U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-USA, INC.

DATE: OCT. 27, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a Texas corporation operating as an importer and distributor of hunting and sports products, seeks to extend the Beneficiary's status 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. The Petitioner filed a motion to reopen. The Director granted the motion to reopen the petition and affirmed the denial of the petition. We dismissed the Petitioner's subsequent appeal. The matter is now before us on a combined motion to reopen and reconsider. The combined motion will be denied.

I. PROCEDURAL HISTORY

The Director denied the petition on December 24, 2013, concluding that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

The Petitioner filed a motion to reopen the denied petition. The Director granted the motion to reopen and, on July 28, 2014, affirmed the denial of the petition making the same observations as in the initial denial. The Director found that because the original organizational chart indicated that the Beneficiary directly supervises a vice president that is employed by the foreign entity, and the vice president cannot be considered part of the new operation staffing, the Beneficiary must directly supervise the marketing manager, whose position is not supervisory, professional, or managerial. Therefore, the Director found that the Beneficiary would be the first-line supervisor of a non-professional employee. The Director further found that the Petitioner's response to the request for evidence (RFE) contained significant changes to the original information provided at the time of filing regarding its current employees and their job duties, which could not be considered as a Petitioner may not make changes to the original information provided.

The Petitioner filed an appeal and, on May 15, 2015, our office dismissed the appeal, concluding that the Petitioner had not provided sufficient information detailing the Beneficiary's duties at the U.S. company to demonstrate that his listed duties qualify him as a manager or executive. We noted that the Petitioner had not established that the Beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. We found that, although the Petitioner asserted that the Beneficiary is an executive at its U.S. company, it did not

demonstrate that the Beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. We further found that, although the Petitioner had shown that some of the Beneficiary's subordinates had been hired, the Petitioner did not establish that the Beneficiary's subordinate employees relieve him from performing non-qualifying operational duties; the job duties provided for the Beneficiary and his subordinates do not demonstrate that the Beneficiary will focus his time primarily on executive duties rather than the day-to-day operations of the business.

The Petitioner now files a joint motion to reopen and motion to reconsider with our office. In this matter, the Petitioner submits a brief and duplicate copies of evidence previously submitted to the record, either in response to the Director's RFE, in support of its previous motion to reopen, or on appeal. In its brief, the Petitioner maintains its objections to the analysis contained in the Director's original decision, with an issue date of December 24, 2013, and contends that it established the Beneficiary's eligibility at the time of filing. The Petitioner discusses the Beneficiary's role within the company, the importance of sales, and its current organizational and revenue growth in the United States.

II. MOTION REQUIREMENTS

For the reasons discussed below, we conclude that the joint motion must be dismissed 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 or application 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).

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

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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.

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.

III. DISCUSSION

The submission constituting the combined motion consists of 23 exhibits in addition to the Petitioner's legal brief. In its brief, the Petitioner lists the exhibits individually, acknowledging that these documents were previously submitted in response to the RFE and in support of its previous motion to reopen. The supporting exhibits include copies of previously-submitted bank statements, email correspondence, tax documentation, invoices and company information, all of which were previously available and previously submitted.

A. Motion to Reopen

Here, while the Petitioner submits extensive documentation on motion, it is all documentation that was previously submitted in response to the RFE, in support of its previous motion, or both. The Petitioner has not submitted any new evidence pertaining to the instant petition or to our recent dismissal of the Petitioner's appeal.

We find that neither the Form I-290B, the legal brief on motion, nor any of the submitted exhibits submitted on motion "state[s] new facts" or constitute new facts to be provided if the proceeding were to be reopened. On motion, the Petitioner asserts simply that the Director's initial decision of December 24, 2013 was erroneous, claiming that the decision "wrongly interpreted the needs of the company and their staffing requirements." We note, however, that the Petitioner provides no statements addressing the specific findings we articulated in our May 15, 2015 decision. The Petitioner outlines no new facts upon which the motion to reopen is based, and further does not support the motion with accompanying affidavits or documentary evidence in support of new facts and their likely positive impact towards changing the result of our decision on the appeal. In sum, the Petitioner has not made any assertions regarding the manner in which its motion to reopen meets the regulatory requirements.

"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. The motion to reopen will be denied.

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).

In order to have established merit for reconsideration of our latest decision the Petitioner must both: (1) state the reasons why the Petitioner believes our decision dated May 15, 2015 was based on an incorrect application of law or policy; and (2) specifically cite laws, regulations, precedent decisions, and/or binding policies that the Petitioner believes we misapplied in our prior decision.

The Petitioner once again asserts that the Beneficiary's position is primarily executive in nature. While the Petitioner's assertion is noted, 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 when the decision to dismiss the appeal was rendered.

As the Petitioner's primary objections focus on findings that the Director made in his original decision denying the petition, it is evident that the Petitioner seeks to address matters that were already addressed on appeal. As previously discussed, the reiteration of previous arguments or general allegations of error will not suffice. The Petitioner 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.

Further, a motion to reconsider must be supported by statutes, regulations, or precedent decisions, which the Petitioner has not provided. Here, while we note the Petitioner's brief reference on motion to *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), for the premise that the size of the petitioning entity is irrelevant when it comes to evaluating a beneficiary's position, the documents constituting this motion do not persuasively articulate how our previous decision dismissing the Petitioner's appeal misapplied the holding in *Young China,* or misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to dismiss the appeal was rendered.

As the Petitioner did not properly state the reasons for reconsideration, the motion to reconsider must be denied.

Finally, the motion shall also be denied for failing to meet another applicable filing requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Again, the regulation at 8 C.F.R. § 103.5(a)(4) states that a motion

which does not meet applicable requirements must be dismissed. Therefore, we are unable to grant the Petitioner's motion for this additional reason because the instant motion did not meet the applicable filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C).

IV. 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 B-USA, Inc.*, ID# 14820 (AAO Oct. 27, 2015)