



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 22 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 service center director denied the nonimmigrant visa petition. The petitioner appealed the denial to the Administrative Appeals Office, and we dismissed the appeal. The petitioner filed a motion to reconsider our decision, which we dismissed. The petitioner filed a second motion which we also dismissed. The matter is again before us on a combined motion to reopen and motion to reconsider. The combined motion will be dismissed.

In the Form I-129 (Petition for a Nonimmigrant Worker), the petitioner describes itself as a provider of social services for children including day care centers. In order to continue to employ the beneficiary in a position to which the petitioner assigned the job title "day care group or head teacher," the petitioner seeks to classify her as a nonimmigrant worker in an H-1B 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 service center director denied the nonimmigrant visa petition on July 16, 2012, concluding 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 appealed the denial on August 13, 2012 and we determined that the record did not contain sufficient evidence to establish that the petitioner would employ the beneficiary in a specialty occupation position. Accordingly, we dismissed the appeal on May 29, 2013.

On July 1, 2013, the petitioner filed a motion to reconsider our decision. We dismissed that motion on August 6, 2013, finding that the motion did not meet the requirements applicable to a motion to reconsider. On August 26, 2013, the petitioner filed a second motion, which we dismissed on February 27, 2014 for reasons which will be discussed below. The petitioner has now filed a third motion, which it identifies, on the Form I-290B, Notice of Appeal or Motion, as a joint motion to reopen and 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:

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

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.

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

II. DISCUSSION AND ANALYSIS

We found in our February 27, 2014 decision that the motion filed on August 26, 2013, which counsel specifically identified in his brief accompanying the August 26, 2013 motion as a "**Motion to Reopen**,"² did not meet the applicable requirements of a motion to reopen set out at 8 C.F.R. § 103.5(a)(2). We further found that even if that motion was construed as a motion to reconsider, it failed to meet the applicable requirements for motions to reconsider. In our February 27, 2014 decision, we also observed that the August 26, 2013 motion did not contain a statement pertinent to whether the validity of the unfavorable decision has been or is the subject of any judicial proceeding, which is required by 8 C.F.R. §103.5(a)(1)(iii)(C).

It is this February 27, 2014 decision that is the subject of the motion currently before us. When a motion is filed, 8 C.F.R. § 103.5(a)(1)(i) authorizes us to reconsider or to reopen the *immediate prior* decision which, in the matter of the instant motion, is our decision of February 27, 2014. Therefore, the decisions of July 16, 2012, May 29, 2013, and August 6, 2013 are not properly under review pursuant to the present motion. Whether to reopen or reconsider those decisions will not be considered again unless the petitioner prevails on the instant joint motion to reopen and reconsider our decision of February 27, 2014.

In his brief, however, counsel asserted that our May 29, 2013 dismissal of the appeal is now properly under review. Specifically, counsel stated:

² Specifically, counsel stated, "Our previous **Motion to Reconsider** (emphasis added) of subject case, per our letter dated June 24, 2013, was dismissed for our many failures to comply with the technical requirements of a 'motion to reconsider.' We would now like to file a **Motion to Reopen**."

The AAO in his current dismissal decision of February 27, 2014, mentioned that: "On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner had satisfied all evidentiary requirements." With this current AAO statement, we could now legally revisit and reargue our past **combined MTRC/MTRO** submitted to the AAO on July 1, 2013, disputing his dismissal of our appeal of the director's denial of our Form I-129 Petition.

[All emphases supplied by counsel.]

We find no merit in counsel's assertion that our mere recitation of the procedural history of this matter allows the petitioner to "revisit and reargue" its past motions, and we will not address that assertion further. The only decision that may be challenged by the instant joint motion is our February 27, 2014 dismissal of the motion filed by the petitioner on August 26, 2013.

A. Dismissal of the Instant Motion to Reopen

Upon review of the evidence, we find that the petitioner has not provided new evidence. In his brief, counsel alleged no new facts. The substance of counsel's argument is that the director's July 16, 2012 decision of denial and our May 29, 2013 dismissal of the subsequent appeal were in error. As was stated above, those decisions are not now under review.

"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.

Because counsel has provided no new facts or new evidence relevant to the propriety of our February 27, 2014 decision, let alone facts or evidence likely to change the result of that decision, the motion to reopen will be dismissed.

