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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 30 2014 OFFICE: VERMONT 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,

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

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner appealed the denial to us, the Administrative Appeals Office (AAO), and we dismissed the appeal. The matter is again before us, on a combined motion to reopen the proceeding and motion to reconsider our decision on the appeal. The combined motion will be dismissed.

In the Form I-129 (Petition for a Nonimmigrant Worker) the petitioner describes itself as a retail business which was established in 2007 and employs three people. In order to employ the beneficiary in a position to which the petitioner assigned the job title "Accountant," 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, appealed the director's decision to us. On appeal, we 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, we dismissed the appeal, by the March 13, 2014 decision which is the subject of the joint motion now before us.

I. MOTION REQUIREMENTS

We will now discuss why the submission constituting the combined motion has not satisfied the substantive requirements for either a motion to reopen or a motion to reconsider. For the reasons discussed below, the AAO concludes that 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.

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)(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.

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[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.

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.

II. THE SUBMISSIONS CONSTITUTING THIS JOINT MOTION

The submissions constituting the combined motion consist of the following: (1) the Form I-290B; (2) a twenty-four page brief submitted by counsel; (3) a letter from the beneficiary asking to be allowed to stay in the United States; (4) a letter from a police officer vouching for the beneficiary's character; and, (5) a letter from a pastor attesting to the beneficiary's religiosity.

We do not question the veracity or sincerity of the letters authors. Unfortunately, none of the statements have an impact upon the analysis that we must conduct. That is because the content of the letters do not address the evaluative factors that the motion regulations require us to apply to the submissions before us on motion.

Next, as we will now discuss, counsel's brief on appeal does not establish either (1) that there are new facts that would likely change the outcome, in the petitioner's favor, if the proceeding were reopened to consider them, or (2) or that our decision on appeal was based upon an erroneous application of law or policy to the evidence of record that was before us on appeal before it on appeal.

We will comment specifically on several aspects of the appeal brief.

We need not analyze whether or not the proffered position should be regarded as a profession, for, contrary to counsel's stated position (brief at page 4), a position's inclusion within the professions, as defined at section 101(a)(32) of the Act does not establish that position as a specialty occupation. The issue before the AAO is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession. Thus, the matters cited

by counsel with regard to profession as are not relevant to the petitioner's H-1B petition and are not material to the proper disposition of this joint motion.[2] Counsel's Federal Register citation pertains to the promulgation of a regulation that predated the revision of the Act that added the H-1B "specialty occupation" category. Neither that now-superseded regulation, nor the section of the Act that it implemented, stated an equivalency between "profession" and "specialty occupation" – a term which, in fact, had not been used in the Act.

Next, we see that counsel asserts, without any specific citation to a regulation or precedent decision on the topic that "the Service" has "through regulation and precedent decision" recognized that occupations that are professions are "thus specialty occupations." The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Also, counsel errs in attributing precedent-decision status to "*In Re X*, 93 245 51412, 12 INA Rept. B2-200 (AAU, Int. Dec. 3-28-94)." Contrary to counsel's description, that decision has not been published as a precedent decision. For a list of the precedent decisions, see the Executive Office of Immigration Review Internet site at http://www.justice.gov/eoir/vll/intdec/aao_comm.html. Therefore, as a non-precedent decision, it does not qualify as a foundation for a motion to reconsider under 8 C.F.R. § 103.5(a)(3).[3]

Also, counsel's reliance upon *Hong Kong T.V. Video Program, Inc. v. Ilchert*, 685 F. Supp. 712 (N.D. CA. 1988), cited as holding that "a position may be considered a profession based on the complexity of the duties alone," is not relevant. The visa classification which that decision addressed (that is, for a temporary worker of "distinguished merit and ability" pursuant to section 101(a)(15)(H)(i) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)) predated the H-1B visa classification for temporary workers in a specialty occupation, which is addressed at section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).[4] That being said, in our decision below we recognized

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[2] We note that the current, primary, and fundamental difference between qualifying as a profession and qualifying as a specialty occupation is that specialty occupations require the U.S. bachelor's or higher degree, or its equivalent, to be in a specific specialty. Thus, while "teachers in elementary or secondary schools" are specifically identified as qualifying as a profession as that term is defined in section 101(a)(32) of the Act, a particular position within that occupation would not necessarily qualify as a specialty occupation unless it met the definition of that term at section 214(i)(1) of the Act.

[3] As an administrative comment, the AAO notes that, aside from the fact that the referenced decision carries no precedential weight, the petitioner did not include a copy of the decision for the AAO's review, but only provides a citation to what appears to be an unofficial reporter but is not familiar to us.

[4] The AAO notes that the applicable language from *Hong Kong T.V. Video Program, Inc. v. Ilchert* states that "the position of *company president* may be considered a profession based on the complexity of the duties alone." *Hong Kong T.V. Video Program, Inc. v. Ilchert*, 685 F. Supp. at 716. (Emphasis added.)

and correctly applied "complexity" as it presently appears as an express factor for consideration in two of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel's brief argues for a different result than reached by the AAO in its decision, and he does so partly by asserting propositions that are not supported by the record of proceeding that was before us at the time of that the decision. As representative examples we note counsel's assertions that "[i]t is standard for a company such as Petitioner to hire an Accountant and require that individual to have attained a Bachelor's Degree" (brief at page 6), and that "an Accountant handling the operations for a small company [like the petitioner] will probably require at least the same, if not more, skills as a same level employee, in a [a] Fortune 500 firm" (brief at page 20).

The brief argues for a different outcome than reached by the AAO's decision to dismiss the appeal. However, the brief does not explain how reopening the proceeding to consider the letters submitted on motion would likely alter the outcome of the proceeding. Likewise, we find that the content of the brief does not explain how any pertinent statutes, regulations, or precedent decisions indicate that the AAO decision below was incorrect.

III. DISMISSAL OF THE MOTION TO REOPEN

As reflected in our preceding discussions of the letters and the brief, the motion does not present new facts of such potentially material impact that reopening the proceeding to consider them would likely result in a more favorable outcome for the petitioner.

"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.

IV. 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 brief filed with the motion separates the four statutory definitions of specialty occupation found at section 214(i) of the Act. Although the brief disagrees with the AAO's decision, it does not explain how our decision on the appeal had disregarded or misapplied any pertinent regulation,

statute, regulation so as to have reached an incorrect decision on the evidence of record that was before it. Thus, the motion to reconsider must also be dismissed.

V. CONCLUSION

For the reasons discussed above, both the motion-to-reopen and the motion-to-reconsider components of the joint motion are dismissed, pursuant to the requirement at 8 C.F.R. § 103.5(a)(4) that "[a] motion that does not meet applicable requirements shall be dismissed."

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.