



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF O-M-&S-, INC.

DATE: NOV. 14, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner describes itself as a construction company that also imports and exports vehicle parts. It seeks to continue the Beneficiary's temporary employment as its chief executive officer (CEO) and manager under the L-1A nonimmigrant classification for intracompany transferees.¹ 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 of the Vermont Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the related foreign entity continues doing business; (2) the Petitioner will employ the Beneficiary in the United States in an executive capacity; and (3) the Petitioner is sufficiently staffed to support an executive position following the one-year "new office" period. The Petitioner appealed the Director's decision. We withdrew the first ground for denial but dismissed the appeal based on the remaining grounds. We also entered an additional finding that the Petitioner had not shown that it had been doing business for the previous year.

The matter is now before us on a combined motion to reopen and reconsider. On motion, the Petitioner submits receipts and bank statements as evidence of its business activity, and asserts that we erred in our interpretation of the job descriptions that the Petitioner submitted at various stages in the proceeding.

Upon review, we will deny both the motion to reopen and the motion to reconsider.

I. MOTION REQUIREMENTS

A motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. We will discuss the requirements of each type of

¹ The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for a one year period from February 17, 2016, to February 16, 2017. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position.

motion below. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

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 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).

II. MOTION TO REOPEN

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Although the Petitioner has submitted some evidence that is new to the record, for the reasons explained below, we find that the Petitioner has not shown good cause to reopen the proceeding or approve the petition.

A new office extension petition must include evidence that the petitioner has been doing business for the previous year. 8 C.F.R. § 214.2(l)(14)(ii)(B). “Doing business” means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. 8 C.F.R. § 214.2(l)(1)(ii)(H). In our appellate decision, we found that the Petitioner did not meet this requirement, for the following reasons:

- The Petitioner had not fully documented its claimed income.
- The Petitioner claimed to facilitate international trade, but had not documented activity performing that function.
- The Petitioner claimed to have earned some of its income as a construction company, but did not submit establish that it is a licensed building contractor.
- The figures on a balance sheet did not match payroll figures, which cast doubt on the credibility of the financial documents relating to the Petitioner’s business activity in 2016.

On motion, the Petitioner submits copies of the following documents:

- Bank statements dated between February 2016 and February 2017
- Invoices sequentially numbered 370 through 457, for various construction contracting services
- Local business tax receipts referring to the Petitioner as a business office, residential contractor, and import/export company

On motion, the Petitioner acknowledges, but does not attempt to resolve, the discrepancies we described in our appellate decision. The Petitioner states: “The AAO decision indicated that the

discrepancies between the profit and loss statement and the tax and payroll documentation cast doubt on the reliability of the profit and loss statement. However, we believe the invoices and [bank documents] show that [the Petitioner] has regularly, systematically and continuously provided services.”

The new submission on motion, however, includes still more discrepancies.

The Petitioner previously submitted copies of four invoices. In our dismissal notice, we noted that the invoice numbers were not in a chronological sequence. Three of the same invoice numbers appear in the Petitioner’s submission on motion, but the invoices do not match:

Number	Discrepancy	Submitted With Initial Filing	Submitted on Motion
401	Date	06/01/2016	05/14/2016
	Delivery address for “Labor and materials”	Yes (in a different font than the rest of the document)	No
	Spelling and wording (errors are reproduced without correction)	furniture	furnitures
		water valves	liquid valves
		deliver it to [redacted] Home	delivery [redacted] Home
		electric plugs	plugs electric
		garage door at [redacted]	doors garage [redacted]
		electric spots	point energy
		door lock	key box
		Repair and paint wall, install new mirror in bathroom, install shelves and organize	Repair wall and paint, install new mirror bathroom, install shelving and organization
		repair and paint wall, repair toilet and delivery garage door at [redacted]	repair wall and paint, repair toilet and delivery garage [redacted]
TOTAL MATERIAL	TOTAL MATERIAIS		
409	Date	04/22/2016	06/01/2016
	Service description	Change tile all floor	Change Roofing and repairs
	Price	Total labor \$19,100.00	Total labor \$19,110.00
		Down payment \$8950.00	Total \$19,110.00
	Total \$10,150.00		
419	Customer’s address	All capital letters	Same address, but with standard capitalization
	Service Description	Change roof	New Pavers and screen
	“Total Labor” line item	No	Yes

The Petitioner does not explain, or even acknowledge, the differences between the identically-numbered invoices.

