



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

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

MATTER OF T-E- INC.

DATE: JAN. 28, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-129, PETITION FOR NONIMMIGRANT WORKER

The Petitioner, an electronic equipment export and freight forwarding business seeks to extend the Beneficiary's employment as its general manager under the L-1A nonimmigrant intracompany transferee classification. *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 appealed the Director's decision and we dismissed the appeal. The Petitioner later filed a motion to reopen which we denied. The matter is now before us again on a motion to reconsider. The motion will be denied.

In denying the petition, the Director concluded that the Petitioner did not establish that it will employ the Beneficiary in a qualifying managerial or executive capacity.

We dismissed the petitioner's subsequent appeal in a decision issued on September 29, 2014 after concluding that the Petitioner did not overcome the grounds for denial. We denied the Petitioner's subsequent motion to reopen, finding that it had not submitted any new evidence in support of the motion.

In support of its current motion to reconsider, the Petitioner asserts that we erred in denying the motion to reopen. Further, the Petitioner states that it does not agree with the conclusions we made in our original decision and requests that these findings be reconsidered. Specifically, the Petitioner contends that we failed to apply the preponderance of the evidence standard.

After reviewing the Petitioner's evidence and arguments submitted on motion, we find that it has not met its burden to establish that the previous decisions of the Director and this office were incorrect at the time of their issuance or that the petition warrants approval. Accordingly, while we will address the Petitioner's evidence and arguments below, we will not disturb our prior decision, and the motion will be denied

I. MOTION REQUIREMENTS

For the reasons discussed below, we will deny the motion to reconsider as the assertions submitted by the Petitioner do not merit reconsideration of the matter.

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 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.

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

On motion, the Petitioner “respectfully disagrees” with our decision to dismiss the previous motion to reopen, asserting that we did not recognize that some of the evidence submitted on motion predated the filing of the petition in 2013. The Petitioner contends that this evidence dated in 2013 reflects that the Petitioner employed the Beneficiary in a qualifying managerial capacity when the petition was filed on October 21, 2013.

Further, the Petitioner asserts that it disagrees with our conclusions set forth in our original decision. Specifically, the Petitioner contests our conclusions: (1) that the Petitioner submitted a vague duty description for the Beneficiary; (2) that the Petitioner's staffing levels and organizational structure were insufficient to support the beneficiary in a qualifying capacity as of the date of the filing of the petition; (3) that the Petitioner's future hiring plans were not relevant to the beneficiary's eligibility as of the date of the filing of the petition; (4) that the Petitioner provided vague and generalized duties for the Beneficiary's asserted subordinates; and (5) that the Petitioner had not substantiated its claim that it had sufficient operational subordinates to relieve the Beneficiary from primarily performing non-qualifying duties. The Petitioner points to the submitted 2013 IRS Form 1120 U.S. Corporation Income Tax Return and states that this evidence establishes that the Petitioner earned nearly \$400,000 in revenue during the first year. In addition, the Petitioner contends that the Petitioner employed six individuals during 2013 and paid over \$250,000 in salaries. The Petitioner also emphasizes that it earned nearly one million dollars in 2014. The Petitioner contends that it has established by a preponderance of the evidence that the Beneficiary is eligible for the requested extension of status.

A. Previous Denial of the Motion to Reopen

The first issue to address is whether we erred in denying the Petitioner's previous motion to reopen based on our conclusion that the Petitioner had not submitted any new evidence required to reopen the matter.

As noted in our previous decision, the Petitioner's submitted the following documentary evidence in support of its motion to reopen:

1. an additional support letter dated September 18, 2014;
2. its 2014 organizational chart;
3. its bank statements from January through September 2014;
4. invoices from various vendors reflecting the purchase of goods by the petitioner in 2014;

5. its 2013 IRS Form 1120, U.S. Corporation Income Tax Return (previously submitted);
6. 2013 and 2014 State of Florida Department of Revenue quarterly wage reports (those from 2013 being previously submitted);
7. documentation reflecting the Petitioner's employees, positions and salaries during 2013 and 2014 (that from 2013 being previously submitted);
8. IRS Forms 941, Employer's Quarterly Federal Tax Returns for 2013 (previously submitted) and for the first three quarters of 2014;
9. payroll checks issued to the Petitioner's employees throughout 2014;
10. its IRS Forms W-2, W-3, and 1099 for 2013 (previously submitted);
11. invoices from vendors for accounting and marketing services in 2014; and
12. a commercial lease agreement that commenced on September 1, 2014.

