



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

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

MATTER OF K-KB-T-(USA), INC.

DATE: FEB. 25, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a Texas corporation claiming to operate a “retail, wholesale, [and] import” business,<sup>1</sup> seeks to extend the Beneficiary’s classification 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, although a subsequent motion to reopen was granted, the Director affirmed her initial decision to deny the petition. The Petitioner filed an appeal with our office, which we dismissed. The matter is again before us on a combined motion to reopen and reconsider. The combined motion will be denied.

The Director denied the petition on January 23, 2013 and affirmed her decision on September 4, 2014, concluding that the Petitioner did not establish that the Beneficiary will be employed primarily in a 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.

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<sup>1</sup> The Petitioner claims to be a corporation organized under the laws of the State of Texas. During the adjudication of the appeal, we discovered evidence that the petitioning business in this matter is not in good standing within the state of Texas and its right to transact business in Texas is listed as “Franchise Tax Involuntarily Ended,” the definition of which is listed as “the entity’s registration or certificate was ended as a result of a tax forfeiture or an administrative forfeiture by Texas Secretary of State.” If the petitioning business is no longer an active business, the petition will have become moot.

Moreover, this fact would be material to the Petitioner’s eligibility for the requested visa. Specifically, the Petitioner’s forfeiture raises serious questions about whether it continues to exist as an importing employer, whether the Petitioner maintains a qualifying relationship, and whether it is authorized to conduct business in a regular and systematic manner. *See* section 214(c)(1) of the Act; *see also* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (l)(3).

#### 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 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 that establish eligibility at the time the underlying petition or application was filed."<sup>2</sup>

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

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<sup>2</sup> 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 I to the contrary, such instructions are incorporated into the regulations requiring its submission.

(b)(6)

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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 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 AND ANALYSIS

In denying the petition, the Director noted that in response to the RFE, the Petitioner identified [REDACTED] as the Beneficiary of the petition and provided additional documents explaining [REDACTED] duties rather than those of the Beneficiary. The Director found that the Petitioner failed to provide consistent evidence of its staffing or evidence that the Petitioner’s staffing is sufficient to relieve the Beneficiary from performing the non-qualifying routine duties to provide the Petitioner’s sales and services. The Director also noted that the Petitioner provided leases and other documentation to suggest that it had several locations, but failed to explain how the limited number of employees adequately staffs the various locations. The Director stated that the Beneficiary and his subordinate employees did not receive salaries commensurate with managerial or executive positions. The Director further found no evidence that the Beneficiary oversees the work of professional-level employees.

In affirming her denial of the petition, the Director found that the evidence submitted on motion was insufficient to establish that the Beneficiary is employed in a managerial or executive capacity. The Director stated that the Beneficiary's position description was overly general and that the evidence did not establish the existence of sufficient employees to relieve the Beneficiary from performing non-qualifying duties.

In dismissing the Petitioner's appeal, we found that it 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, although the Petitioner was given the opportunity to submit an expanded description of the Beneficiary's duties in response to the RFE, it instead submitted additional information related to its president and his duties. We found that the Petitioner had not provided a consistent or accurate organizational chart or other representation of its structure, nor had it consistently identified or documented its staffing levels as of the date of filing the petition. As such, we could not determine the number or type of employees the Beneficiary directly or indirectly supervised, whether there were employees available to relieve him from performing non-qualifying duties associated with the Petitioner's day-to-day operations, or his level of authority within the petitioning company. We noted that the Petitioner must demonstrate eligibility at the time of filing the petition, and its explanation of discrepancies due to an economic recession do not exempt the Petitioner from providing an accurate illustration of its actual staffing levels as of May 2012 when the petition was filed, along with evidence of wages paid to employees at that time. We found that, although the reasonable needs of the Petitioner serve only as a factor in evaluating the lack of staff, based on the Petitioner's representations, it did not appear that the reasonable needs of its company might plausibly be met by the services of a president, a vice president, and only two additional employees. We finally found that the Petitioner did not demonstrate that the Beneficiary in the instant matter is relieved from performing non-qualifying duties related to the company's marketing function or overall business operations.

The Petitioner filed this combined motion to reopen and reconsider on August 17, 2015. The submission constituting the combined motion consists of the Form I-290B and a brief. Although the Petitioner's brief refers to Exhibits A through E, the only documents submitted in support of the joint motion are the Petitioner's brief, a copy of our July 14, 2015 decision, and a copy of the Director's September 4, 2014 decision. In this matter, the Petitioner submits a brief that is almost identical to the previous brief submitted on appeal. In its brief, again, the Petitioner maintains its objections to the Director's decision and inserts references to our decision on appeal. The Petitioner adds references to federal court decisions in an effort to establish that it has complied with 8 C.F.R. § 103.2(a)(1) and that "the favorable factors outweigh the unfavorable factors in this case."

#### A. Denial of the Motion to Reopen

Upon review, we find that the Petitioner did not provide any new facts in this motion. While the Petitioner references Exhibits A through E 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 this office's 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. Denial 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).

Upon review, we find that the Petitioner did not properly state the reasons for reconsideration. The Petitioner briefly discusses its reasonable needs and staffing levels, concluding that "the company structure depends on their business and therefore, in this case is not a valid ground for denial." However, the Petitioner's assertions on this issue were discussed at length on appeal and will not be discussed again on motion.

In terms of the Beneficiary's position in the United States, the Petitioner states that the Beneficiary is "assigned at an 'Executive Capacity' as the Vice President-Marketing of the corporation." The Petitioner referenced and included the same previously submitted position descriptions and lists of job duties that were discussed in our previous decision and will not be discussed again on motion.

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.

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 K-KB-T-(USA), Inc.*, ID# 15913 (AAO Feb. 25, 2016)