B. Dismissal of the Instant Motion to Reconsider

Our February 27, 2014 decision dismissed the August 26, 2013 motion on two bases, finding:³

1. The August 26, 2013 motion must be dismissed as it did not meet the applicable

³ As noted above, we also determined that even if that motion was a motion to reconsider, it did not meet the applicable requirements for motions to reconsider, and our February 27, 2014 decision explained why it did not meet such requirements.

requirements of a motion to reopen set out at 8 C.F.R. § 103.5(a)(2), and

2. The August 26, 2013 motion must be dismissed as it did not contain a statement pertinent to whether the validity of the August 6, 2013 decision has been or is the subject of any judicial proceeding, which is required by 8 C.F.R. § 103.5(a)(1)(iii)(C).

With the instant motion to reconsider, counsel submitted various documents and a brief. Other than the brief, the documents submitted have no relevance to whether (1) we overlooked or decided in error any other issues that were properly before us when we issued our February 27, 2014 decision, (2) the August 26, 2013 motion contained the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C), or (3) the August 26, 2013 motion met the motion to reopen requirements of 8 C.F.R. § 103.5(a)(2). Therefore, those documents will not be further considered.

With regard to counsel's brief, he largely addressed the propriety of the director's July 16, 2012 decision denying the visa petition and our May 29, 2013 decision dismissing the appeal of that denial. Counsel also addressed some of his argument toward our August 6, 2013 decision. Counsel's assertions pertinent to those decisions will not be considered because, as was explained above, the propriety of those decisions is not before us.

Counsel, did, however, raise a point pertinent to the propriety of our February 27, 2014 decision. Counsel cited *On Matter of Mohammed v. Gonzales*, 400 F.3d 785, 792-93 (9th Cir. 2005) for the proposition that if a motion is improperly titled a motion to reopen or to reconsider, the BIA should construe the motion based on its underlying purpose. Counsel asserts, therefore, that the August 26, 2013 motion, titled by counsel in his brief as a motion to reopen, should have been considered as a combined motion to reopen and motion to reconsider.

The decision counsel cited is a decision of the U.S. Court of Appeals for the Ninth Circuit. In contrast to a practice of acquiescence to the holdings of a circuit court in cases arising within the jurisdiction of that circuit, we are not required to accept an adverse determination by one circuit court of appeals as binding throughout the United States. *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989); cf. *Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). Although the reasoning underlying a circuit court's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. See *Matter of Anselmo*, *supra*.

In any event, the case cited pertains to a Board of Immigration Appeals (BIA) case in which a motion was improperly titled a motion to reopen, but its content made clear that its purpose was to ask for reconsideration of a decision, as it asserted that evidence already in the record may have been overlooked. Counsel asserts that the same principle should have applied in our February 27, 2014 AAO decision pertinent to the August 26, 2013 motion. Counsel asserts that, although he identified the August 26, 2013 motion as a motion to reopen, it should have been considered as a motion to reconsider.

In the instant case, however, the petitioner's August 26, 2013 motion did not even clarify that it was addressing the reasoning of our immediately prior decision of August 6, 2013. On the contrary, the petitioner's August 26, 2013 motion was devoted exclusively to challenging the propriety of the director's July 16, 2012 decision of denial and our May 29, 2013 decision dismissing the petitioner's appeal of that decision of denial. Neither of those decisions were properly the subject of the petitioner's August 26, 2013 motion. Therefore, even if that motion had been considered as a motion to reconsider, it necessarily would have failed, as it contained no argument pertinent to the propriety of our August 6, 2013 decision dismissing the motion to reconsider filed by the petitioner on July 1, 2013.

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. 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).

Accordingly, the instant motion to reconsider does not address the propriety of our February 27, 2014 decision, except to assert that we should have considered counsel's August 26, 2013 motion as a motion to reconsider. To reiterate, however, even if that motion to reopen had been considered as a motion to reconsider, we would have dismissed it as explained in our February 27, 2014, because it did not demonstrate that the August 6, 2013 decision was incorrect based on the evidence in the record when it was decided. Therefore, the instant motion does not establish that our February 27, 2014 decision was incorrect based on the evidence of record at the time of that decision. Because the instant motion to reconsider does not satisfy the requirements of a motion to reconsider as stated at 8 C.F.R. § 103.5(a)(3), it must be dismissed.

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.