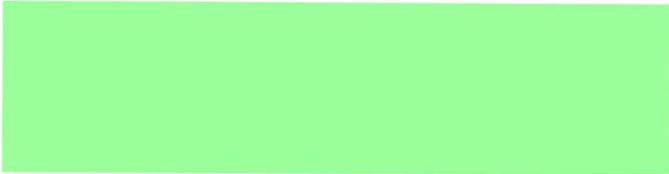


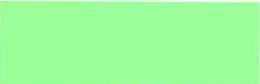
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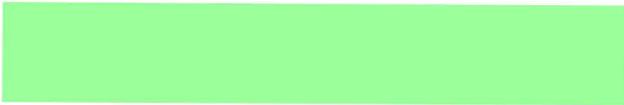
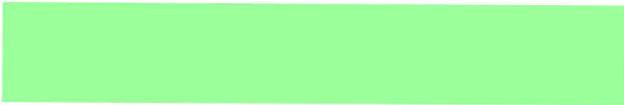
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: **MAY 21 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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 the AAO dismissed the appeal. The matter is again before the AAO 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 supplier of art glass and tile which was established in 2005. In order to employ the beneficiary in a position to which the petitioner assigned the job title "Environmental Compliance Inspector," 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 director denied the petition, 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, through counsel, submitted an appeal of the director's decision to the AAO. The AAO reviewed the evidence and determined that the record of proceeding contained insufficient evidence to establish that the petitioner would employ the beneficiary in a specialty occupation position. Accordingly, the AAO dismissed the appeal. The AAO issued its decision on Wednesday, September 25, 2013. The AAO properly gave notice to the petitioner that any motion must be filed within 33 days of the date of the decision.

#### I. MOTION – IMPROPERLY FILED

The petitioner subsequently submitted a Form I-290B (Notice of Appeal or Motion) to U.S. Citizenship and Immigration Services (USCIS) contesting the AAO's decision to dismiss the appeal. 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. The combined motion was received by USCIS on Thursday, November 7, 2013, which is 43 days after the AAO's decision was issued.<sup>1</sup> On that date, the USCIS Lockbox accepted the Form I-290B for filing and issued a receipt number.

##### A. Regulatory Framework

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states, in pertinent part, the following:

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

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<sup>1</sup> It appears from the record of proceeding that the submission had previously been rejected by USCIS because it was improperly filed.

The date of filing is not the date of mailing, but the date when USCIS receives the intended motion properly completed, signed, and accompanied by the required fee as specified by the Form I-290B instructions.<sup>2</sup> See 8 C.F.R. § 103.2(a)(1) and (b)(1). A benefit request will be considered received by USCIS as of the actual date of receipt at the location designated for filing such a request. 8 C.F.R. § 103.2(a)(7)(i). A benefit request which is rejected will not retain a filing date, and there is no appeal from the rejection. 8 C.F.R. § 103.2(a)(7)(iii).

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing a motion to reconsider. The regulations do permit USCIS, in its discretion, to excuse the untimely filing of a motion to reopen when it is demonstrated that the delay was both (a) reasonable and (b) beyond the control of the petitioner. 8 C.F.R. § 103.5(a)(1)(i).

#### B. Motion Filed Late

Upon review of the submission constituting the motion, the petitioner and its counsel do not assert, nor is there any probative evidence to support a finding, that the untimely filing was either reasonable or beyond the control of the petitioner. As the motion was untimely filed, it must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4) for failure to meet the applicable filing requirements.

### II. MOTION REQUIREMENTS

Although the untimely filing of this motion is dispositive and requires that the motion be dismissed, we will now discuss why the submission constituting the combined motion would not have satisfied the substantive requirements for either a motion to reopen or a motion to reconsider. For the reasons discussed below, the AAO concludes that, if the joint motion had been timely filed, dismissal would still be required because the motion does not merit either reopening or reconsideration.

