



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 01 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,


for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: After the service center director revoked the approval of the H-1B nonimmigrant visa petition, the petitioner submitted a timely appeal to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The AAO's decision dismissing the appeal is now before us as the subject of combined motions for the AAO (1) to reopen the proceeding (2) to reconsider the AAO's decision that dismissed the appeal. The joint motion will be dismissed, and the petition's approval will remain revoked.

The matter now before us is the petitioner's motion contesting the AAO's decision to dismiss the appeal. In light of the check mark at Box F of Part 2 of the Form I-290B ("I am filing [(1)] a motion to reopen and [(2)] a motion to reconsider a decision"), we will adjudicate the motion submissions both as a motion to reopen the proceeding and also as a motion to reconsider the AAO's decision to dismissal the appeal.

I. FACTUAL OVERVIEW

We shall first orient towards aspects of the proceeding that are particularly relevant to the proper determination of this joint motion.

The record reflects the following facts in the development of the proceeding from the petition's filing through its approval.

1. The petition was filed to extend the beneficiary's classification as an H-1B nonimmigrant worker in a position to which the petitioner assigned the title "Computer Programmer."
2. As constituted at the time of its approval, the petition attested to the following as the factual predicate for approving the 9/30/2009 to 9/9/29/2012 period of intended employment specified in the petition:
 - a. Throughout the period of employment the beneficiary would be assigned as a computer programmer to perform a particular set of duties described in the petitioner's September 9, 2009 letter of support.
 - b. The beneficiary would perform those specified duties pursuant to the petitioner's particular contract with a particular firm – [REDACTED] of [REDACTED] California.
 - c. Pursuant to that Invenger contract, the beneficiary would perform all of his work for [REDACTED]'s client, [REDACTED] and all of that work would be performed at [REDACTED] offices in [REDACTED]

- d. The LCA submitted in support of the petition had been certified only for employment at the [REDACTED] location specified in the petition.
 - e. The petition also specified only one place of employment for the beneficiary, that is, the [REDACTED] location in [REDACTED], California.
3. The petition's approval was, of course, based solely upon the information presented within the four corners of the petition. That information conveyed that the petition was filed so that the beneficiary could work on assignment by the petitioner to [REDACTED] in [REDACTED], pursuant to a contract between the petitioner and [REDACTED].
 4. Likewise, the petition was approved only for the terms and conditions and work location that were stated in the petition and specified in the certified LCA filed with it. Consequently, the petition was approved *only* for the beneficiary to provide the particular services described in the petition, and *only* at the single location specified in the petition, and only to the extent encompassed by the LCA that accompanied the petition.

The record further reflects that the director initiated and continued the revocation-upon-notice processes on the basis of the following undisputed information coming to the director's attention after the petition had been approved. Contrary to the statements submitted in the petition that was approved, and likewise contrary to the LCA submitted in support of that petition, the beneficiary was assigned to work at a different location (in fact, in a different state), and to work at for a different end-client [REDACTED] and pursuant to a different contract with a different entity [REDACTED] than was presented in the approved petition.

In its opening statements the NOIR communicated that revocation of the petition's approval was being considered under the provision at 8 C.F.R. § 214.2(h)(11)(iii)(A)(2), which provides for revocation upon notice if it is later discovered that the approval relates to a petition whose statement of facts was not true and correct. That provision states in full that "the director shall send to the petitioner a notice of intent to revoke the petition [i.e., an NOIR] in relevant part if he or she finds that":

The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact.

The NOIR stated in part that the petition's approval is subject to revocation because the statement of facts in the petition appeared to be not true and correct. In pertinent part, the NOIR reads:

USCIS has received information regarding the beneficiary's continued qualification for

the classification sought. In accordance with Title 8, Code of Federal Regulations ("8 C.F.R.") 214.2(h)(11)(iii), it is the intent of USCIS to revoke approval of the petition because the statement of facts contained in the petition was not true and correct.

Under 8 C.F.R. § 214.2(h)(11)(iii)(A)(2), USCIS may revoke approval of the petition where statement of facts contained in the petition was not true and correct.

Further, when a petitioner signs the petition, he or she is certifying that the petition and all evidence contained in the petition [were] true and correct. See 8 C.F.R. § 103.2(a)(2).

The NOIR later informed the petitioner that the beneficiary provided information contradicting the petitioner's attestation in the petition that the beneficiary would be assigned to work at [REDACTED] in [REDACTED], California, through a mid-vendor identified as [REDACTED] Inc. The NOIR communicated this material discrepancy as follows (emphasis added):

However, the United States Consulate General in New Deli, India, revealed that during the visa interview, when asked where and how the beneficiary would work for the petitioner, the beneficiary stated that he would be working at the petitioner's client, [REDACTED] Corporation. When asked to submit additional documentation, the petitioner submitted a contract with [REDACTED] Inc[.], which in turn places the beneficiary at the end client [(i.e., [REDACTED] Corporation, and *not* the end client identified in statement of facts upon which the petition had been approved)]. The involvement of [REDACTED] Inc. in the beneficiary's placement was not mentioned in the initial filing and contradicts the petitioner's claim that the petitioner will be placed to work at [REDACTED] through a mid-vendor, [REDACTED] Inc.

The NOIR not only identified what the director perceived as untrue and inaccurate aspects of the petition's statement of facts – that is, that the petition had conveyed that the work, job location, LCA wage-requirements and other material terms and conditions of H-1B employment would be as set forth in the Form I-129, all of its supporting documentary evidence, and the LCA that were before the director when the director approved the petition – but we find that the NOIR also discussed the revocation action in terms of two "issues," namely, that, based upon the information from the United States Consulate General in New Deli about the beneficiary's assignment to a different end-client, different location, and pursuant to a contractual relationship with a different intermediate vendor than identified in the petition that had been approved, the petitioner failed to establish for this newly discovered [REDACTED] scenario (1) that there existed the requisite employer-employee relationship between the petitioner and the beneficiary necessary to establish for establish the petitioner as a U.S. Employer, and (2) that this newly revealed employment situation established a specialty occupation position.

