



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

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

MATTER OF E-P-F-S-, LLC

DATE: JAN. 5, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a “Hispanic Wholesale Foods Distributor,” seeks to temporarily employ the Beneficiary as a “Distribution & Logistics Manager” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 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 proffered position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). On motion, the Petitioner asserts that our decision was erroneous, and that the proffered position meets the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), (2), and (3). In support of the motion, the Petitioner submits recent invoices, bank statements, a payroll statement, and other documentation, which according to the Petitioner, “demonstrate[s] its continued growth.”

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.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.

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).

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.”

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

A. Discussion of Motion to Reopen

On motion, the Petitioner submits copies of recent invoices, bank statements, a payroll statement, and other financial documentation. While this newly submitted evidence presents “new facts,” the Petitioner has not sufficiently explained how these new facts demonstrate eligibility at the time of filing or otherwise possess such significance that it would likely change the result in the case. *See Matter of Coelho*, 20 I&N Dec. at 473; *see also Maatougui v. Holder*, 738 F.3d at 1239-40.

The Petitioner asserts that the recent invoices and other financial documentation demonstrate the Petitioner’s “continued growth,” and thus, the Petitioner’s need to create and fill the proffered position. The Petitioner further asserts that this new evidence shows that the Petitioner “normally” requires a bachelor’s or higher degree, or its equivalent, under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), as the word “normally” “must be viewed in the context of a dynamic and growing company which has not heretofore required the services of a distribution and logistics manager but which now, due to its success and growth, requires one.”

The Petitioner’s assertions are unpersuasive. As we stated in our July 17, 2015, decision, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) entails an employer demonstrating its normal employment practices, i.e., its past recruiting and hiring practices for the proffered position. It is not clear how an employer that has never before recruited and hired for the proffered position, as in this case, would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The Petitioner’s new evidence demonstrating its “continued growth” and “success” are not relevant to a demonstration of the Petitioner’s past recruiting and hiring practices.

While the Petitioner asserts that the word “normally” should be viewed in the context of the Petitioner’s “reasonable business judgement” to create and fill the proffered position, the Petitioner has not submitted any new evidence to support this interpretation of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). In other words, the Petitioner has not submitted new evidence to establish that the word “normally” at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) should be interpreted as pertaining to

the “reasonableness” of an employer’s employment practices, as opposed to an employer’s “normal” employment practices that can be established through the employer’s recruiting and hiring history.² Nor has the Petitioner submitted any new evidence to support its assertion that the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) could be satisfied by a newly-created position such as this.

For the reasons stated above, the Petitioner’s motion does not satisfy the requirements of a motion to reopen. The motion to reopen will be denied.

B. Discussion of Motion to Reconsider

The Petitioner’s motion also does not 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.

The Petitioner asserts that the proffered position qualifies as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), and that we misinterpreted the *Occupational Outlook Handbook (Handbook)* and Occupational Information Network (O*NET) information regarding the occupational classification. More specifically, the Petitioner contends that the *Handbook*’s statement that “more companies prefer to hire workers who have at least a bachelor’s degree” is sufficient to establish eligibility under this criterion. U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., “Logisticians,” <http://www.bls.gov/ooh/business-and-financial/logisticians.htm#tab-4> (last visited Dec. 9, 2015). The Petitioner also contends that O*NET’s Job Zone 4 rating, indicating that “[m]ost of these occupations require a four-year bachelor’s degree,” is sufficient to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). O*NET Online Summary Report for 13-1081.00, Logisticians, <http://www.onetonline.org/link/summary/13-1081.00> (last visited Dec. 9, 2015).

The Petitioner’s assertions are insufficient to establish that our decision was incorrect. With respect to the *Handbook*, as we stated in our July 17, 2015, decision, a *preference* is not a minimum *requirement*. Moreover, not only does the *Handbook* indicate that an associate’s degree is sufficient

² The Petitioner appears to have misinterpreted our discussion of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) in our July 17, 2015, decision. While we also stated that a petitioner’s “claimed self-imposed requirements,” alone, was insufficient to establish a position as a specialty occupation, our conclusion that the Petitioner did not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) was based upon the lack of evidence regarding the Petitioner’s past employment practices. Where a petitioner does not have a past practice for a particular position, as is the case here, we need not further examine the petitioner’s claimed degree requirements under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

for some positions, but the *Handbook* also indicates that logistician positions do not require a bachelor's degree *in any specific specialty*. Rather, the *Handbook* indicates that a general degree in "business" is a sufficient educational qualification for some positions. U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Logisticians," <http://www.bls.gov/ooh/business-and-financial/logisticians.htm#tab-4> (last visited Dec. 9, 2015). A requirement of a degree with a generalized title, such as "business," without further specification, is not a degree in a specific specialty.³ *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). For similar reasons, the O*NET Job Zone 4 rating is not indicative of a position qualifying as a specialty occupation, as Job Zone designations make no mention of the specific field of study from which a degree must come.

The Petitioner contends that we "incorrectly recast the text of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), (2), and (3) to engraft the words 'in a specific specialty' after the words 'a baccalaureate or higher degree' in each of the subsections." Noting that "the actual text of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), (2), and (3) *do not* include the words 'in a specific specialty,'" the Petitioner therefore asserts that these criteria can be satisfied by merely a bachelor's or higher degree, or its equivalent, without more.

We find the Petitioner's assertions unpersuasive. As we also stated in our July 17, 2015, decision, 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.⁴ See *K Mart 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-*,

³ A general degree requirement does not necessarily preclude a proffered position from qualifying as a specialty occupation. For example, an entry requirement of a bachelor's or higher degree in business administration with a concentration in a specific field, or a bachelor's or higher degree in business administration combined with relevant education, training, and/or experience may, in certain instances, qualify the proffered position as a specialty occupation. In either case, it must be demonstrated that the entry requirement is equivalent to a bachelor's or higher degree in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

⁴ 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 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.

21 I&N Dec. 503 (BIA 1996). The criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should therefore logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), it was not erroneous for us to interpret the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean a baccalaureate or higher degree *in a specific specialty* (or its equivalent). USCIS has consistently applied this interpretation in the past. See *e.g.*, *Royal Siam Corp.*, 484 F.3d at 147 (acknowledging that the agency consistently has stated that a general-purpose bachelor’s degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa because it does not meet the requirement of a degree in a specific specialty); *Matter of Michael Hertz Assocs.*, 19 I&N Dec. at 560 (the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation). The Petitioner has not cited to any cases, precedent decisions, or other legal authority to support its contrary position on the matter.

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.

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 E-P-F-S-, LLC*, ID# 15652 (AAO Jan. 5, 2016)