#### 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.

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<sup>2</sup> See 8 C.F.R. § 103.2(a)(1) (every benefit request submitted to USCIS must be executed and filed in accordance with the form instructions and with the required fee(s)); 103.2(a)(6) (all benefit requests must be filed in accordance with the form instructions).

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>3</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)(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.

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<sup>3</sup> 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.

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.

### III. DISCUSSION AND ANALYSIS

The submission constituting the combined motion consists of the following: (1) a letter signed by the petitioner's counsel; (2) the Form I-290B; (3) a three-page brief submitted by counsel; and (4) documentary evidence, which is identified by counsel as "Exhibit A - [REDACTED] Inspection Test Results."

In Part 3 "Basis for the Appeal or Motion" of the Form I-290B, counsel states:

The denial is erroneous. Attached are new facts and a brief in support of this motion to reopen and reconsider.

The documentary evidence consists of nine letters addressed to the petitioner. All of the letters are printed on [REDACTED] letterhead, and all are signed by the [REDACTED] President/CEO. Each letter bears a November 2007 date and provides information regarding various tests. In order of the appearance of the related letters in the record, the test groups are identified as follows:

- (1) Water Absorption ASTM C 373);
- (2) Standard Test Method ASTM C 485 for Measuring Warpage of Ceramic Tile;

- (3) Resistance of Ceramic Tile to Chemical Substances (ASTM C650);
- (4) Abrasion Resistance (ASTM C-1027);
- (5) T-85 Mohs' Hardness Test [(evaluating the tile material's resistance to scratching)];
- (6) ASTM C-1026: Standard Test for Measuring the Resistance of Ceramic Tile to Freeze-Thaw Cycling;
- (7) Coefficient of Friction Test Standard: ASTM C 1028 (further described as the "Standard Test Method for Evaluating the static Coefficient of Friction of Ceramic Tile and other like surfaces by the Horizontal Dynamometer Pull Meter Method");
- (8) Coefficient of Friction Test Standard: ASTM C 1028 (the same test described at item (7) above); and
- (9) Breaking Strength (ASTM C 648) (further described as the "Standard Test Method for Breaking Strength of Ceramic Tile.")

The brief on motion introduces these documents as "new evidence in the form of inspection test reports completed at the request of [the] Petitioner . . . [that] provide an example of various standardized test methods performed on tile products to ensure compliance with regulatory requirements."

#### IV. DISMISSAL OF THE MOTION TO REOPEN

Upon review of the evidence, the AAO observes that all of the letters bear November 2007 dates, indicating that these documents existed and were known to the petitioner before the H-1B petition was filed on May 23, 2012. Thus, the documentation was previously available and could have been submitted with the initial petition, in response to the RFE, or with the appeal.

Further, while the letters contain technical terms and references to specialized tests, test methods, and measurements, the petitioner has not established the purpose of the letters and how they are relevant to the proffered position. Further, the President/CEO of the [redacted] provides information that appears to require some technical knowledge; however, without more, the AAO cannot conclude that proficiency in such testing is achievable only by the attainment of at least a bachelor's degree in a specific specialty, or its equivalent, as opposed to vocational training, on-the-job training, work experience, and/or other academic credentials. In short, these documents have little or no probative value towards establishing the proffered position as satisfying the statutory and regulatory provisions for a specialty occupation. The petitioner has not established that the letters would change the outcome of this case if the proceeding were reopened to consider them.

"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.

#### V. 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) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.

The petitioner asserts that the AAO erred when it found a "significant discrepancy" between (1) the position's level of complexity as asserted in the Form I-129 and supporting documentation and (2) the wage level indicated on the Labor Condition Application (LCA). The documents constituting this motion do not, however, articulate how the AAO's decision on appeal misapplied any particular pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to dismiss the appeal was rendered. The petitioner has not submitted any document that would meet the requirements of a motion to reconsider. Thus, the motion to reconsider must be dismissed.

#### VI. 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 the previous decision of the AAO will not be disturbed.

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