



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 18 2014**

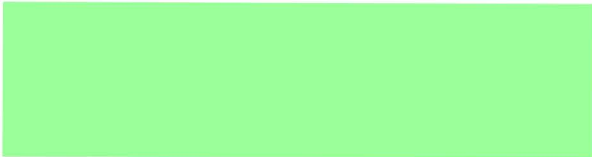
OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner:
Beneficiary:



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:



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 two subsequent combined motions to reopen and reconsider. The petitioner appealed the director's decision to the Administrative Appeals Office (AAO), and we dismissed the appeal. The matter is again before us on a combined motion to reopen and motion to reconsider. The combined motion will be dismissed.

On the Form I-129 visa petition, the petitioner describes itself as a five-employee medical business¹ established in 1974. In order to employ the beneficiary in what it designates as a full-time administrative support staff position at a salary of \$10.54 per hour,² 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, concluding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

The petitioner, through counsel, submitted two combined motions to reopen and reconsider, both of which were dismissed by the director. The petitioner appealed the matter to the AAO, and we agreed with the director that the evidence of record does not establish that the proffered position is a specialty occupation. We further found that the petition was not properly signed by the petitioner and that the filing should have been rejected by the service center; that the petitioner failed to establish that it would pay an adequate salary to the beneficiary if the petition were approved; and that the petitioner had failed to establish the nature of the proffered position and the capacity in which she would be employed. We also highlighted several inconsistencies and discrepancies contained in the record of proceeding and questioned whether the LCA submitted by the petitioner in support of the petition actually corresponds to the petition. We dismissed the appeal for all of these reasons on November 21, 2013.

I. MOTION REQUIREMENTS

For the reasons discussed below, we conclude that dismissal of the motion is required because the motion does not merit either reopening or reconsideration.

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 621111, "Offices of Physicians (except Mental Health Specialists)." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "621111 Offices of Physicians (except Mental Health Specialists)," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 5, 2014).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Office and Administrative Support Workers, All Other" occupational classification, SOC (O*NET/OES) Code 43-9199.99, and a Level II prevailing wage rate.

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 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 3 of the Form I-290B, which states:³

Motion to Reopen: The motion must state new facts and must be supported by affidavits and/or documentary evidence.

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).

³ 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.

C. Requirements for Motions to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(1)(i)(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 id.* 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.

III. DISCUSSION

The submission constituting the combined motion consists of the following: (1) the Form I-290B, Notice of Appeal or Motion; (2) counsel's brief; (3) a letter signed by the petitioner; and (4) a portion of a presentation made in 2010, which counsel printed from the website of the Centers for Medicare and Medicaid Services ("CMS") discussing that entity's Electronic Health Care Record Incentive Programs.

The petitioner states in its letter that it will comply with the provisions of section 214(c)(5) of the Act and 8 C.F.R. § 214.2(h)(4)(iii)(E) which make it liable for the reasonable costs of return

transportation of the beneficiary if she is dismissed from employment before the end date of the period of authorized admission, and argues that this statement corrects his failure to properly sign the Form I-129, which he calls a "scrivener's error." Counsel states that the petitioner's obligation to pay for reasonable transportation costs is only mentioned once in the Form I-129 instructions. Counsel argues that the required certification on the Form I-129 to pay for reasonable return transportation costs is to be provided by "an authorized official of the employer;" and the individual who signed on behalf of the petitioner is not an "authorized official of the employer" but rather the employer himself. Counsel also argues that the certification the petitioner failed to sign was not actually part of the petition, and asserts that the plain language of 8 C.F.R. § 103.2(a)(7)(i) and (iii) did not mandate rejection of the petition.

Counsel asserts that the proffered position requires knowledge of a business environment subject to extensive, rigorous government regulation and large organizations' strict procedures, and lists various job duties for the proffered position. Counsel states that the petitioner incorporates, as its own statement, the statement previously provided by the beneficiary. Counsel submits the excerpt from the CMS presentation in support of his assertion that the Affordable Care Act of 2010 has brought on a level of complexity to the position; that there are new record-keeping requirements; and that the beneficiary would have to create, expand, and implement major changes in the Excel database design without supervision.

Counsel asserts that he referenced selected tasks listed under the Medical Office Manager and Medical Coder, and there was some overlap between those positions and the proffered position. However, counsel contends that the petitioner is not offering a new position to the beneficiary. Counsel also claims that the duties of the position were not generalized as found by the AAO.

Neither counsel nor the petitioner addresses our observation that the petitioner claimed the duties of the position could be performed by an individual with only a general-purpose bachelor's degree. Nor do they address our discussion regarding how the conflict between the petitioner's assertions with regard to how the levels of expertise and responsibility required for the proffered position, as well as its stated educational qualifications for the position, are materially inconsistent with its submission of an LCA certified for a Level II wage-level,⁴ and how this inconsistency undermines the credibility of the entire petition.

Although counsel does respond in very general terms to our finding that the proffered position was described exclusively in terms of generalized and generic functions without sufficient information regarding the particular work, and the associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations, he did not address, let alone resolve, any of the specific examples we provided. In

⁴ Again, by virtue of its wage-level designation on the LCA, the petitioner effectively attested that the proffered position requires that the beneficiary exercise only a "limited" degree of professional judgment, that the job duties proposed for her are merely "moderately complex," and that, as clear by comparison with DOL's instructive comments about the next higher level (Level III), the proffered position does not even involve "a sound understanding of the occupation" (the level of complexity noted for the next higher wage-level, Level III).

similar fashion, while counsel argues in general terms that we erred in finding that the proffered position is not a specialty occupation, he does not specifically address each of the reasons we found that such is not the case.

