



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 28 2015** OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Nebraska Service Center Director denied the preference 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 this Form I-140, Immigrant Petition for Alien Worker, to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The petitioner, a Kentucky corporation, engaged in "management, operations and development," claims to be an affiliate of [REDACTED], the beneficiary's former employer in India. The petitioner seeks to employ the beneficiary in the position of Vice President.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The petitioner appealed the director's decision to us. We reviewed the record of proceeding and determined it did not contain sufficient evidence to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity, or that there was a qualifying relationship between the petitioner and the entity where the beneficiary was employed abroad. 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 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 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.

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).

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 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 submission constituting the combined motion consists of the following: (1) the Form I-290B; (2) a brief submitted by counsel; and (3) documentary evidence that consists of the following documents:

- Form 941, Quarterly Tax Returns, for the fourth quarter of 2013 and the first and second quarters of 2014;
- Form 1040, U.S. Individual Income Tax Return, 2013 for the beneficiary;
- 2013 Form 1120S, U.S. Income Tax Return for an S Corporation;
- Balance Sheet and Income Statement dated August 31, 2014;
- Weekly work schedule;
- Organizational chart of the petitioner;
- Hardship letter;
- Doctor letter; and,
- Documentation regarding the beneficiary's medical condition.

A. Dismissal of the Motion to Reopen

Upon review, we observe that most of the documents submitted in support of this motion are documents that are relevant to the petitioner after the I-140 petition was filed. The current petition was filed on February 7, 2013 and on motion, the petitioner submits documentation for 2014. For example, the petitioner submits a weekly work schedule dated September 15, 2014 to September 21, 2014; an income statement ending in August 31, 2014; payroll statements for three employees for July, August and September 2014; and, Form 941, Employer's Quarterly Federal Tax Return, for the first and second quarters of 2014 and the fourth quarter of 2013. All of these documents provide information of the petitioner after the current petition was filed which does not establish eligibility at the time of filing, in this case from February 7, 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). As such, the petitioner has not established that

the evidence submitted on this motion would change the outcome of this case if the proceeding were reopened.

The petitioner also submitted on motion a "hardship letter" indicating that the beneficiary was diagnosed with a brain tumor and he has to be "under doctors observation for life." The petitioner also explained that he has a wife and child. The beneficiary states in the letter, "I am requesting you to grant me permanent residency so I can continue to receive much needed medical treatment here and raise loving family." The petitioner also submitted medical records for the beneficiary. The hardship letter and the medical records do not present the evidentiary requirements to overcome the concerns discussed at length in the director's decision and our decision.

On motion, the petitioner also submitted an undated organizational chart which indicated a President, a Vice President and a Secretary/Manager. It is not clear if this chart represents the employees from the date of filing the instant petition. As discussed in our decision dated August 27, 2014, the petitioner provided two different organizational charts and did not explain the reason for the differences. The first organizational chart submitted with the initial petition listed a president, a vice president, a secretary/manager, an assistant manager, an assistant manager in restaurant, a cashier/cook, and a clerk/cashier. In response to the request for evidence, the petitioner submitted a second organizational chart that indicated a president, a vice president, a secretary/manager, an assistant manager and a clerk/cashier. The petitioner does not explain why it no longer employs an assistant manager or a cook for the restaurant as listed in the initial organizational chart. Now on motion, the third organizational chart indicated a President, a Vice President and a Secretary Manager. It is not clear which organizational chart contains the accurate information. 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).

On motion, the petitioner also submits the Form 1120, U.S. Corporation Income Tax Return, for 2013, "confirming annual wages, and continuing conduct of business." Although this document indicates annual wages paid in 2013, the petitioner still does not explain why it submitted three different organizational charts and does not clearly explain the individuals employed by the company. The Form 1120 for 2013 does not overcome the concerns outlined in the director's and our decisions.

"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 and its counsel have 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).

The petitioner asserts that the proffered position qualifies as a managerial or executive capacity and that "there was not proper weight accorded to the actual descriptions and responsibilities to be performed by the Beneficiary." 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, the director 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.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition. Here, the submitted evidence is not relevant, probative, and credible.

The petitioner correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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 facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

The petitioner cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the

proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, we note that the petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. In addition, as noted in our decision, the petitioner provided vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis and several non-qualifying duties. In addition, the petitioner did not provide sufficient information of its employees, the job duties performed by each employee and the work schedules maintained by each employee. 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).

With respect to *Mars Jewelers*, we are not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. We have long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, we require the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the beneficiary is not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

The petitioner also cites *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. The petitioner also cites *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991) to stand that "responsibilities must be executive and managerial 'to the exclusion' of more other duties." As thoroughly discussed in the dismissal of the appeal, the petitioner provided vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis and several non-qualifying duties. In addition, the petitioner did not provide sufficient information of its employees, the job duties performed by each employee and the work schedules maintained by each employee. The petitioner's documentation was inconsistent and insufficient to establish a full-time staff as indicated in the organizational chart. The petitioner did

not provide any documentation to overcome the AAO's concerns such as inconsistent hours of operations, lack of full-time employees and several shifts being run by only one employee. 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).

Upon review, we find that the petitioner did not properly state the reasons for reconsideration. Counsel does not articulate how our decision was based on incorrect application of law or policy and does not provide documentation to overcome our decision.

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 dismissed.

III. ADDITIONAL ISSUES

When we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

Our decision dated August 27, 2014 outlined an additional group for dismissal in that the petitioner did not provide sufficient evidence to establish a qualifying relationship between the petitioner and the entity where the beneficiary was employed abroad. On motion, the petitioner stated that it previously provided additional documentation from the stock certificate such as VIBE registration, agreements, promissory note, Kentucky online filing and a letter from the foreign entity. The documents do not provide sufficient evidence of a qualifying relationship. For example, the articles of incorporation filed with the Commonwealth of Kentucky do not state ownership of the petitioner. In addition, as noted in our decision, the information on the petitioner's stock certificate is inconsistent with the statements of the petitioner. As noted, the petitioner submitted Certificate Number 1 issuing 1000 shares of the petitioner to [REDACTED], dated February 22, 2011, and not to the employer's foreign company. The petitioner stated that this was a mistake and submitted a one paragraph document certifying that [REDACTED] acquired 51% partnership in the petitioner, signed by [REDACTED] and the beneficiary only and not be [REDACTED]. The petitioner also submitted a document entitled, "Minutes of the Director's Meeting," stating that [REDACTED] transferred 510 shares of the petitioner to [REDACTED]. However, the petitioner did not submit a new stock certificate and a stock ledger to indicate the change in ownership. 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). For this additional reason, the combined motion will be dismissed.

Additionally, 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." The petitioner's motion does not contain this statement. 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, because the instant motion does not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed.

Even if the petitioner had complied with the requirements at 8 C.F.R. § 103.5(a)(1)(iii)(C), the petitioner did not submit any new evidence, nor has it established that the AAO's decision to dismiss the appeal was based on an incorrect application of law or USCIS policy.

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

ORDER: The combined motion is dismissed.