MATTER OF A-T-T-R-M-, INC. DATE: JAN. 10, 2017

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 a managerial or executive capacity under the extended petition. The Petitioner appealed the Director's decision and we dismissed the Petitioner's appeal. The Petitioner subsequently filed a combined motion to reopen and reconsider, which we denied.

The Petitioner then filed a second combined motion to reopen and reconsider. We denied the combined motion based on a finding that the Petitioner did not submit a brief and/or additional evidence with its motion or provide a statement regarding the basis for the motion with its Form I-290B, Notice of Appeal or Motion.

Subsequent to the denial, the Petitioner provided evidence that it did in fact submit a brief and evidence with the Form I-290B that was not incorporated into the record of proceeding. Accordingly, we will reinstate the motion in order to consider this brief and evidence and the merits of the motion, and to issue a new decision.

Upon review, we will deny the combined motion.

I. LAW

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen the proceeding to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening, a petitioner must not only meet the formal filing requirements (such as, for instance, submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper

cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

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.[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).

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 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. ANALYSIS

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 the Beneficiary would perform some managerial or executive duties and exercise the appropriate level of authority as the Petitioner's senior employee, we found 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. We found that, at the time of filing, the Petitioner was operating a restaurant that, according to its menu, 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, from early October 2014, showed only five employees, including the Beneficiary. We found that 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 denying the first combined motion, we determined that the Petitioner had not submitted any evidence that could be considered a "new fact" in support of a motion to reopen. All of the evidence submitted was either previously submitted and already considered, or it post-dated the filing of the petition.

We further found that the Petitioner's first motion did not satisfy the requirements of a motion to reconsider, as the Petitioner did not submit sufficient evidence to overcome the deficiencies outlined in our decision and did not specifically address how the decision was based on an incorrect application of law or policy.

In a brief submitted in support of the current motion to reopen and reconsider, the Petitioner asserts that our decision to deny the first motion was "based upon either incorrect information and/or insufficient information at that time." The Petitioner further asserts that there were specific factual and legal issues raised on appeal that were either decided in error and/or overlooked in the initial decision that could be considered "new facts."

First, the Petitioner asserts that when reviewing the Petitioner's staffing levels and considering whether the Beneficiary had sufficient staff to relieve him from performing the day-to-day duties of the restaurant, "USCIS mistakenly concluded, based on information incorrectly received, that 'the Petitioner was operating a restaurant that was open for 105 hours per week.'"

In support of its claim that the business is in fact open for 77 hours per week, from 11:00 a.m. to 12:00 a.m. with a break from 3:00 to 5:00 p.m. daily, the Petitioner submits an un-notarized "affidavit" from the Beneficiary attesting to these operating hours. The Beneficiary mentions that the restaurant had reduced operating hours of 42 hours per week following a burglary that occurred in 2014, although it appears that this reduction in hours was temporary, as the Beneficiary stated that the business was "back to normal since October of 2014," and regularly employing eight to nine workers by that time. The Petitioner also submits a police report and insurance claim confirming the burglary in 2014.

In addition, the Petitioner submits two "amended" organizational charts illustrating the company's staffing levels and structure as of October 22, 2014, and November 5, 2014, both of which are supported by payroll check registers showing the hours worked by and wages paid to each employee. The latest chart shows eight employees subordinate to the Beneficiary. This chart shows that the Beneficiary serves as both general manager and as the "Development Department" and that he supervises the kitchen manager and the front office manager who is also identified on the chart as the "HR Department" and "Financial Department"). The chart includes one storekeeper, three kitchen workers, and two cashiers/waiters. The payroll evidence indicates that most employees were working 30 hours per week as of November 2014, while the front office manager worked 32-33 hours per week and one waiter worked fewer than 25 hours. All subordinate employees were paid the same wage of $9.00 per hour.

It appears that the Petitioner is presenting its newly-described operating hours and its November 2014 staffing levels as "new facts" to be considered in the reopened proceeding. The Petitioner has had multiple opportunities to state its operating hours and previously, has twice submitted its menu

indicating that its restaurant is open daily for 15 hours. Further, the Petitioner's November payroll records were available at the time of filing and the Petitioner instead submitted its payroll only through early October 2014 even when responding to the Director's RFE in January 2015. While the burglary of the restaurant was not mentioned previously, it is unclear how this circumstance would have impacted the Petitioner's eligibility as of the date of filing the petition on December 2, 2014, particularly when the Beneficiary attests that the restaurant resumed normal operations and staffing by October 2014.

Nevertheless, even if we consider these to be "new facts," upon review, the newly submitted evidence would not change our analysis of the Petitioner's organizational structure and staffing levels as of the date of filing, and would not cause us to overturn our adverse finding in this case.

