



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

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

MATTER OF M- LLC

DATE: DEC. 23, 2015

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a New York limited liability company operating a restaurant business, seeks to classify the Beneficiary as an L-1A nonimmigrant intracompany transferee. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition, and we dismissed the subsequent appeal. The matter is now before us on a combined motion to reopen and reconsider. The combined motion will be denied.

The Director denied the petition on April 11, 2014, on three alternate grounds, concluding that the Petitioner did not establish that: (1) it had a qualifying relationship with the foreign entity; (2) the Beneficiary was employed in a qualifying managerial or executive capacity at the foreign entity; and (3) the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States. The Petitioner submitted an appeal of the Director's decision to our office. We reviewed the record of proceeding and determined that it did not contain sufficient evidence to overcome the bases for the Director's denial. We provided a comprehensive analysis of the Director's decision and dismissed the appeal.

I. MOTION REQUIREMENTS

For the reasons discussed below, we conclude that this combined motion will be denied because the motion does not merit either reopening or reconsideration.

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).

A. 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 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.”

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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 AND ANALYSIS

In denying the petition, the Director concluded that the evidence of record did not establish that the controlling shareholders of the foreign entity and the controlling shareholders of the U.S. company were the same group of individuals. The Director noted that, in addition to the additional two shareholders of its U.S. company, [REDACTED] owns approximately 33% of the foreign entity but does not have any ownership or control over its U.S. company, and [REDACTED] owns 30 shares of its U.S. company but does not have any ownership or control over the foreign entity.

Second, the Director found that many of the duties listed for the Beneficiary’s position abroad demonstrated that he was engaged in non-qualifying duties and, although requested by the Director, the Petitioner did not quantify the amount of time spent on each of the duties assigned to the Beneficiary on a regular basis. As such, the Director was unable to conclude that the Beneficiary was primarily engaged in managerial duties at the foreign entity without supporting evidence to show that the majority of his time was spent in a managerial capacity.

Third, the Director found that many of the duties listed for the Beneficiary’s proposed position in the United States demonstrated that he would be performing rather than managing the duties and, although requested by the Director, the Petitioner also did not quantify the amount of time he would spend on each of the regularly assigned duties. Again, the Director was unable to conclude that the Beneficiary would be primarily engaged in managerial duties without supporting evidence to show that the majority of his time would be spent managing restaurant kitchen operations. The Director further found that the Beneficiary would not be involved in the supervision and control of the work of other supervisory, professional, or managerial employees to relieve him from performing the services of running a restaurant kitchen in the United States and that the Petitioner did not provide any evidence to verify the employment of the U.S. staff listed on its organizational chart.

In dismissing the Petitioner's appeal, we found that it had not provided sufficient information detailing the Beneficiary's duties abroad and at the U.S. company to demonstrate that his listed duties qualify him as a manager or executive. We noted that, although one of the Beneficiary's subordinates performed some supervisory duties, the Beneficiary had not been shown to *primarily* supervise and control the work of other supervisory, professional, or managerial employees. We found that the Petitioner did not demonstrate that the Beneficiary's duties had and would primarily focus on the management of the organization and the supervision of qualifying managerial, professional, or supervisory employees, rather than on producing a product or providing a service of the Petitioner. We further found that the job duties provided for the Beneficiary and his subordinates did not demonstrate that the Beneficiary would focus 51% of his time on managerial duties rather than the day-to-day operations of the business.

The Petitioner filed this combined motion to reopen and reconsider on March 18, 2015. The submission constituting the combined motion consists of the Form I-290B and a brief. Although the Petitioner's brief states that "copies of the referenced exhibits accompany [its] brief," the only documents submitted in support of the joint motion are the Petitioner's brief and a copy of our February 13, 2015 decision. In its brief, the Petitioner asserts that it maintains an affiliate relationship with the foreign entity and that the Beneficiary has been and will be employed in a managerial capacity.

A. Motion to Reopen

Upon review, we find that the Petitioner did not provide any new facts in this motion. While the Petitioner states that it is submitting "copies of referenced exhibits" with its motion, the record does not contain any documentation other than the Petitioner's brief in support of the motion. The Petitioner has not submitted any new evidence pertaining to the instant petition or our recent dismissal of the Petitioner's appeal. As such, the Petitioner has not established that the evidence submitted on motion would change the outcome of this case if the proceeding were reopened. Therefore, the Petitioner has not met the requirements of a motion to reopen.

"There is a strong public interest in bringing [a case] to a close as promptly as is consistent with the interest in giving the [parties] a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988). Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94). A party seeking to reopen a proceeding bears a "heavy burden" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the Petitioner has not met that burden.

B. 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 a decision on an

application or petition must, when filed, 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) (detailing the requirements for a motion to reconsider).

Upon review, we find that the Petitioner did not properly state the reasons for reconsideration. The Petitioner briefly discusses its qualifying relationship with the foreign entity and the Beneficiary's positions abroad and in the United States. Some of the Petitioner's arguments pertaining to each issue were previously presented and addressed on appeal and will not be discussed again on motion.

In terms of its qualifying relationship, the Petitioner references an unpublished decision in which we determined that a qualifying relationship exists where one individual wholly owns the U.S. company and 61% of the foreign entity along with a second individual owning the remaining 39%. The Petitioner has not established that the facts of the instant petition are analogous to those in the unpublished decision. In the unpublished decision, although the U.S. company had one shareholder and the foreign entity had two shareholders, one individual majority-owned and controlled both entities. In the instant matter, five individuals own the U.S. company and three individuals own the foreign entity, and no one person majority-owns and controls both entities. Both entities share common ownership with two individuals, each owning 30% and 33.5% of the U.S. company and foreign entity, respectively, but the Petitioner has not shown that there are any agreements in place for them to always vote in concert. Absent documentary evidence such as voting proxies or agreements to vote in concert, the Petitioner has not established that any one individual, or group of individuals, effectively owns and controls the U.S. company or the foreign entity in order to establish a qualifying affiliate relationship as defined at 8 C.F.R. § 214.2(l)(i)(ii)(L). While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Regarding the Beneficiary's positions abroad and in the United States, the Petitioner states that the Beneficiary is a "second line manager in charge of 14 persons to satisfy the definition of manager." The Petitioner referenced previously submitted position descriptions and lists of job duties that were discussed in our previous decision and will not be discussed again on motion. The Petitioner further referenced an unpublished decision in which we determined that the Beneficiary met the requirements of serving in a managerial capacity for L-1 classification as a banquet manager even though he was a second line manager and not a professional. The Petitioner has not established that the facts of the instant petition are analogous to those in the unpublished decision. Again, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the Petitioner's statement in support of this motion, it appears that the Petitioner seeks to address matters that were already addressed on appeal. However, we conclude that 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. The Petitioner has therefore not submitted any document that would meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider must be denied.

III. CONCLUSION

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 M- LLC*, ID# 15147 (AAO Dec. 23, 2015)