



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 29 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

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. The petitioner appealed the denial to the Administrative Appeals Office (AAO), and we dismissed the appeal. The matter is again before us on a second combined motion to reopen and motion to reconsider. The combined motion will be dismissed.

On the Form I-129 (Petition for Non-Immigrant Worker), the petitioner describes itself as a retail business established in 2008. In order to continue to employ the beneficiary in what it designates as an accountant position, the petitioner seeks to extend his classification 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 is a specialty occupation. Thereafter, the petitioner submitted an appeal of the director's decision to the AAO. We reviewed the evidence and determined that the record of proceeding contained insufficient evidence to establish that the petitioner was a business in good standing, and we dismissed the appeal.

The petitioner and its counsel subsequently submitted a Form I-290B (Notice of Appeal or Motion), combined motion to reopen and reconsider. We reviewed the file in its entirety and determined that the petitioner's submission did not meet the requirements for either a motion to reopen or a motion to reconsider. We denied the combined motion. In our decision, we explained that even if the motion had been properly filed, the appeal could not be sustained. We provided a comprehensive analysis of the director's decision that was the basis of the petitioner's original appeal.

The petitioner subsequently submitted a second Form I-290B to U.S. Citizenship and Immigration Services (USCIS) contesting our decision to deny the motion. As indicated by the check mark at Box F of Part 2 of the Form I-290B, the petitioner filed a motion to reopen and motion to reconsider.

I. MOTION REQUIREMENTS

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:¹

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).

C. 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:

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, such instructions are incorporated into the regulations requiring its submission.

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 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. DISCUSSION AND ANALYSIS

The submission constituting the combined motion consists of the following: (1) the Form I-290B; (2) a copy of our April 9, 2014 decision denying the petitioner's prior combined motion; (3) a brief prepared by counsel; (4) documents from the Texas Secretary of State, including a certificate of filing, a "packing slip," and a letter; and the petitioner's Internal Revenue Services (IRS) Form 944 for 2013.

A. Motion to Reopen

The submission contains documents from the Texas Secretary of State dated July 17 and 18, 2013 indicating that the petitioner was reinstated to "active" status in the State of Texas as of July 17, 2013.² However, the documentation does not show that the petitioner was in active status at the time that the petition was filed on March 5, 2012. We note that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible

² Counsel also submitted the petitioner's IRS Form 944 for 2013. The relevancy of this document has not been established. It is not apparent that this document contains facts that are material to the instant proceeding. Counsel has not provided an explanation for the submission of this document.

It appears from the evidence submitted that the petitioner is now eligible to do business in the State of Texas and is currently engaged in business operations. While the change in the petitioner's corporate status does not overcome the bases of denial of the instant petition, the instant denial does not prejudice the petitioner from filing a new Form I-129 petition, with the associated fees.

under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Thus, the petitioner's new evidence does not overcome our finding that the petitioner was not authorized to do business in the State of Texas at the time the petition was filed. Further, even if the evidence were sufficient to overcome this basis of denial, we note that the petitioner has not presented evidence on motion to overcome our findings that (1) the proffered position is not a specialty occupation, (2) the petitioner failed to establish that it would pay an adequate salary for the beneficiary's work, and (3) the petitioner failed to submit a Labor Condition Application (LCA) that corresponds to the petition. See AAO Decision (April 9, 2014). Therefore, the new facts presented do not 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. at 473.

"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.

B. 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 his brief, counsel does not claim that our prior decision was based on an incorrect application of law or USCIS policy. Rather, counsel notes that the petitioner is now an entity in good standing, and reiterates arguments previously made and considered numerous times in these proceedings. As noted above, the fact that the petitioner subsequently reinstated its eligibility to do business in the State of Texas does not establish eligibility for the benefit sought at the time of filing, nor does it demonstrate that our previous decision was based on an incorrect application of law or USCIS policy. Therefore, the motion to reconsider will be denied.

III. CONCLUSION

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).

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.