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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: JUN 20 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: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Rn
Michael T. Kelly
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition on July 1, 2013, and dismissed a subsequent motion to reconsider on October 2, 2013. The matter is currently before the AAO on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

The Form I-129 visa petition states that the petitioner is a software development company. In order to employ the beneficiary in what it designates as an "Oracle Database Administrator" position, the petitioner seeks to classify him 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 petitioner failed to establish that: (1) it would employ the beneficiary in a specialty occupation position; and (2) it was a qualifying U.S. employer. The petitioner filed a motion to reconsider, which was dismissed by the director on October 2, 2013. The matter is now before the AAO on appeal.

It is noted that the director stated: "If you desire to appeal *this* decision, you may do so." (Emphasis added). As this language indicates, where, as here, 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. We see, for instance, that the regulatory provision at 8 C.F.R. § 103.3(a)(2)(i) states: "The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions *within 30 days after service of the decision.*" (Emphasis added). Thus, if the petitioner wished to appeal the director's decision to deny the appeal, it should have elected to file that appeal within 30 days of the director's denial decision. Here, though, the petitioner elected to file a motion instead and, thereby, limited the scope of the appeal to the merits of the director's decision to dismiss that motion.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's July 1, 2013 denial letter; (5) the petitioner's Form I-290B with the petitioner's Motion to Reconsider and supporting documents received on July 26, 2013; (6) the director's decision dated October 2, 2013 dismissing the motion and affirming its prior decision; and (7) the petitioner's appeal, consisting of the Form I-290B and allied documents submitted with it.

We have focused our review and analysis upon determining whether - based upon the record of proceeding at the time the director decided to deny the petition - 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)(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.

C. DISCUSSION AND ANALYSIS

The director's initial decision to deny the petition was based upon the director's determinations that the evidence of record failed to establish (1) that the proffered position is a specialty occupation; and (2) that the petitioner is a qualifying United States employer. However, as we noted above, the matter before us on appeal is the director's later decision to dismiss the petitioner's motion for reconsideration. However, the issue currently before the AAO is whether the director's October 2, 2013 decision was correct in dismissing the petitioner's motion to reconsider upon the grounds that it did not meet the pertinent regulatory requirements for a motion to reconsider. As will be discussed below, we find that the director's decision to dismiss the motion was correct. Accordingly, the appeal will be dismissed and the petition will be denied.

Again, 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.

It is worth specifically noting that a motion to reconsider is not a vehicle for introducing evidence on the merits of the petition that was not before the director at the time of his or her decision to deny the petition: as quoted above, "A motion to reconsider a decision on an application or petition must . . . establish that the decision was incorrect based on the evidence of record at the time of the initial decision."

We find that the petitioner's submissions on motion did not meet the requirements of a motion to reconsider. Our review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner generally stated that the service "was incorrect in its determination" that the proffered position was not a specialty occupation and that the petitioner would not serve as a qualifying employer. Aside from a letter dated July 18, 2013 from [REDACTED] Ph.D., submitted for consideration as an expert opinion, the supporting documentation submitted on motion was identical to the submissions by the petitioner in response to the RFE. (Of course, we noted that Professor [REDACTED]'s submission on motion was post-dated the decision that is the subject of the motion, and accordingly, we discounted it as evidence of the merits of the petition.)

On motion the petitioner did not specifically and sufficiently articulate why the director's decision denying the petition was based on an incorrect application of law or USCIS policy; nor did the petitioner cite to any relevant statute, regulation or relevant precedent decision that would support a contention that the director's decision to deny the petition was based upon a misapplication of statute,

regulation, or policy to the evidence of record before the director at the time of the decision to deny the petition.

On appeal, the petitioner submits the exact same supporting documentation that it previously submitted on motion. The assertions submitted in support of the appeal, outlined in a document entitled "Appendix A," are also identical to a document entitled "Appendix A" that was previously submitted on motion.

The petitioner does not address the October 2, 2013 decision dismissing the motion. Rather, the appeal addresses the basis for the July 1, 2013 denial of the petition, which is not the subject of the instant appeal and is not now before the AAO. The only issue correctly before the AAO on appeal is whether the immediate prior decision – that is, the director's decision to dismiss the motion for reconsideration – was correctly decided. However, the petitioner did not address that issue.

As the appeal does not establish that the director's decision to dismiss the motion to reconsider was incorrect, the appeal will be dismissed, and the petition will be denied.

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.

We find that the director did not err in dismissing the motion for reconsideration, as the documents constituting that motion for reconsideration did not articulate how the director's decision to deny the petition misapplied any particular pertinent statutes, regulations, policies or precedent decisions to the evidence of record that was before the director when the director rendered the decision to deny the petition.

III. CONCLUSION

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.