U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUL 14 2015

PETITION RECEIPT #:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center denied the nonimmigrant visa petition. The petitioner appealed the denial to the Administrative Appeals Office (AAO), and we dismissed the appeal. The matter is again before us on a combined motion to reopen and motion to reconsider. The combined motion will be dismissed.

The petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New York corporation established in states that it operates a discount retail store. The petitioner states that it is a subsidiary of located in Pakistan. The petitioner seeks to employ the beneficiary as its director of operations for a period of three years.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

The petitioner submitted an appeal of the director's decision to this office. We reviewed the record of proceeding and determined it did not contain sufficient evidence to overcome the director's findings.

Specifically, we concluded that the petitioner submitted job duties for the beneficiary that were inconsistent with the nature and scope of its business. We indicated that the duties reflected the beneficiary's management of a regional sales organization rather than a single discount retail store location. We further found that the petitioner provided insufficient detail and evidence to substantiate the beneficiary's primary performance of qualifying executive duties. We determined that the petitioner failed to submit pertinent evidence requested by the director, including duty descriptions for its claimed sales representatives. We also pointed to discrepancies in the petitioner's submitted IRS Forms W-2, which indicated the employment of insufficient operational employees to relieve the beneficiary from primarily performing non-qualifying duties associated with the day-to-day operations of the store. Lastly, we noted that the petitioner had not substantiated its assertion that it was a rapidly expanding business with significant revenue.

I. MOTION REQUIREMENTS

For the reasons discussed below, we will dismiss the combined motion 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 United States Citizenship and Immigration Service (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 3 of the Form I-290B, which states:[1]

> **Motion to Reopen:** The motion must state new facts and must be supported by affidavits and/or documentary evidence.

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 3 of the Form I-290B, which states:

> **Motion to Reconsider**: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

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

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

The petitioner's combined motion consists of a brief submitted by counsel for the petitioner. The petitioner contends that USCIS failed to consider a crucial portion of the submitted evidence and impermissibly relied solely on the size of the petitioner's business in denying the petition.

A. Dismissal of the Motion to Reopen

Upon review, we find that the petitioner did not provide any new facts in this motion. The petitioner has not submitted any additional documentation or evidence to be considered on motion.

"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 (1988)). 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. Dismissal of the 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).

On motion, the petitioner asserts that USCIS was incorrect to conclude that the beneficiary's duties are

inconsistent with the operation of a discount retail store. The petitioner reiterates the beneficiary's duties and those of his asserted subordinate sales manager. The petitioner contends that we failed to articulate why the beneficiary's duties are inconsistent with the nature and scope of the petitioner's business. Further, the petitioner again asserts that USCIS improperly relied solely on the size of the company in determining that the beneficiary would not employed in a qualifying managerial or executive capacity. The petitioner contends that USCIS erred by not issuing a second request for evidence (RFE) to "discuss any construction, expansion, or disaster that forced [the petitioner] to close during a reasonable period of time." The petitioner states that USCIS improperly assumed that its dollar store location was open for an average of forty hours per week and asserts we should have clarified this fact through the issuance of another RFE.

First, we do not find the petitioner's assertions with respect to the beneficiary's duties persuasive. This office clearly articulated discrepancies and vagueness in the beneficiary's stated duties, neither of which have been directly addressed by the petitioner on motion. For instance, the beneficiary's duty description indicates that he will acquire new accounts, develop sales quotas for regions, identify new business and sales targets, drive sales initiatives through the development of sales campaigns, and create a self-reliant import-export system, all duties inconsistent with the operation of a single dollar store location and the petitioner has not further explained the nature of the beneficiary's proposed tasks within the context of its business. Although the petitioner articulates that these duties relate to the expansion of the business, the petitioner has provided no details or supporting evidence to substantiate these claims. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, the beneficiary's duties offer little insight into what the beneficiary would do on a day-to-day basis within the context of the petitioner's actual business. The petitioner has not provided specific examples of programs the beneficiary will improve, administrative procedures he will create or adapt, objectives he will set or be tasked with, or regulations with which he will ensure compliance. Going 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 California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Indeed, the petitioner has done little more than reiterate the same arguments on motion that were provided on appeal with respect to the beneficiary's duties. Once again, 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."). Therefore, the petitioner has not established that this office improperly considered the beneficiary's duties or that we erred in finding such duties inconsistent with the petitioner's business.

