



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

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

MATTER OF 2233P-R-, LLC

DATE: AUG. 24, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a company providing consumer lending, Internet deferred deposit, and credit services, seeks to employ the Beneficiary as a “chief operating officer” 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 Director concluded that the Petitioner had not established that the job offered qualifies as a specialty occupation. The Petitioner appealed the decision to us. 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.

The matter is now before us on a combined motion to reopen and reconsider. In its motion, the Petitioner asserts that we erroneously concluded that the proffered position is not a specialty occupation.

We will deny the combined 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 U.S. Citizenship and Immigration Services (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 Motion or Appeal, 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.¹

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.

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.”

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.

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 combined motion will be denied.

A. Motion to Reopen

In support of the motion to reopen, the Petitioner submits a brief explaining why it believes the proffered position qualifies as a specialty occupation, and why our conclusions regarding the viability of the Petitioner’s business were erroneous. Specifically, it asserts that the proffered position is specialized and complex, and further contends that the record demonstrates that the position requires an individual with a minimum of a master’s degree in business administration to perform the duties of the position. Its brief is supported by an updated organizational chart, which it claims encompasses the entire organization, as well as a copy of its IRS Form 1065, U.S. Partnership Income Tax Return, for 2014. Based on this newly submitted evidence, the Petitioner concludes that the motion should be granted and the petition approved.

We first observe that the organizational chart submitted on motion was previously available, and thus does not “state new facts” demonstrating that the proceeding should be reopened. That is, the Director’s request for evidence (RFE) specifically requested that the Petitioner submit its line and block organizational chart depicting the Petitioner’s hierarchy and staffing levels. In addition, the

Director specifically asked the Petitioner to list all divisions in its company. In response, the Petitioner submitted a one-page organizational chart entitled “Executive Staff,” which depicted the Beneficiary as directly overseeing two individuals – the senior vice president of operations and the CFO – in a company with a total of 11 positions. Noting that the organizational chart did not support the Petitioner’s contention that it employed 55 persons, combined with the other noted discrepancies regarding the Petitioner’s business, we found that the record as constituted did not support the Petitioner’s assertions regarding the nature of the proffered position within the Petitioner’s claimed corporate structure.

On motion, the Petitioner submits a new organizational chart also entitled “Executive Staff,” but now includes seven additional pages depicting the Beneficiary as supervising six different individuals: the senior vice president of operations, the CFO, the CIO, the assistant vice president of call center operations, the assistant vice president of operations, and the customer service supervisor.² The Petitioner has not sufficiently explained, however, why it has submitted different organizational charts and statements regarding the Beneficiary’s direct subordinates and level of responsibility within the organization. The only explanation the Petitioner provides, that the originally submitted organizational chart “cannot be expected to include all employees when it is entitled as such,” is insufficient to explain the discrepancies.

The Petitioner cannot offer a new position to the Beneficiary, or materially change a position’s level of authority within the organizational hierarchy, associated job responsibilities, or the requirements of the position, subsequent to filing the petition. The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998). The Petitioner’s newly submitted organizational chart – which is not consistent with any of the Petitioner’s prior documents or statements – therefore cannot be considered as evidence of eligibility at the time of filing.

The Petitioner also submits its 2014 IRS Form 1065 in support of the premise that its salaries paid and revenues have increased since the time of our adjudication, thereby establishing that the Petitioner is a viable company and has a legitimate need for the Beneficiary’s services. While the Petitioner’s 2014 return is a “new” document that provides updated information about the Petitioner’s financial status, this document does not provide further insight into the Petitioner’s organizational structure and the Beneficiary’s role within it, so as to overcome all the other discrepancies we observed in our previous decision.

² Although not noted in our previous decision, we now observe the Petitioner’s statements in response to the Director’s RFE indicating that the Beneficiary directly oversees *seven* individuals: the senior vice president of operations, the CFO, the assistant vice president of call center operations, the assistant vice president of product management and compliance, the assistant vice president of analytics, the assistant vice president of marketing, and the assistant vice president of information technology. Not only has the Petitioner inconsistently stated the number of subordinate positions, but the Petitioner has also inconsistently listed the actual positions reporting to the Beneficiary.

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Additionally, the Petitioner's 2014 tax return reflects that the company had a gross total income of \$1,454,926, and an ordinary business income loss of -\$2,800,638.³ When considered with the Petitioner's 2013 tax returns showing a gross total income of \$830,853, and an ordinary business income loss of -\$366,093, the record still does not corroborate the Petitioner's initial statement that the company has "experienced healthy financial growth since our inception in 2011." The Petitioner has not sufficiently overcome our reasoning to question the credibility of the Petitioner's assertions based upon inconsistencies in the record. It is incumbent upon the Petitioner to resolve inconsistencies in the record by competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the Petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The Petitioner has not established how the evidence presented on motion demonstrates the Petitioner's eligibility at the time the underlying petition was filed. The motion also falls short of establishing that the new facts are of such significance that they would likely change the outcome of this case if proceedings were reopened. *See Matter of Coelho*, 20 I&N Dec. at 473; *Maatougui v. Holder*, 738 F.3d at 1239-40. The Petitioner's motion does not satisfy the requirements of a motion to reopen, and accordingly, the motion to reopen will be denied.