IV. DISMISSAL OF THE MOTION TO REOPEN

Upon review, we observe that the excerpt from the CMS presentation existed at the time the petition was filed and could have been submitted with the initial petition, in response to the director's RFE, in one of the motions filed with the service center, or with the appeal. Nor do counsel and the petitioner advance any argument or state any fact that could not have been submitted previously.

Furthermore, even if we found the CMS materials or any of the arguments or facts stated by counsel and the petitioner persuasive, which we do not, it would still not change the outcome of this case if the proceeding were reopened to consider them, because counsel and the petitioner have not addressed (let alone overcome) all of the findings made in our November 21, 2013 decision.

"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.

V. 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) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.

As a preliminary matter, we note that even if we agreed with the arguments made by counsel in his brief, the petition would still not be approvable because counsel does not address, let alone resolve, many of the issues we discussed at length in our November 21, 2013 decision. As noted, neither counsel nor the petitioner even address, let alone resolve, our observation that the petitioner claimed the duties of the position could be performed by an individual with only a general-purpose bachelor's degree. Nor do they address our discussion regarding the conflict between the petitioner's assertions regarding how the levels of expertise and responsibility required for the proffered position, as well as its stated educational qualifications for the position, are materially inconsistent with its submission of an LCA certified for a Level II wage-level, and how this inconsistency undermines the credibility of the entire petition. Counsel does not address those portions of our decision, articulate any error in them, or cite any pertinent statutes, regulations,

and/or precedent decisions to establish that those portions of our decision were based on an incorrect application of law or USCIS policy

Also, while counsel did respond in very general terms to our finding that the proffered position had been described exclusively in terms of generalized and generic functions and that sufficient information regarding the particular work, and the associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations had not been provided, he did not address, let alone resolve, any of the specific examples we provided. In similar fashion, while counsel argues in general terms that we erred in finding that the proffered position is not a specialty occupation, he does not specifically address each of the reasons we found that such is not the case. He does not address those portions of our decision, articulate any error therein, or cite any pertinent statutes, regulations, and/or precedent decisions to establish that those portions of our decision were based on an incorrect application of law or USCIS policy.

Thus, even if we found counsel's arguments persuasive, which we do not, they would still not change the outcome of this case if the proceeding if we were to reconsider our November 21, 2013 decision because counsel has not addressed each of our reasons for dismissing the appeal.

Furthermore, as noted above, 8 C.F.R. § 103.5(a)(3) requires that a motion to reconsider a decision on an application establish that the decision was incorrect based on the evidence of record at the time of the initial decision. However, the instant motion relies upon on several new items submitted on motion, notably: (1) the petitioner's certification that it will comply with the return transportation provisions set forth in the Act and in the regulations; and (2) counsel's claim that the petitioner "herewith affirms that he incorporates and includes as his own statement the said statement provided by the beneficiary." This certification and affirmation were not before the director when she made any of her decisions, and they were not before the AAO when we made our decision, either.

In any event, we do not find the arguments made by counsel on motion persuasive. With regard to the petitioner's failure to properly complete the petition, counsel cites no provision of law in support of his argument that the unsigned affirmation at page 9 of the Form I-129 visa petition was not actually a part of the petition. Nor does counsel cite any legal authority in support of his apparent argument that the petitioner was not required to sign page 9 of the Form I-129 at all because, in the words of counsel, "[t]he petitioner in the present case cannot call himself 'an official of the employer' in any way that makes sense . . . [s]imply put, he is the employer."⁵

⁵ Counsel argues on motion that in our November 21, 2013 decision dismissing the appeal we did not adequately consider the case law he had cited. However, none of that case law is applicable to the instant matter. In *Fred 26 Importers v. DHS*, 445 F. Supp. 2d 1174 (C.D. Cal. 2006), the court found that USCIS had failed to provide a rational basis for its finding that the petitioner had failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Such is clearly not the case here, as we specifically discussed that criterion at pages 18 and 24-25 of the decision, and discussed matters relevant to our analysis of that criterion throughout the decision. Even if that were not the case, the AAO would be under no obligation to follow the holding in *Fred 26 Importers*: in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters

Again, 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 and 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) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.

The documents constituting this motion do not, however, articulate how our decision on appeal misapplied any particular pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to dismiss the appeal was rendered. 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.

VI. CONCLUSION AND ORDER

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). The combined motion to reopen and reconsider will therefore be dismissed, and our November 21, 2013 decision will be affirmed.

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 dismissed, the proceedings will not be reopened or reconsidered, and our previous decision will not be disturbed.

ORDER: The combined motion is dismissed. The AAO's decision dated November 21, 2013 is affirmed.

arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Matter of Shin, 11 I&N Dec. 686 (Dist. Dir. 1966), pertained to an immigrant visa petition and whether the beneficiary was a member of the professions as defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and as interpreted at that time. The primary issue here is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession. *Matter of Shin* is therefore also irrelevant to the instant petition.

With regard to the unpublished cases cited by counsel, we note that he furnished no evidence to establish that the facts in those decisions are analogous to the instant petition. Regardless, even if the facts of those cases were analogous to those in this matter, they are unpublished decisions and, as such, not binding on the AAO. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.