Upon review of this evidence, we concluded that all of the newly submitted evidence was dated in 2014. On motion, the Petitioner contends that we overlooked certain evidence dated in 2013. However, the Petitioner resubmitted evidence from 2013 that had already been considered by this office in previously dismissing the matter on appeal, including the Petitioner's IRS Forms 1120, 941, W-2, W-3 and 1099. Therefore, it was appropriate for us to determine that this was not "new" evidence. The purpose of the motion to reopen is not to reconsider evidence already taken into account by this office, but to review new evidence relevant to the time of eligibility, in this case, the time prior to the filing of the renewal petition on October 21, 2013. On motion to reopen, 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).

However, as found in our previous decision, all of the evidence submitted in support of the motion to reopen was evidence that was either previously submitted or evidence that post-dated the filing of the petition. Therefore, this evidence was not relevant to determining whether the Petitioner employed the Beneficiary in a qualifying managerial or executive capacity when the petition was filed on October 21, 2013. Again, the Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). On motion the Petitioner resubmitted evidence that was previously considered by this office in dismissing the appeal. As such, we properly determined that the Petitioner did not present new facts as necessary to support the motion to reopen, and the Petitioner has not established that we denied the motion to reopen in error.

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).

As previously explained, the Petitioner asserts that it disagrees with our conclusions set forth on appeal. The Petitioner points to its submitted 2013 IRS Form 1120 U.S. Corporation Income Tax Return and states that this evidence establishes that the Petitioner earned nearly \$400,000 in revenue during that year. In addition, the Petitioner contends that the Petitioner employed six individuals during 2013 and paid over \$250,000 in salaries. The Petitioner also emphasizes that it earned nearly one million dollars in 2014. The Petitioner contends that we have overlooked the preponderance of the evidence that demonstrates the Beneficiary's eligibility.

We do not find the Petitioner's assertions on motion persuasive. The Petitioner has not addressed in detail any errors of law made by this office or explained how our previous grounds for denying the appeal were mistaken based on the application of pertinent statutes, regulations or precedent decisions. Rather, the Petitioner states that it disagrees with our decision and points to evidence we have already considered in previously dismissing the appeal, namely, its 2013 IRS Form 1120.

Moreover, the Petitioner overlooks the specific finding made in our previous decision. Again, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must establish that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In dismissing the Petitioner's appeal, we analyzed the Beneficiary's duties in detail and concluded that they were overly vague and that they failed to convey the Beneficiary's actual day-to-day tasks. For instance, we determined that although the Petitioner provided a number of duty descriptions for the Beneficiary, they included few specifics relevant to his day-to-day activities such as examples or documentation substantiating strategies or goals he developed or implemented, specific budgets he managed, risks he assessed, or internal controls he implemented. We found that several of the Beneficiary's duties simply described the general attributes of a manager or executive, rather than the specific tasks he performs. We stated that 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. The actual duties themselves will reveal the true nature of the employment. *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). 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)). However, on motion, the Petitioner states that it disagrees with this conclusion, but does not articulate specifically why this constitutes an error of law. Therefore, we uphold this basis of the original dismissal.

Further, beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

In dismissing the Petitioner's appeal, we provided a detailed review of all evidence in the record and found that the Petitioner did not establish by a preponderance of the evidence that the Beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. For instance, the Petitioner acknowledged on appeal that it had only four employees as of the date of the petition. The Petitioner stated that its employees at the time of filing included the Beneficiary, a chief operating officer (COO) and a chief financial officer (CFO) reporting to the Beneficiary, and one operational employee responsible for domestic and international sales. The chart also indicated a number of open operational positions to be hired, including a billing employee, an administrative employee, a budget analyst, and purchasing, customer service, and receiving and inspection employees. We concluded that the Petitioner had not established that the staffing and organizational structure in place at the time of filing had sufficient operational employees to support the Beneficiary in a qualifying managerial or executive capacity. On motion, the Petitioner does not address this finding or articulate who performed the necessary operational duties as of the date the petition was filed.

On appeal, the Petitioner submitted evidence indicating that it hired customer service and receiving and inspection employees as of December 2013. However, the petition was filed in October 2013. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Once again, the Petitioner does not address how we erred by excluding evidence that post-dates the filing of the petition.

Likewise, we concluded that the Petitioner had submitted only generalized position descriptions for the Beneficiary's immediate subordinates. Much like the Beneficiary's duty description, the duty descriptions provided for his subordinates provided little insight into their actual day-to-day duties. For instance, we noted that the Petitioner vaguely stated that the COO spends her time on overseeing the company's operations, looking after issues related to marketing sales, production, and personnel; strategically planning and allocating resources; ensuring quality control of all company output; setting operational and performance goals; and establishing and monitoring performance reporting systems. Further, we pointed out that the Petitioner had explained that the CFO was responsible for analyzing and reviewing financial data, reporting financial performance, preparing budgets and monitoring expenditures and costs; ensuring in-depth testing of internal information technology systems; assisting other departments in improving information technology usage and capabilities; and overseeing treasury activities.