B. Motion to Reconsider

The Petitioner's motion also does not satisfy the requirements of a motion to reconsider. More specifically, while the Petitioner continues to assert that its petition should be approved, it does not sufficiently articulate how our February 26, 2016, decision was based on an incorrect application of law or policy.

In support of the motion to reconsider, the Petitioner resubmits a copy of its Client Services Agreement with [REDACTED] dated November 26, 2014, asserting that we erroneously focused on the signature of [REDACTED] the Petitioner's Chief Operating Officer (COO), as a basis for the denial of the petition.⁴ We recall that the instant petition seeks to employ the Beneficiary as the Petitioner's COO. The fact that this document demonstrated that the Petitioner already employed an individual in the position in which it sought to employ the Beneficiary, coupled with the other discrepancies in the record, prompted our denial of the petition because the Petitioner had not resolved these inconsistencies with independent, objective evidence.

On motion, the Petitioner explains that [REDACTED] "held the title of COO but was not qualified to handle the evolution of the company," and that the Beneficiary "assumed this role due to his highly specialized knowledge." However, this new explanation is not entirely consistent with the

³ In comparison, the Petitioner represented on the Form I-129, filed on January 30, 2015, that it had a gross annual income of -\$1,263,970 and a net annual income of -\$3,213,477.

⁴ We note that the Petitioner refers to this document as the "executive recruiter agreement" on motion. The Petitioner previously submitted this contract as evidence of the "Posted Job Vacancy Announcement" for the proffered position.

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Petitioner's previous statements, made in its RFE response under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) regarding the Petitioner's normal employment practices for the proffered position, that "[t]he [COO] position was vacant prior to [the Beneficiary] joining the company," and that "[t]he closest equivalent in the company [to the COO] is [REDACTED] who is the CEO and CLO of the Company."

Nevertheless, even if we were to consider the Petitioner's explanation regarding [REDACTED] "COO" title on the Client Services Agreement, the Petitioner still has not sufficiently demonstrated how this document constitutes evidence of the proffered position as a specialty occupation requiring at least a bachelor's degree in a specific specialty, or its equivalent. Notably, the Petitioner states that this Client Services Agreement is "the contract that eventually led to Petitioner hiring the Beneficiary." Pursuant to this contract (deliverable #1), [REDACTED] was to complete and submit to the Petitioner information regarding "the responsibilities and authority of the position[] as well as the candidate's desired qualifications." However, nowhere in the copy of the submitted Client Services Agreement (nor elsewhere in the record) does it specify the position's responsibilities and level of authority, or the "candidate's desired qualification." "[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." *Matter of 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)).

Also in support of its motion, the Petitioner relies upon two United States district court cases in an attempt to demonstrate that our decision was erroneous based on the evidence in place at the time of adjudication.

We will first address the Petitioner's reliance on *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), asserting that we erroneously focused on the size of the Petitioner in reviewing the appeal and reaching our decision. While we concur that USCIS should not limit its review to the size of a petitioner and must consider the actual responsibilities of the proffered position, we find that it is reasonable to assume that the size of an employer's business has or could have an impact on the claimed duties of a particular position. See *EG Enters., Inc. v. Dep't of Homeland Sec.*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). The size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the actual duties of a particular position. As noted in our February 26, 2016, decision, the record contained inconsistent evidence regarding the Petitioner's operations and the duties of the proffered position. On motion, the Petitioner has not provided sufficient evidence to clarify the previously noted discrepancies.

As discussed previously, absent independent documentary evidence to support a finding that the duties to be performed by the Beneficiary in relation to the Petitioner's claimed operations are sufficiently complex to require the services of a specialty-degreed individual, or that a degree requirement is common to the industry, the Petitioner's reliance on *Young China Daily* is not persuasive. Regardless, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715, 719-20 (BIA

1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law: *Id.*

The Petitioner also cites to *Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that we should have focused on the duties of the proffered position, and not simply the position's title. The Petitioner quotes the decision, asserting that "[w]hat is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge," and concludes that we ignored the highly specialized tasks of the Beneficiary in rendering our decision.

We agree with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." But for specialty occupation purposes, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, or a general-purpose business administration degree, does not establish the position as a specialty occupation. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). As noted in our February 26, 2016, decision, however, the Petitioner has not met its burden to establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those tasks. Simply claiming that a general purpose degree, or a degree in business administration, is required for the position, as the Petitioner does here, is not sufficient.

In any event, the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Finance*.⁵ We again note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. at 719-20.

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

⁵ It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the Director in the decision denying the petition. We further note that the Director's decision was not appealed to us. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by us in our *de novo* review of the matter.

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.

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 2233P-R-, LLC*, ID# 18168 (AAO Aug. 24, 2016)