



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 25 2013**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:
[REDACTED]

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,

for *Michael T. Kelly*
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now again before the AAO on a motion to reconsider. The motion will be dismissed.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center. The petitioner describes itself as a private institute offering classes in standardized test preparation and academic skill enhancement.¹ In order to employ the beneficiary in what it designates as a part-time “math and science teacher” position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner, through counsel, submitted an appeal of the director's decision to the AAO, which was dismissed.

Thereafter, the petitioner, through counsel, timely filed the present motion. As indicated by the check mark at Box E of Part 2 of the related Form I-290B, the petitioner elected to file a motion to reconsider the decision.

The AAO will now discuss the motion to reconsider submitted by the petitioner. As will be discussed below, the submissions constituting this motion do not satisfy the requirements of a motion to reconsider. A motion that does not meet applicable requirements shall be dismissed. *See* 8 C.F.R. § 103.5(a)(4). Accordingly, this motion to reconsider will be dismissed.

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 preceding decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy.

The subject of this present motion is the AAO's June 20, 2013 decision to dismiss the previously filed appeal. Where, as here, the subject of a motion to reconsider is an AAO decision to dismiss a previous appeal to the AAO, the motion must, when filed, also establish that the preceding AAO decision was incorrect based on the evidence of record at the time of that decision. *See* 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.²

¹ The AAO notes that on the Form I-129, the petitioner claimed that it was engaged in financial investment management. Upon a request for clarification from the director, the petitioner acknowledged that this entry was erroneous and that it was in fact a private tutoring center.

² The provision at 8 C.F.R. § 103.5(a)(3) states the following:

The AAO finds, however, that, on motion, counsel for the petitioner fails to establish that the AAO's June 20, 2013 decision to dismiss the previous appeal was based on an incorrect application of law or USCIS policy to the evidence of record that was before the AAO at that time of its decision.

In this matter, the motion to reconsider consists of the Form I-290B along with a brief from counsel. In the brief, counsel contends that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous. Specifically, counsel's primary arguments on motion are (1) that the proffered position qualifies as a specialty occupation; (2) that the AAO's conclusion that "three [job vacancy] announcements are insufficient to demonstrate an industry-wide requirement" is erroneous in that "[t]here is no such standard of 'how-many-evidences' [sic] in your requirement; [a]s long as we can provide such evidence, the burden is met"; and (3) that the petitioner previously had two other H-1B approvals for the same job title, job description, and educational requirement as in the present petition.

The AAO finds that the statements in the brief from counsel merely constitute a recitation of the petitioner's view that the prior decision is erroneous and that the proffered position is a specialty occupation. Those statements do not include citations to appropriate statutes, regulations, or precedent decisions; and they do not specify in what respects, if any, the AAO's decision on appeal was based upon an incorrect application of law or Service policy to the evidence of record at the time of the decision. The AAO further finds that the brief contains no explanation as to how, if at all, the AAO's decision to deny the appeal incorrectly applied any law or Service policy.

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and 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, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

This regulation is supplemented by the instructions on the Form I-290B, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions. With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

In short, the AAO finds that the Form I-290B and brief do not articulate how any particular aspect of the AAO's decision on appeal misapplied any statute, regulation, precedent decision, or binding Service policy in adjudicating the issues and evidence that were within the scope of that appeal.

While counsel asserts that the position is a specialty occupation and reiterates some of the arguments from the previous proceeding, the motion does not cite a statutory or regulatory authority, case law, or precedent decision to establish that the AAO's decision to dismiss the appeal was based on an incorrect application of law or USCIS policy.

Moreover, even considered in their totality, the submissions constituting this motion do not articulate how the AAO's decision was incorrect based on the evidence of record that was before the AAO at the time of its initial decision. In short, the petitioner has not submitted any document that would meet the requirements of a motion to reconsider. Thus, the motion to reconsider must be dismissed.

To merit reconsideration of the AAO's decision to dismiss the appeal, the petitioner must both (1) specifically cite laws, regulations, precedent decisions, and/or binding USCIS policies that the petitioner believes that the AAO misapplied in deciding to dismiss the preceding appeal; and (2) articulate how those standards cited on motion were so misapplied to the evidence before the AAO on appeal as to result in a dismissal of that appeal that should not have been rendered. Here, the submissions on motion fail to articulate how such standards were misapplied to the petitioner's evidence that was before the AAO when it decided to dismiss the appeal on June 20, 2013.

Again, the regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and 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, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In other words, the purpose of a motion to reconsider is to contest the correctness of the original decision based on the previously established factual record. A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied. *See Matter of Medrano*, 20 I&N Dec. 216, 219-20 (BIA 1990, 1991). The "reasons for reconsideration" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached by the AAO in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

In short, the AAO finds that the submissions on motion neither articulate nor establish that the AAO's decision on appeal was based upon misapplication of any statutory or regulatory authorities, case law, precedent decisions, or binding USCIS policy.

Additional Basis for Dismissal

In addition, the motion shall be dismissed for failing to meet another applicable filing requirement. 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." In this matter, the submissions constituting the motion do not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Again, 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 requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion 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 motion will be dismissed, the proceedings will not be reconsidered, and the previous decision of the AAO will not be disturbed.

ORDER: The motion is dismissed.