



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

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

MATTER OF B-I- CORP.

DATE: DEC. 16, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a “management, consulting, investment” company which operates a motel, seeks to employ the Beneficiary as its vice president under the multinational executive or manager immigrant classification. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). The Director, Texas Service Center, denied the petition. We dismissed the Petitioner’s appeal and denied its subsequent combined motion to reopen and reconsider as untimely filed. Subsequently, the Petitioner filed a second combined motion to reopen and reconsider, which we also denied. The matter is now again before us on a third combined motion to reopen and reconsider, in accordance with 8 C.F.R. § 103.5. The combined motion will be denied.

In dismissing the Petitioner’s appeal, we affirmed the Director’s finding that the Petitioner did not establish that the Beneficiary has been employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

On this third motion, the Petitioner asserts that we should review the motion to reopen and the motion to reconsider, and that the cumulative evidence in the record supports a finding that the Beneficiary has been and would be employed in a qualifying managerial or executive capacity.

#### I. MOTION REQUIREMENTS

For the reasons discussed below, this combined motion will be denied 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.”

A. 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.<sup>1</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).

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 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

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<sup>1</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 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission.”

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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

The Director’s initial decision to deny the petition, and our subsequent dismissal of the Petitioner’s appeal, was based upon a finding that evidence of record did not establish that the Beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity as defined at section 101(a)(44) of the Act. On August 25, 2014, we rejected the Petitioner’s first combined motion to reopen and reconsider as untimely filed.

The Petitioner’s second combined motion to reopen and reconsider, filed on September 11, 2014, demonstrated that the untimely filing of the first combined motion was reasonable and beyond the Petitioner’s control. Consequently, as we have the discretion to excuse the late filing of a motion to reopen in such situations under 8 C.F.R. § 103.5(a)(1)(i), we granted review of the motion to reopen component of the combined motion in our decision dated May 22, 2015, but determined that the motion to reopen did not meet the applicable requirements set forth at 8 C.F.R. § 103.5(a)(2). We did not grant the motion to reconsider, noting that we do not have the authority to exercise similar discretion for untimely motions to reconsider. It is this May 22, 2015 decision that is the subject of the motion currently before us.

### A. Motion to Reopen

Upon review of the documents submitted in support of the motion to reopen, we find that the Petitioner has not provided new evidence. In its brief, the Petitioner alleges no new facts. The substance of the Petitioner’s argument is that the Director’s September 18, 2013 decision of denial and our March 19, 2014 dismissal of the subsequent appeal were in error.

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The submission constituting the combined motion currently before us consists of the Form I-290B, Notice of Appeal or Motion, a brief, and additional documentation.

The Form I-140, Immigrant Petition for Alien Worker, was filed on August 8, 2008, and several of the documents submitted on motion are dated after August 2008. On motion, the petitioner submits copies of the following documents: IRS Form 1120, U.S. Corporation Income Tax Return, for 2013 and 2014; Schedule K-1, Shareholder's Share of Income, Deductions, Credits, etc. for 2014 and 2013; and IRS Form W-2, Wage and Tax Statement, for all of its employees in 2014. Thus, all of the documents submitted on motion post-date the filing of the Form I-140. The Petitioner noted that in our previous decision, we identified case law regarding a nonimmigrant visa petition rather than an immigrant visa. However, the case law regarding immigrant petitions also indicates that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

All of the documents submitted in support of this motion to reopen were previously available or are documents that are relevant to the Petitioner after the petition was filed. For example, the Petitioner submits a support letter that reiterates the duties the Beneficiary performed abroad and in the United States. The information in this document was previously available. Further, the Petitioner has not established that the evidence submitted on this motion would change the outcome of this case if the proceeding were reopened.

"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.

Because the Petitioner has provided no new facts or new evidence, let alone facts or evidence likely to change the result of that decision, 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 our May 22, 2015 decision, we rejected the Petitioner's second motion to reconsider, based on the untimely filing of the Petitioner's first motion to reconsider which was rejected on August 25, 2014. We noted again that unlike motions to reopen, we have no discretionary authority to excuse the late filing of a motion to reconsider. The motion currently before us does not address our lack of discretionary authority to excuse an untimely motion to reconsider, and has not established that our most recent decision rejecting the Petitioner's motion to reconsider was incorrect based on the evidence of record at the time of the initial decision.

Further, reviewing the merits of the motion to reconsider, the Petitioner has not established that the evidence submitted on motion would change the outcome of this case if the proceedings were reconsidered.

With respect to our finding that the evidence of record did not establish that the Beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, the Petitioner asserts on motion that we erred in determining that the Petitioner provided an overly broad description for the Beneficiary and that the submitted description contained several non-qualifying duties. In our appeal decision, we listed some of the Beneficiary's job duties and noted that the Petitioner did not provide sufficient detail of the day-to-day duties the Beneficiary performed abroad. Instead, the Petitioner provided broad duties such as "oversee[s] and manages Accounts, Finance, Sales and Operations departments."