Our determination that the Petitioner's restaurant is open for 105 hours per week was based on credible, probative evidence of its operating hours. Specifically, in response to the Director's request for evidence (RFE), the Petitioner stated that it changed its operating hours in October 2014 "to add more time to the business day" and also commented that the Beneficiary had redesigned the menu. The Petitioner submitted a copy of the "new menu" with the operating hours listed as lunch service from 11:00 a.m. to 5:00 p.m. and dinner service from 5:00 p.m. to 2:00 a.m. The same menu was submitted at the time of filing and it was therefore reasonable to conclude that these were the restaurant's actual operating hours. The Beneficiary provides different operating hours in his un-notarized "affidavit" submitted in support of this motion, but the Petitioner has not provided any supporting evidence, such as a different version of the restaurant's menu, information from the Petitioner's or other public website, or photographs of the operating hours posted at the restaurant itself.[2] It is unclear why the Petitioner would have a menu printed with operating hours it now claims it never maintained. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, while the Petitioner has now submitted payroll records through November 4, 2014, the record still does not contain evidence of its staffing levels as of the date of filing on December 2, 2014. Moreover, this newly-submitted evidence does not support the Petitioner's claim, made on appeal, that the Beneficiary's two direct subordinates, charged with overseeing the kitchen and dining room operations, are full-time employees working 48 hours per week. While the Petitioner implied that that these work hours ensure that there would always be at least one manager on the premises, the most recent payroll evidence available shows that the managers were working 30 and 32-33 hours, respectively, and could not cover all of the restaurant's operating hours, even if the restaurant were actually open for 77 hours rather than 105 hours as stated on its menus. Finally, the

[2] We acknowledge that, on appeal, counsel stated that the Petitioner's restaurant is open 70 hours per week from 10:30 a.m. until 3:00 p.m. and from 5:00 p.m. until 10:30 p.m. The record does not contain any supporting evidence to corroborate these operating hours. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See, e.g., INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

newly submitted evidence shows that the Petitioner's two wait staff were working a combined total of only 62 to 63 hours per week and it is unclear who would fill in for them during the remaining operating hours with only one manager on duty at any given time.

Finally, we observe that the Petitioner has now assigned one of the managers, with two additional job titles that indicate he is responsible for "HR" and "financial" departments. The Petitioner did not provide a revised position description for him or explain how much of his time is allocated to these activities in addition to his responsibility for supervising the dining room, filling in for servers and performing other duties that were previously attributed to him.

Therefore, even after considering the newly submitted evidence relating to the Petitioner's operating hours and staffing levels, the record does not establish that the restaurant was fully staffed at the time of filing or that the Petitioner had sufficient staff in place to relieve the Beneficiary from involvement in the non-managerial, day-to-day operations of the restaurant.

The Petitioner further asserts on motion that USCIS has erred in concluding that the Beneficiary's involvement in business development and expansion is not a managerial or executive level function, and suggests that we erred in concluding that such expansion functions are not his primary duties, in part because of the "incorrectly received" information regarding the restaurant's operating hours and staffing levels. The Petitioner also states that USCIS has mischaracterized the Beneficiary's position as that of a "food service manager" as opposed to that of a "general manager."

In addition to the organizational charts and payroll evidence already submitted, the Petitioner submits additional documentary evidence intended to show the Beneficiary's performance of managerial duties, including a copy of the police report he filed, a retail food official inspection report, a billing statement from and an application filed with the Department of Alcoholic Beverage control, as evidence of his interactions with government officials. In addition, the Petitioner submits evidence of various contracts the Beneficiary entered on the company's behalf, including contracts or agreements for rental of space, pest control services, advertising services, an alarm system for the Petitioner's restaurant, and evidence of the Beneficiary's correspondence with insurers.

Further, in the Beneficiary's un-notarized affidavit he states that his "primary job duties" as the Petitioner's general manager include: interviewing, hiring, training and terminating workers and determining their salaries; maintaining personnel records; signing contracts on behalf of the company; presiding over meetings seminars and conferences with the "department heads"; meeting with an accountant, legal counsel and government officials; setting the goals and policies of the company; and planning the development and expansion of the U.S. business as well as making decisions about the same.

Finally, the Petitioner submits a "restaurant management" job description that it found based on an online search, as well as the "manager, food service" occupational description excerpted from the U.S. Department of Labor's *Dictionary of Occupational Titles*. The Petitioner submits these descriptions in support of the Petitioner's claim that the Beneficiary's involvement in the company's

expansion activities is a managerial function not typical to that of an employee who solely manages a restaurant.

Upon review of this newly submitted evidence, the Petitioner has not submitted any "new facts" that would change the outcome of the case or overcome our finding that it did not establish by a preponderance of the evidence that the Beneficiary's primary duties under the extended petition, as of the date of filing, would be managerial or executive. Accordingly, the motion to reopen will be denied.

While we do not doubt that the Beneficiary holds the appropriate level of decision-making authority as the senior employee in the company, and performs some duties beyond those normally performed by a restaurant or food service manager charged, neither the Petitioner's varied descriptions of the Beneficiary's duties nor the evidence submitted to establish the Petitioner's staffing levels and organizational structure at the time of filing support a finding that his duties would be primarily managerial or support the Petitioner's claim that he was allocating little time to the oversight of the company's one existing restaurant.

Rather, as we determined in our previous decision, the duty descriptions submitted prior to the denial of the petition, although varied, indicated that he was primarily involved in the day-to-day operations of the Petitioner's existing restaurant at the time the petition was filed on December 2, 2014. In fact, in support of the appeal, the Petitioner submitted a lengthy and detailed description for his "general manager" position which was entirely composed of duties he performs within the context of the restaurant. The brief description provided by the Beneficiary in support of this motion does not offer further insight into the nature of his day-to-day duties or how much time he allocates to managerial or executive duties and is insufficient to overcome our previous findings.

While the Petitioner previously submitted evidence of an increase in staffing levels that occurred in 2015 and which may have freed the Beneficiary to allocate additional time to expansion activities, 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).

Finally, although the Petitioner has filed a combined motion to reopen and motion to reconsider, 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 Petitioner's motion to reconsider will also be denied.

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).

III. CONCLUSION

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# 315960 (AAO Jan. 10, 2017)