



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **NOV 17 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Commonwealth of the Northern Mariana Islands (CNMI) Only Nonimmigrant Transitional Worker Classification Pursuant to 48 U.S.C. § 1806(d)

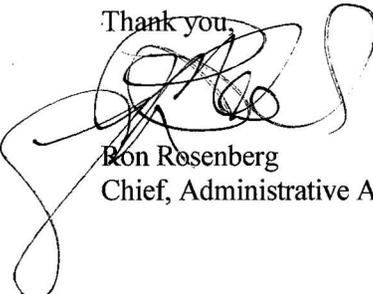
ON BEHALF OF PETITIONER:

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

I. PROCEDURAL AND FACTUAL HISTORY

The petitioner submitted a Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I-129CW) to the California Service Center on July 17, 2013. On the Form I-129CW petition, the petitioner describes itself as a full-service restaurant established in [REDACTED]. In order to employ the beneficiaries in what it designates as cook positions, the petitioner seeks to classify them as CNMI-Only Nonimmigrant Transitional Workers (CW-1) to work in the Commonwealth of the Northern Mariana Islands (CNMI) pursuant to 48 U.S.C. § 1806(d).

The director denied the petition, finding that the petitioner failed to establish eligibility that the petitioner was an eligible employer in accordance with 8 C.F.R. § 214.2(w)(4). The director noted that the petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b). Thereafter, counsel submitted a Form I-290B (Notice of Appeal or Motion) and checked Box E of Part 2 of the form to indicate that she was filing a motion to reconsider. The director dismissed the motion finding that it did not meet the applicable requirements. The matter is now before us on appeal.

The record of proceeding contains: (1) the petitioner's Form I-129CW; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision on the petition; (5) the Form I-290B (motion to reconsider) and supporting materials; (6) the director's decision on the motion; and (7) the Form I-290B (appeal) and supporting materials.

It is noted that the director stated: "If you desire to appeal *this* decision, you may do so (emphasis added)." As this language indicates, when an appeal is filed in response to a director's unfavorable action on a motion, the scope of the appeal is limited to the director's decision on that motion. Accordingly, our review is to determine whether the director's decision to dismiss the motion to reconsider was correct.

II. LAW AND ANALYSIS

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 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).

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 that were decided in error or overlooked in the initial decision. *See Matter of O-S-G-*, 24 I&N Dec. at 60.

C. 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).

In the brief, counsel does not claim that the prior decision was based on an incorrect application of law or USCIS policy. Rather, counsel claims that there is no law or policy on this issue. Further, counsel indicates her disagreement with the director's decision. She further repeatedly states that the petitioner placed job announcements for the proffered positions in May 2013 and September 2013.¹

Upon review, the submission does not establish eligibility for the benefit sought at the time of filing, nor does it demonstrate that the previous decision was based on an incorrect application of law or USCIS policy.

As noted by the director, the initial job announcement did not specify the number of workers. The petitioner's job announcement must provide a description of the vacancy specific enough to apprise U.S. workers of the job opportunity. The advertisement should be written to attract the interest of the greatest number of qualified U.S. workers and encourage them to apply. Here, the petitioner failed to state in the initial job announcement that there were multiple openings.

In response to the RFE, the petitioner submitted a new job posting that was placed after filing the instant petition. We note that the requirements specified in the new job announcement vary from the original job announcement. More specifically, the job announcement posted in May 2013 requires a "**[h]igh school diploma** with minimum of 3 years of work related experience." In contrast, the job announcement posted in September 2013 requires a "**[h]igh school graduate or**

¹ Counsel references other cases that she claims were approved. Copies of these allegedly approved petitions, however, were not included in the record. If a petitioner wishes to have unpublished service center decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).

Again, the petitioner in this case failed to submit copies of these petitions and their respective approval notices. As the record of proceeding does not contain any evidence of the allegedly approved petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

Moreover, USCIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

equivalent; with minimum of 3 years of work-related experience (emphasis added)." Thus, in this respect, it appears that the first announcement did not accurately reflect the petitioner's minimum requirements for the proffered position.

The petitioner has not established that the original job announcement sufficiently and accurately described the job opportunity. Accordingly, the documentation does not demonstrate that the petitioner considered all available United States workers for the positions being filled – prior to filing the petition and, thus, that it meets the requirements to establish that it is an eligible employer in accordance with 8 C.F.R. § 214.2(w)(4).

D. Failure to Satisfy the Requirements of a Motion

Moreover, we find that the submission did not satisfy the requirements of a motion. Specifically, the regulation at 8 C.F.R. § 103.5(a)(1) states the following:

(iii) Filing Requirements—A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:

* * *

(C) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;

In this matter, the submission constituting the motion did not contain a statement as to whether or not the unfavorable decision has been or is the subject of any judicial proceeding as required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Thus, the petitioner failed to comply with the requirements as set by the regulations for properly filing a motion. Moreover, if the decision has been or is the subject of any judicial proceeding, the petitioner failed to provide any information regarding "the court, nature, date, and status or result of the proceeding" as stipulated in the regulations. Accordingly, the filing did not meet the applicable requirement for motions as stated at 8 C.F.R. § 103.5(a)(1)(iii)(C).

IV. CONCLUSION

The appeal does not establish that the director's decision to dismiss the motion to reconsider was incorrect. 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 appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.