U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-T-T-R-M-, INC.

DATE: JULY 18, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a restaurant business, seeks to extend the Beneficiary's temporary employment as its general manager under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary would be employed in either a managerial or executive capacity under the extended petition. The Petitioner subsequently appealed the Director's decision and we dismissed the Petitioner's appeal.

The matter is now before us on a combined motion to reopen and reconsider. On motion, the Petitioner submits additional evidence and asserts that this evidence "explains in more detail" what the Beneficiary has been doing during the previous year and "makes it clear that his only job is to be a manager . . . and that he does not do anything else."

Upon review, we will deny the combined motion.

I. MOTION REQUIREMENTS

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).

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.

[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."

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

For the reasons discussed below, we will deny the motion to reopen and the motion to reconsider.

In dismissing the Petitioner's appeal, we found that the Petitioner had submitted multiple descriptions of the Beneficiary's position which contained non-qualifying duties, overly generalized duties, and inconsistent statements regarding the Beneficiary's role which had not been resolved. Therefore, while we concluded that he would perform some managerial or executive duties and exercises the appropriate level of authority as the Petitioner's senior employee, the evidence of record did not establish that he would primarily perform managerial or executive duties under the extended petition.

We also considered the nature of the Petitioner's business, along with its staffing levels, organizational structure and stage of development at the end of its initial year of operations. At the time of filing, the Petitioner was operating a restaurant that was open for 105 hours per week. Although it claimed to have "7 to 9" employees when the Petition was filed in December 2014, the most recent payroll evidence it submitted showed only five employees including the Beneficiary, and it was unclear what positions were staffed at the time of filing or whether there would be sufficient personnel to relieve the Beneficiary from involvement in the day-to-day duties of the restaurant during its stated operating hours.

We acknowledged the Beneficiary's responsibility for locating additional restaurant locations for investment, but we concluded that the evidence of record did not support the Petitioner's claim that the Beneficiary's primary duties at the end of the initial year involved managing the company's expansion activities. Further, we found that the many of the duties the Beneficiary would perform in researching possible locations would not be managerial or executive in nature.

In support of the motion, the Petitioner submits a brief and additional evidence of its efforts to secure additional restaurant locations beginning in early 2015, including evidence that the foreign entity

established a separate subsidiary company in April 2015 to operate one of the potential restaurant investments. In addition, the Petitioner submits tax documentation including: its 2013 IRS Form 1120, U.S. Corporation Income Tax Return, for the fiscal year ended on June 30, 2014, which shows that the Petitioner had revenue of $106,613 that year; and copies of its California quarterly wage reports for the first three quarters of 2015, which document the company's increasing staff size and personnel expenses in the nine months following the filing of the petition. The Petitioner also re-submits copies of training and employee manuals developed by the Beneficiary for restaurant staff.

Although the Petitioner marked on the Form I-290B that it was filing a combined motion to reopen and motion to reconsider, it has not submitted evidence that could be considered "new facts" in support of a motion to reopen. All of the evidence submitted was either previously submitted and already considered, or it post-dates the filing of the petition. As such, the Petitioner's motion does not satisfy the requirements of a motion to reopen. The motion to reopen will be denied.

Nor does the Petitioner's motion satisfy the requirements of a 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 must 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) (requirements for a motion to reconsider); Instructions for Motions to Reconsider at Part 4 of the Form I-290B.

Here, the Petitioner's stated reasons for reconsideration are insufficient to establish that our decision was incorrect.

On motion, the Petitioner states that "additional documentation is attached that explains in more detail what duties and responsibilities the beneficiary has had during the past year and that will continue into the coming years that makes it clear that his job is only to be a manager of the petitioning company operations in the United States and that he does not do anything else." The Petitioner also states that the Beneficiary's primary responsibility is to "locate and secure additional locations for new restaurants and to direct and manage the company's work in remodeling, equipping, staffing, training and opening these restaurants." The Petitioner further outlines the different attempts the Beneficiary made to secure additional restaurant locations during 2015, none of which concluded in the Petitioner's purchase of a second restaurant.

The Petitioner further states in reference to the Beneficiary's job duties that "there is no way to provide details to quantify what he is going to do or how many hours he will spend doing it" because the company is still at a preliminary stage of development and is still "being created." The Petitioner maintains that the sole purpose of the Beneficiary's transfer was to manage the company's expansion in the United States to include multiple restaurants. In addition, the Petitioner states that the parent company remains committed to spending "up to $2,000,000 in the coming 18 months to ensure this expansion happens."

The Petitioner does not submit sufficient evidence to overcome the deficiencies outlined in our decision and nor does it specifically address how the decision was based on an incorrect application of law or policy.

Although the Petitioner claims that it is still "being created," the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation only one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have the necessary staffing and business operations after one year, to sufficiently relieve the Beneficiary from performing operational and administrative tasks, the Petitioner is ineligible by regulation for an extension.

The Petitioner reiterates the job duties performed by the Beneficiary but has not overcome the concerns discussed in our decision regarding the lack of documentation of employees available at the time of filing who would relieve the Beneficiary from performing non-qualifying duties. The Petitioner emphasizes that the Beneficiary's primary duties relate to expansion activities; however, the duty descriptions submitted prior to the denial of the petition, although varied, indicated that he was primarily involved in the operations of the Petitioner's existing restaurant at the time the petition was filed on December 3, 2014. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

While the evidence submitted on motion shows that the Petitioner's staffing levels increased in 2015 and it appears the Beneficiary may have been free to allocate additional time to identifying additional restaurant locations, the record does not include probative evidence that the Beneficiary will be performing managerial tasks rather than the necessary research, contract negotiations, and work with financial institutions and government entities to locate and begin the process of the Petitioner's expansion. The reiteration of previous arguments or general allegations of error will not suffice. *See Matter of O-S-G-*, 24 I&N Dec. at 60. The Petitioner must state the specific factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision. *Id.* The Petitioner has not done so here.

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. Accordingly, the Petitioner's motion to reconsider will 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 A-T-T-R-M-, Inc.*, ID# 17432 (AAO July 18, 2016)