In addition, since the Petitioner did not provide corroborating evidence of the foreign company's organizational structure, we cannot determine if the foreign company had accounts, finance, sales or operations departments for the Beneficiary to oversee. As noted in our decision, the organizational chart of the foreign company identified three directors, seven managers, and a large staff but did not explain why a gas station would require so many directors and managers. The Petitioner explained that this gas station is not like a gas station in the United States as it also supplies "gas, petrol and diesel to many smaller dealers, and at our location we had exclusive contracts with big distributors of many types of consumer products." However, the Petitioner did not provide any contracts or other information to explain the work the foreign company does above and beyond selling gasoline. In addition, the organizational chart does not identify any cashiers or clerk positions for running the gas station. It was not unreasonable to question the accuracy of the submitted organizational charts in light of this evidence. The Petitioner has not provided sufficient evidence of the organizational structure of the foreign company and thus, it has not established that the Beneficiary was employed in a managerial or executive capacity.

On motion, the Petitioner asserts that we erred in finding that the Beneficiary's position description for the foreign company contained several non-qualifying duties and that "market research and contract negotiations are highly professional areas, which were handled by the beneficiary as Director of the foreign entity." However, performing the actual tasks of market research and contract negotiation is an operational task of running the business operations, and even "highly professional" duties do not equate with duties in a managerial or executive capacity as those terms are defined at section 101(a)(44) of the Act. An employee who "primarily" performs the tasks

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necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm’r 1988).

Turning to the Beneficiary’s proposed U.S. employment, the Petitioner asserts that the proffered position qualifies as executive and that we erred in not applying the required preponderance of the evidence standard. Our appeal decision applied the “preponderance of the evidence” standard that requires that the evidence demonstrate that the petitioner’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.* Our decision included a detailed discussion of the Petitioner’s evidence and explained why the evidence did not establish eligibility.

On motion, the Petitioner does not address of the specific evidentiary deficiencies, discrepancies and omissions in the record which led us to conclude that the Petitioner did not meet its burden of proof. For example, we noted that the Petitioner stated at the time of filing that it will provide management services to four clients as evidenced by agreements provided with the initial petition. In response to the request for evidence, the Petitioner continued to state that it would provide services to the companies listed in the agreements. Only in response to the Director’s notice of intent to deny (NOID) did the Petitioner state that the “management contracts we entered into with the above listed entities, were agreed to, but never fulfilled.” The Petitioner also explained that it could not fulfill the contracts submitted with the petition because the Petitioner entered into an agreement to lease three [REDACTED] and handle the management services of the three motels. The Petitioner also submitted two lease agreements indicating that the Petitioner is the new tenant of two [REDACTED]. The leases are signed in 2008 when the current petition was filed; thus, it is not clear why the Petitioner declined to mention this change in business operations earlier and waited until the response to the NOID. Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In addition, the lease agreements signed by the Petitioner are for leases that expired on December 31, 2008 and April 14, 2009, respectively. There is no evidence that the Petitioner renewed these leases and continues to rent the [REDACTED] in [REDACTED] and [REDACTED] Virginia. In addition, the Petitioner did not provide any agreement to corroborate its assertion that it has been contracted to provide management services to the two motels. 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)).

Finally, the Petitioner’s organizational chart does not reflect an organizational structure of a company that manages multiple motels. The chart identifies a vice president who in turn supervises

a general manager accounting and finance, general manager sales and marketing, general manager, operations and administration, and general manager information technology. Under these four managers, the chart identifies a financial manager, accountant, bookkeeping clerk, sales and marketing manager, business development manager, sales/customer services staff, administrative assistant, human resources, administrative clerk, and network administrator. The chart does not identify any positions that are typical of a motel operation such as housecleaning, maintenance, front office manager, front office staff, and reservations staff. Furthermore, upon review of the IRS Forms W-2 for the Petitioner's employees in 2008, most of the employees received salaries of under \$7,000.00 for the year, and several received less than \$500.00. It is unclear what positions these employees held or how the company was staffed and structured at the time of filing. The Petitioner has not provided sufficient evidence of the organizational structure of the company and thus, it has not established by a preponderance of the evidence that the Beneficiary will be employed in an executive capacity. 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. Overall, on motion, the Petitioner has not adequately addressed the specific evidentiary deficiencies address in our initial decision.

We conclude that the documents constituting this motion to reconsider do not articulate how our decisions or the Director's decision misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record at the time those decisions were rendered, such that the proceedings would warrant reconsideration. Accordingly, the 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 B-I Corp.*, ID# 14879 (AAO Dec. 16, 2015)