



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: **OCT 16 2014** 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)

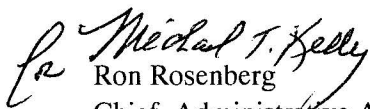
ON BEHALF OF PETITIONER:

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 Director, California Service Center, revoked the previously approved nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is again before us on a motion to reopen and motion to reconsider. The joint motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C) and 103.5(a)(2), (3), and (4).<sup>1</sup> The petition's approval will remain revoked.

In the Form I-129 petition, the petitioner identified itself as a software consulting company. The subject of this joint motion is our decision to dismiss the appeal of the director's decision to revoke the approval of the H-1B petition which the petitioner had filed in order to employ the beneficiary as a temporary 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 had approved the petition on July 27, 2009.

After issuance of a Notice of Intent to Revoke (NOIR) and review of the petitioner's submissions in response to the notice, the service center director revoked approval of the petition on November 30, 2010. On appeal, we affirmed the director's findings and dismissed the petitioner's appeal in a decision dated November 3, 2012.

On motion, counsel contends that the decisions of both the service center and our office were based upon mistakes in law and mistakes of fact. We will focus exclusively on our decision to dismiss the petitioner's appeal, because, in accordance with the regulations governing motions, as the latest agency decision, that decision is the proper subject of this joint motion.

As indicated by the check mark at box F of Part 2 of the Form I-290B, counsel for the petitioner elected to file both a motion to reopen the proceeding and a motion for us to reconsider our decision that dismissed the appeal.

## I. MOTION REQUIREMENTS

We will now discuss why the submissions constituting the combined motion do not satisfy the substantive requirements for either a motion to reopen or a motion to reconsider. For the reasons discussed below, we conclude that the joint motion must be dismissed because the motion does not merit either reopening or reconsideration.

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<sup>1</sup> We issued a Notice of Derogatory Information to the petitioner and its counsel on July 2, 2014. Upon review of the petitioner's response, we find that the petitioner has sufficiently addressed the issues raised therein; therefore, those issues will not be discussed further. (Of course, that Notice and the petitioner's response are now included within the record of proceeding, pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i).)

#### 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 U.S. Citizenship and Immigration Services (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:<sup>2</sup>

**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:

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<sup>2</sup> 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.



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 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 submissions constituting the combined motion consist of the following: (1) the Form I-290B; (2) a 21-page brief submitted by counsel; (3) a letter from the petitioner dated November 26, 2012; and (4) documentary evidence previously submitted into the record. We have considered all of these submissions in reaching our decision to dismiss the joint motion.

The documentary evidence consists of copies of the following:

1. [REDACTED] funding certificate;
2. Investment Agreement dated September 1, 2012 between the petitioner and [REDACTED];
3. Investment Agreement between the petitioner and [REDACTED] dated June 28, 2010;

4. Assignment Agreement between [REDACTED] the petitioner, and [REDACTED] dated January 1, 2009;
5. Amendment to [REDACTED] dated July 2, 2009;
6. Stock Certificate issued to the petitioner on July 26, 2007, demonstrating that the petitioner owns 10,900 shares of [REDACTED];
7. An excerpt from the chapter of the U.S. Department of Labor's *Occupational Outlook Handbook* pertaining to Computer Programmers;
8. An excerpt from the Department of Labor's Foreign Labor Certification Data Center's OnLine Wage Library displaying the prevailing wage for the occupation of computer programmer in the [REDACTED] Illinois Metropolitan Division for the period from July 2012 to June 2013; and
9. An excerpt from the O\*NET OnLine's Summary Report for Computer Programmers.

A. Dismissal of the Motion to Reopen

Upon review of the evidence, we observe that most of the documents submitted on motion were previously a part of the record of proceeding. The Amendment to [REDACTED] dated July 2, 2009 and the stock certificate issued to the petitioner on July 26, 2007 were previously available and could have been submitted in response to the RFE, or with the appeal. The excerpts from the *Handbook*, O\*NET OnLine, and the FLC's Online Wage Library are readily available.

In any event, we find that neither the Form I-290B, the brief on motion, nor any document submitted on motion, "state[s] new facts" such that, if the proceeding were reopened to consider them, they would have significant probative value towards establishing that we should have decided in the petitioner's favor on appeal. It logically follows, of course, that, without showing such new facts to be provided if the proceeding were to be reopened, the motion to reopen fails to establish new facts so significant as to likely change the outcome of the case if the proceeding were reopened for their consideration. Even if regarded as stating new facts to be provided in a reopened hearing, the documents submitted on motion would have little or no probative value towards establishing that the record of proceeding upon which the petition had been approved actually satisfied the statutory and regulatory provisions for a specialty occupation so as to merit that approval.

