We find the Petitioner's assertions unpersuasive. Although the Petitioner's assertions are noted, the requirement of an otherwise unspecified general bachelor's or even master's degree – without more – is insufficient to establish a position as a specialty occupation. The Petitioner contests this finding, but provides no persuasive evidence to demonstrate that our conclusion was erroneous.

As we stated in both our November 30, 2015, and May 4, 2016, decisions, all of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii) as to require not only a bachelor's or higher degree, but a bachelor's or higher degree *in a specific specialty*, or its equivalent. The regulatory language in 8 C.F.R. § 214.2(h)(4)(iii)(A) must be construed in harmony with the thrust of section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii), both of which define the term "specialty occupation" as requiring the attainment of a bachelor's or higher degree in a "specific specialty" or its equivalent.[3] *See K Mart*

[2] The scope of this motion cannot be expanded to consider whether the Director's decision to deny the petition on specialty occupation grounds was correct or to consider our initial decision to dismiss the appeal or subsequent decisions to deny the prior motions.

[3] The statute contains the term "a bachelor's or higher degree in *the* specific specialty (or its equivalent)" while the regulation contains the term "a bachelor's degree or higher in *a* specific specialty, or its equivalent (emphasis added)."

Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section

Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). The criterion stated in 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) should therefore logically be read as requiring a bachelor's or higher degree *in a specific specialty*, or its equivalent, as the normal minimum entry requirement for the particular position. Despite the Petitioner's assertions to the contrary, neither the *Handbook* nor O*NET indicate that a bachelor's (or higher degree) in any particular field(s) is normally required for the occupation.

On motion, the Petitioner emphasizes the *Handbook*'s statement that, for entry into the "Sales Managers" occupation, "[c]ourses in business law, management, economics, accounting, finance, mathematics, marketing, and statistics are advantageous." However, as we stated in our November 30, 2015, decision, the *Handbook* does not state that such courses are *required*, or that these courses cumulatively lead to a bachelor's degree in a specific specialty.

On motion, the Petitioner again cites to *Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985 (S.D. Ohio 2012) for the proposition that the Beneficiary's knowledge is what is relevant, and not the title of the degree. The Petitioner also again cites to *Raj and Co. v. USCIS*, 85 F. Supp. 3d 1241, 1246 (W.D. Wash. 2015) to support similar propositions. In our May 4, 2016, decision, we found that the Petitioner misinterpreted *Residential* and confused the issue of a beneficiary's qualifications with the issue of a proffered position's qualifications as a specialty occupation. On motion, the Petitioner asserts that our conclusion constitutes gross error, as we disregarded the submitted list of job duties the Beneficiary had been performing. We disagree. As stated previously, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. Thus, whether or not the Beneficiary in this case has completed a specialized course of study directly related to the proffered position is irrelevant to the issue of whether the proffered position qualifies as a specialty occupation, i.e., whether the duties of the proffered position require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent. Section 214(i)(l) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

Moreover, the Petitioner has once again not overcome our previous finding that there is insufficient evidence to establish that the facts of the instant petition are analogous to those in *Residential* and *Raj*, and that we are not bound to follow the published decision of a United States district court.[4] *See Matter of K-S-*, 20 I&N Dec. 715, 719-20 (BIA 1993).

214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. This also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

[4] In particular, these cases apply to the "Market Research Analysts" occupational classification, as opposed to the "Sales Managers" classification chosen here. While the Petitioner claims that the proffered duties include some similar duties

The Petitioner again reiterates its assertion that a business manager position meets the definition of "specialty occupation" as defined at 8 C.F.R. § 214.2(h)(4)(ii), as it is "obviously" one of the "business specialties" included in that definition. The Petitioner states that "[a] Business manager is a job type that Congress contemplated when it created the H-1B visa category."

Again, the Petitioner has not supported its assertion with citations to precedent decisions, legislative history, or other legal authority. Without citations to legal authority or other persuasive sources, we cannot find that a business manager position, particularly a "general business manager" position as the Petitioner characterizes the proffered position, constitutes a business specialty. Instead, we find that a general business manager position like the one proffered here is a position involving general business duties, and is outside the scope of the definition of "specialty occupation" at 8 C.F.R. § 214.2(h)(4)(ii).

With respect to the first alternative prong under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), the Petitioner resubmits, for the third time, the same job announcements that we previously found to be insufficient. The Petitioner asserts that these job announcements establish eligibility under this criterion and asserts that we erred by "blankly rejecting" these announcements. However, as explained above and in our previous decisions, the requirement of a general bachelor's degree or a degree with a generalized title such as business administration, without further specification, does not establish a position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988); *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). The Petitioner has not overcome our finding that these advertisements do not establish a requirement of a bachelor's or higher degree *in a specific specialty*, or its equivalent.