Further, the petitioner asserts that this office incorrectly considered its size and staffing levels in concluding that the beneficiary would not act in a qualifying executive capacity. However, we addressed this issue at length in our previous decision. We did not solely consider the petitioner's size in concluding that the beneficiary was ineligible, but the totality of the evidence, including the beneficiary's inconsistent and vague duty description, the inconsistent and lacking duty descriptions for the beneficiary's subordinates, the petitioner's failure to submit evidence requested by the director, insufficient wages paid by the petitioner to support the operational aspects of the business, amongst other evidentiary shortcomings. Likewise, the director's decision was based on similar discrepancies and lack of evidence. As such, the record does not support the petitioner's claim that USCIS improperly considered the petitioner's size as the sole basis for denying the petition.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act. However, we note that it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the petitioner's assertions are true. *See Systronics*, 153 F. Supp. 2d at 15. Here, the petitioner indicates that the beneficiary supervises a subordinate sales manager and three subordinate sales representatives; however, these four employees earned a combined total of only $16,200 in 2012, the year preceding the filing of the petition, and the petitioner did not provide any updated evidence of wages paid to them as of the date of filing in May 2013. These four employees combined, assuming that they were paid minimum wage, worked only slightly more hours than a single full-time worker. While there is no requirement that the beneficiary supervise full-time staff, the petitioner must establish that someone other than the beneficiary is available to perform the non-managerial aspects of operating a retail store.

Finally, the petitioner asserts on motion that this office was incorrect to presume that the petitioner was operational for at least forty hours a week. The petitioner contends that we should have issued a second RFE to allow the petitioner to "discuss any construction, expansion, or disaster that forced [the petitioner] to close for a reasonable period of time." This office notes that the petitioner has not offered any evidence or explanations as to why it would not operate for hours consistent with a discount retail location, nor does it actually claim that it is open for fewer hours or identify its specific operating hours. Further, this assertion of limited operations is in direct contradiction to its contention that it is one of the fastest growing retail locations in New York City garnering significant revenue. Indeed, as noted in our previous decision, the petitioner has not offered evidence to substantiate these assertions at any point in the record, including now on motion. Therefore, as there was no indication by the petitioner that it had a reduction in operating hours or staffing levels for any reason as of the date of filing, there was no reason to issue a request for evidence to inquire about the petitioner's normal business hours.

Regardless, the number of hours the petitioner operates is of little issue given that the preponderance of the evidence indicates that the petitioner has insufficient operational employees to relieve the beneficiary from primarily performing non-qualifying duties. As noted in our previous decision, the record shows that the petitioner has three part-time sales representatives working very limited hours, thereby leaving question as to whether the business employs sufficient operational staff to relieve both the beneficiary and his asserted sales manager from performing these tasks. Once again, going 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

We note that in visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. If the petitioner has evidence and explanation of limited operations or a temporary reduction in staffing levels that it would like us to consider, it should have submitted such evidence in support of its motion. The petitioner has not done so and has offered no additional evidence or explanation in support of its assertion that the beneficiary will be employed in a qualifying managerial or executive capacity.

In conclusion, we find that the petitioner has not y articulated 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. Therefore, the petitioner has not met the requirements of a motion to reconsider and the motion to reconsider will be dismissed.

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 dismissed, the proceedings will not be reopened or reconsidered, and our previous decision will not be disturbed.

ORDER: The combined motion is dismissed.