We note, for example, while the motion contains an Investment Agreement document dated September 1, 2012 between the petitioner and [REDACTED] a document not previously submitted, this document has little probative value towards satisfying the requirements of a motion to reopen. Although it suggests an investment of \$90,000 into the petitioner's [REDACTED] solution, this Investment Agreement document was created and executed after both the filing of the petition and the subsequent revocation of its approval. 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 under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). In a strictly temporal sense, the

Investment Agreement may be regarded as a new fact, but reopening the proceeding to consider it as such would not produce a more favorable outcome on appeal. The content of the Agreement does not show, that if the proceeding were reopened to consider it, its content would provide probative evidence that we had erred in our decision to dismiss the appeal.

Additionally, we find that, on motion, counsel reasserts many of the same arguments presented to us in the appeal brief dated January 11, 2011, but counsel provides no statements addressing the requirements of a motion to reopen or assertions regarding the manner in which the documents submitted on motion meet such requirements.

"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.

As the submissions on motion do not satisfy the requirements for a motion to reopen, the motion-to-reopen component of this joint motion will be dismissed. *See* 8 C.F.R. § 103.5(a)(4).

#### B. 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).

Counsel for the petitioner asserts that we erred by failing to consider all of the submitted evidence, noting specifically that we were obligated to focus on the evidence submitted in response to the NOIR and not simply focus on the lack of documentation in the original submission. The documents constituting this motion do not, however, articulate how our decision on appeal misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to dismiss the appeal was rendered. The petitioner has therefore not submitted any document that would meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider must be dismissed.

We shall now make some additional comments in the interests of a more comprehensive and instructional decision.



The petitioner has not substantiated its claims that the beneficiary will be employed as a programmer through September 30, 2012 – the end-date of the employment period specified in the petition. The record falls short of establishing either a work itinerary for the beneficiary, or that actual H-1B caliber work exists for the beneficiary. The petitioner has not established that the petition was filed for non-speculative work for the beneficiary, for the entire period requested, that existed as of the time of the petition's filing. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. Neither counsel nor the petitioner has submitted any evidence on motion that refutes this finding.

We further note, with regard to the specialty occupation issue, the petitioner's failure to specifically establish the nature of the beneficiary's employment throughout the course of the requested validity period has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Although counsel asserts on motion that the duties as described in the record before the director during the approval-revocation stage were sufficient to establish that the approval of the proffered position as a specialty occupation was correct and therefore not subject to revocation, counsel does not articulate where and how the record that was before us on appeal showed that our decision violated pertinent statutes, regulations, and/or precedent decisions, so as to constitute an incorrect application of law or USCIS policy.

We note in particular counsel's partial reliance on argument that the director erred in referencing *Matter of Tayabji*, 19 I&N Dec. 264 (BIA 1985) as the basis for revocation authority. We need not address that question, for the director's reference was superfluous and inconsequential in light of the force and effect of the USCIS regulations at 8 C.F.R. § 214.2(h)(11)(iii), which invest the director with authority to revoke approval of a petition on notice.

In light of the evidence of record, we are persuaded by counsel that the [REDACTED] Petitioner agreements do not establish that the beneficiary would be working as an employee of [REDACTED]. However, we see nothing on motion that indicates that we erred in finding that the evidence of record before us on appeal did not establish that the documentary evidence regarding the petitioner's agreements with [REDACTED] was a basis for finding that the revoked approval had been based upon sufficient evidence that, at the time of the petition's filing, the petitioner had actually secured for the beneficiary computer programmer work at a specialty occupation level. In this regard, we direct the petitioner's attention to our appeal decision's comments and findings about the specific dates and the differing natures of the [REDACTED] Petitioner agreements, which accurately reflect that, at the time of the petition's filing, there was no agreement for the development of the [REDACTED] solution, which the petitioner presents as the core of its specialty occupation claim.

As a final note, we acknowledge counsel's statements regarding the petitioner's filing for bankruptcy protection under Chapter 11, and counsel's assertions that the [REDACTED] funding

remedied the issues previously raised by USCIS and our office. Merely referring in general terms to funding awarded to the petitioner in 2009, and referring us to this previously-submitted document evidencing such funding, does not substantively address either the specific nature of work - if any - that such funding would generate for the proffered position - and whether the petitioner had been paying the required wage in compliance with its LCA obligations for the particular position and location specified in the LCA. The motion fails to articulate a legal basis in statute, regulation, precedent decisions, or case law for establishing that we were incorrect in our determination on appeal that, absent objective evidence to the contrary, the petitioner had not established that it did not violate of the terms and conditions of the approved petition under 8 C.F.R. § 214.2(h)(11)(iii)(A)(3).

As the submissions on motion do not satisfy the requirements for a motion to reconsider, the motion-to-reconsider component of this joint motion will be dismissed. *See* 8 C.F.R. § 103.5(a)(4).

#### C. Additional Basis for Dismissal

The motion shall also 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 motion does 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 did 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.

### III. CONCLUSION

It should be noted for the record 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 proceeding will not be reopened, our decision on appeal will not be reconsidered, and our previous decision will not be disturbed.

**ORDER:** The combined motion is dismissed.