The petitioner's response to the NOIR did not directly address the NOIR's assertions that the petition had presented untrue and incorrect statements with regard to the particular employment for which the petition was filed. Rather, the written response and its supporting documents addressed the NOIR's discussions about the employer-employee and the specialty occupation concerns that the NOIR identified as its two "issues."

The record also reflects that, as in the NOIR response, both the director's revocation decision and the AAO's decision to dismiss the appeal analyzed the petitioner's NOIR-response in terms of the employer-employee and the specialty occupation issues as framed in the NOIR.

II. PRELIMINARY FINDINGS

Here we will enter some specific findings that are relevant to our disposition of this joint motion. They are all based upon our review of the entire record of proceeding, including all of the submissions on motion. Here we specifically find that:

- The petitioner did not address the NOIR's assertions that the statement of facts contained inaccurate and untrue information, as described in the NOIR.
- Whether or not the petitioner has realized it, the petitioner's statements and documents submitted in the petitioner's NOIR response, on appeal, and also on motion establish as a matter of fact that the beneficiary's employment at [REDACTED] through [REDACTED] (1) was beyond the scope of the statement of facts in the petition that was approved; (2) had not been considered, adjudicated, or approved as part of the petition that was approved; and (3) constitutes material changes to the terms and conditions of the employment for which the petition had been approved.
- Because the new employment constitutes material changes to the terms and conditions of the employment for which the petition had approved, it would necessitate revocation-on-notice proceedings pursuant to the provisions at 8 C.F.R. § 214.2(h)(11)(iii)(A)(I) ("The petitioner violated terms and conditions of the approved petition"), if the AAO's decision on appeal were to be overturned.
- The evidence and statements submitted by the petitioner with regard to the new employment conclusively establish that petitioner in fact has violated terms and conditions of the approved petition. Thus, re-initiation of revocation-on-notice proceedings would serve no useful purpose for either the petitioner or the H-1B program.

We also find that, whether or not the petitioner intended it, the statements and documents that the petitioner has submitted on motion and earlier in response to the NOIR and on appeal constitute an

improper attempt to amend the approved petition. The regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) state in pertinent part (emphasis added):

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed *to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition.*

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). The regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) instead require that the petitioner "file an amended or new petition, with fee, with the service center where the original petition was filed to reflect any material changes in the terms and conditions of employment"

III. MOTIONS: GENERAL REQUIREMENTS

A. Showing Proper Cause

The regulatory provisions setting the requirements for motions appear at 8 C.F.R. § 103.5(a).

The provision at 8 C.F.R. § 103.5(a)(1)(i) limits a USCIS officer's authority to reopen or reconsider to instances where "proper cause" has been shown. It states:

[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 submissions on motion must not only meet the formal requirements for filing (such as, for instance, inclusion of a completed and properly executed Form I-290B and timely receipt at the proper location) but those submissions must also show a proper cause for granting the motion. In the case before us, no such cause is shown.

B. Dismissal if Motion Requirements are not Satisfied

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."

IV. THE MOTION 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 submitted on motion, 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).

We find that none of the submissions on motion state any new facts that would make any difference if the proceeding were reopened. The content of those submissions in fact confirm that providing the new employment in question "violated terms and conditions of the approved petition," the ground for revocation at 8 C.F.R. § 214.2(h)(11)(iii)(A)(I). Further, we find that none of the submissions counter the NOIR's assertion that the new-employment information indicated that the statement of facts in the approved petition was untrue and incorrect, in terms of its attestations about the beneficiary's employment if the petition were approved.

"There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988). Motions to reopen immigration cases are "plainly disfavor[ed]." *Id.*

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 movant has not met that burden.

Again, as stated 8 C.F.R. § 103.5(a)(4), "[a] motion that does not meet applicable requirements shall be dismissed."

For the reasons discussed above, the motion to reopen is dismissed.

¹ 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.

V. THE MOTION TO RECONSIDER

For the reasons discussed below, we will also dismiss the motion-to-reconsider component of this joint motion.

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 submitted on motion, 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 moving party must state the specific factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision. *See* 24 I&N Dec. at 60.

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 petitioner has not met that burden. Rather, in effect, the petitioner is attempting to amend the approved petition by trying to modify the approved petition by now inserting - and seeking retroactive approval of - material changes to terms and conditions of the approved petition. While both the AAO on appeal and the director appear to have missed this critical fact, it nonetheless remains true.

Also, we find that the petitioner has not addressed the NOIR's allegation of an untrue and incorrect statement that the beneficiary would be only employed as attested in the petition. Accordingly, the petitioner has not overcome that stated basis for revocation. (And, in this regard, we find that the director's revocation decision did not withdraw that ground.)

In any event, the motion must be dismissed because it is indisputable that the petitioner's submissions into the record after the NOIR was issued affirmatively and conclusively establish that the petitioner has violated the terms and conditions of the approved petition. It follows that overturning the AAO's decision below would not serve any good cause. Remanding the matter for re-initiation of revocation-on-notice proceedings would be futile, as the petitioner's own statements and submissions unequivocally establish that it has violated the terms and conditions of the approved petition – and this set of facts would mandate revocation of the petition's approval.

A motion that does not meet applicable requirements shall be dismissed. See 8 C.F.R. § 103.5(a)(4). Thus, for the reasons stated above, the motion to reconsider will also be dismissed.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion 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).

VI. 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 motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decision of the AAO will not be disturbed.

ORDER: The combined motion is dismissed.