Furthermore, the year on the newly submitted invoices shifts back and forth between 2015 and 2016, although the invoice numbers are consecutive. The lowest-numbered invoice submitted on motion is number 370, dated February 3, 2016; previously, the Petitioner submitted an invoice with a lower number, 354, but dated later (February 14, 2016).

The discrepancies described above cast serious doubt on the authenticity of the invoices described. Given the discrepancies on the invoices, it is significant that deposits shown on the bank statements do not always correlate to the newly submitted invoices. The Petitioner has not provided reliable, credible evidence to show that the bank deposits are the result of regular, systematic, and continuous business activity by the Petitioner as described on the invoices. The local business tax receipts show authorization to conduct business but do not show the extent of business activity.

The inconsistencies between the two sets of invoices cast doubt on their authenticity, and therefore their credibility. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner's submission of new invoices that do not match the previous versions do not resolve or diminish the prior credibility issues, and do not establish good cause to reopen the proceeding or issue a new decision favorable to the Petitioner.

III. MOTION TO RECONSIDER

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services or Department of Homeland Security policy.

“Executive capacity” means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

As discussed in our appellate decision, the Petitioner submitted three job descriptions for the Beneficiary, first with the initial filing of the petition, then in response to a request for evidence, and finally on appeal. We found that these job descriptions lacked detail, and also conflicted with one another.

On motion, the Petitioner asserts:

The job description in response to the request for evidence is not substantially different than the initial description, but rather it breaks down with more specificity. . . . Since [the Petitioner] has provided the how, when, where, and with whom of [the Beneficiary's] duties, it is unclear what the AAO thinks is vague or simply copies the regulations.

The record does not support the Petitioner's assertion that the second version of the job description "breaks down [the first version] with more specificity." For example, the second version stated that the Beneficiary spends 30% of his time representing the petitioning company "before the managers, employees, contractors, clients, potential clients, prospects, suppliers, partners, authorities, community leaders, civic groups, students, and the community in general." The Petitioner identifies nothing from the first job description that corresponds to this assertion. The Petitioner also has not shown that the Beneficiary has any significant contact with "community leaders, civic groups, students, and the community in general."

Furthermore, the motion does not address key elements of the appellate decision. Job descriptions for the Beneficiary and others referred to nonexistent departments, subordinate positions, and in one case a retail store. The Petitioner indicated that subcontractors performed much of the construction work, but the Petitioner documented service agreements with only three subcontractors.

The Petitioner asserts that the Beneficiary "spends a majority (51%) of his time reporting to the Board of Directors [which consists of the Beneficiary himself and one other person] and making decisions relating to the direction of [the company]." The "51%" figure derives from previously submitted job descriptions. The Petitioner has not overcome or addressed the specific deficiencies we identified in those job descriptions, so the Petitioner cannot establish eligibility by citing those same descriptions.

The Petitioner maintains that the Beneficiary's "duties are in line with an executive position in other similar sized businesses." Rather than elaborate, the Petitioner cites an episode of the *Freakonomics* podcast, available online with a transcript at <http://freakonomics.com/podcast/c-e-o-actually/>. The podcast did not discuss immigration issues such as L-1A status. The podcast cited an unsourced statistic that most companies have three or fewer employees, but it did not detail the duties of running a company of that size. Eligibility for the classification sought ultimately rests on conformity with the statutory definition of "executive capacity," and not everyone who runs a small business meets that definition. A motion to reconsider should be supported by statute, regulation, or case law; it cannot suffice to state that supporting information lies at an unspecified point in a one-hour podcast.

Because the Petitioner has identified no error of law or fact in our appellate decision, we will deny the motion to reconsider.

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IV. CONCLUSION

The Petitioner did not establish good cause to reopen the proceeding or meet the requirements of a motion to reconsider.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of O-M-&S-, Inc.*, ID# 1762959 (AAO Nov. 14, 2018)