We stated that the Petitioner had provided few specifics or supporting evidence to corroborate that these employees actually perform their stated duties. 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)). In addition, we found that the duties of the Beneficiary's executive subordinates included no day-to-day operational duties necessary for the operation of the Petitioner's electronics export business. We found that, given that the company had only one operational employee as of the date of the petition, that it is reasonable to conclude that the Beneficiary's executive subordinates were performing lower-level tasks in order for the company to operate at the date of filing. Indeed, we pointed to the fact that the Petitioner had submitted evidence reflecting that the Beneficiary himself had been purchasing and shipping electronics abroad despite these tasks not being included in his position description. Again, on motion, the Petitioner has not directly addressed these discrepancies which led, in part, to the dismissal of the appeal.

Furthermore, we note that the Petitioner asserted on appeal that its operations were supplemented by independent contractors performing the non-qualifying functions of the business. We stated in our initial decision that the Petitioner had submitted no supporting evidence to substantiate this assertion. The Petitioner did not provide evidence of payments to contractors, identify any contractors on its organizational chart, or otherwise explain how this contracted staff relieved the Beneficiary, the COO, and CFO from performing non-qualifying duties. The Petitioner does not address this finding on motion.

Rather than addressing specific evidentiary deficiencies, omissions and discrepancies in the record, the Petitioner seeks to rely on revenues and salaries reported in its 2013 and 2014 tax returns in support of its claim that the Beneficiary will be employed in a qualifying managerial or executive capacity. However, evidence of the accumulation of revenue or the payment of salaries does not alone establish that the Beneficiary acted in a qualifying managerial or executive capacity when the petition was filed. We are tasked with reviewing the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business. Upon doing so, we found many of the insufficiencies discussed above, including vague duties for the Beneficiary and his subordinates, an organizational chart including only one operational employee, and various other discrepancies. Therefore, the Petitioner's reliance on its IRS Forms 1120 does not overcome these deficiencies and discrepancies. In fact, as we have previously noted, the Petitioner's 2014 IRS Form 1120 is not relevant to demonstrating the Beneficiary's eligibility as of the date of the petition in October 2013.

In addition, the Petitioner states on motion that it paid over \$250,000 in wages in 2013. However, the Petitioner's 2013 IRS Form 1120 reflects that it only paid \$138,000 in wages during that year, and its 2013 IRS Form W-3, Transmittal of Wage and Tax Statements, indicates that it paid \$62,240 in wages. Likewise, there are discrepancies in the record which call into question whether the petitioner's current employees work on a full-time basis. The Petitioner asserted that the CFO

received \$39,000 per year, the COO earned \$26,000 per year and that the sales employee earned a salary of \$20,800 during 2013. However, the petitioner submitted payroll documentation indicating that the CFO received \$300 per week, the COO \$200 per week, and the sales employee \$160 per week, each for 40 hours of work. Further, the Petitioner provided IRS Forms W-2 for each employee reflecting that they earned salaries lesser than that indicated in their pay stubs and the Petitioner's state and federal quarterly wage reports.

On appeal, the Petitioner submitted IRS Forms 1099 for each employee and the Petitioner asserts that all employees were paid additional amounts independent of withholdings. However, this division of payments is not reflected in the submitted pay stubs and the Petitioner has offered no specific explanation for this approach. Further, these amounts are not reflected in the Petitioner's tax return as payments to contractors. The Petitioner did not show with sufficient evidence that these employees are receiving their stated weekly salaries. Once again, on motion, the Petitioner has not addressed these discrepancies, but only provides further confusion by asserting that it paid \$250,000 in salaries during 2013, an amount not reflected in its IRS Form 1120. 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).

Lastly, on motion, the Petitioner contends that we did not apply the preponderance of the evidence standard in adjudicating its appeal. The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, we must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. As noted herein, we have analyzed the record in its totality and specifically addressed various insufficiencies and discrepancies in the submitted evidence. The Petitioner's assertion that we failed to apply the preponderance of the evidence standard is not persuasive.

In conclusion, we find that the Petitioner has not specifically 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. The Petitioner has not met its burden to establish that the previous decisions of the Director and this office were incorrect at the time of their issuance or that the petition warrants approval.

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 motion to reconsider will be denied and our previous decisions will not be disturbed.

ORDER: The motion to reconsider is denied.

Cite as *Matter of T-E- Inc.*, ID# 15230 (AAO Jan. 28, 2016)