Moreover, the Petitioner again asserts that we erroneously "discredited" the opinion letter from and his "years of experience and educational background." Once again, the Petitioner acknowledges that "opinion is based on personal experience and observations of the industry, not empirical experience or research performed at the Petitioner's site," but asserts that this personal experience is what qualifies him as an expert to begin with. While personal experience in the industry is certainly noted, it does not establish that possessed an adequate level of factual foundation *about the proffered position* to support his opinion, notwithstanding his general knowledge about business-related professions.

The Petitioner also asserts once again that we "summarily discredit[ed]" the opinion letter from the Beneficiary's business associate. As noted previously, the Petitioner has not established how this letter constitutes probative evidence that the proffered position requires a bachelor's or higher degree *in a specific specialty*, or its equivalent. Again, merely indicating that the Beneficiary's educational background is "somehow tied" or beneficial to the performance of the proffered duties, without more, is insufficient to establish that the proffered duties can only be performed by an individual

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to a market research analyst, the fact remains that the proffered position has been classified under the "Sales Managers" occupational classification, and thus, the analysis specifically regarding the "Market Research Analysts" occupational classification found in *Residential* and *Raj* is inapplicable here.

with a specific degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). Moreover, the author has not specifically identified the Beneficiary's educational background (or his own), thus leading us to further question the probative value of this letter.

Under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), the Petitioner again claims we erred by failing to consider the Beneficiary's prior H-1B status. Again, while we recognize that this is an extension petition, we also pointed out that the Beneficiary has only been employed with the Petitioner since 2012.

Moreover, the mere fact that the Beneficiary was previously granted H-1B status does not establish that the Petitioner "normally" requires a specific degree (or its equivalent), or that the performance of the proffered duties necessitates such a degree or its equivalent. As we stated in our previous decisions, if the proffered position does not actually require such a specialty degree (or its equivalent) to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation regardless of the Petitioner's imposed degree requirement.[5] *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

Under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), the Petitioner again asserts that we failed to properly consider all of the proffered job duties. The Petitioner submits the same chart listing each job duty, percentage of time, level of responsibility, number of hours per week, and minimum educational training and experience. However, the Petitioner has not provided additional explanations and information about each job duty to overcome our prior finding that these job duties were not sufficiently distinguished from other duties that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Finally, the Petitioner again takes issue with our determination that the Level I, entry-level, wage rate selected here is indicative that the proffered position is not a specialty occupation. The Petitioner again claims that, based on the position's Job Zone 4 designation, "[a]nyone meeting this requirement, bachelor's plus 4 years of experience, should be classified at level I."

As we explained in our previous decisions, a position's Job Zone designation, or its SVP rating, is not probative of a position being a specialty occupation because it does not describe whether the requisite degree (if any) must be in any specific field(s). Moreover, a Level I, entry-level, wage rate is not consistent with the Petitioner's claim that the position is particularly complex or specialized compared to other positions within the same occupation, which do not normally require a bachelor's degree in a specific specialty, or its equivalent. Instead, the position's Level I wage rate indicates that

[5] A prior approval does not compel the approval of a subsequent petition or relieve the Petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 Fed. Reg. 2,606, 2,612 (Jan. 26, 1990) (to be codified at 8 C.F.R. pt. 214). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Tex. A&M Univ. v. Upchurch*, 99 F. App'x. 556 (5th Cir. 2004).

the proffered position is a low-level position compared to other positions within the same occupation, and thus, would not reasonably have educational requirements surpassing those normally required for the occupation (i.e., a general bachelor's degree).[6] Contrary to the Petitioner's assertions, the Department of Labor's *Prevailing Wage Determination Policy Guidance* clarifies that a Level I wage rate is "assigned to job offers for beginning level employees" while a Level II wage rate is appropriate when the "requirement for years of education and/or experience [is similar to that] generally required as described in the O*NET Job Zones."

Once again, the fundamental deficiency in this case is that the Petitioner has not established that the proffered position requires a minimum of a bachelor's degree *in a specific specialty*, or its equivalent. A requirement of a general bachelor's degree, without more, is insufficient. Overall, the Petitioner has not established how our May 4, 2016, decision was incorrect in concluding that the proffered position does not meet any criterion of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

III. CONCLUSION

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. The instant motion to reconsider 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 B-H-E-, Inc.*, ID# 11822 Aug. 18, 2016)

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[6] For additional information, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.