U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-C- INC.

DATE: DEC. 10, 2015

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a software consulting services firm, seeks to temporarily employ the Beneficiary as a "Programmer Analyst" under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, California Service Center, revoked the approval of the petition. The Petitioner appealed the revocation to the Administrative Appeals Office (AAO), which we dismissed. The matter is now before us on a combined motion to reopen and reconsider. The combined motion will be denied.

The Director's revocation of approval of the petition was based on her finding that the Beneficiary was no longer working at the location for which the visa petition was approved. We dismissed the appeal, concluding that the Petitioner began employing the Beneficiary at a new work location, not covered by the approved petition, prior to the filing of an amended or new petition.[1] We further concluded that the Petitioner did not fully comply with the LCA and H-1B petition process, including adhering to the proper sequence of submissions to the Department of Labor and U.S. Citizenship and Immigration Services (USCIS), and that such a change in the terms and conditions of the Beneficiary's employment affected eligibility under section 101(a)(15)(H) of the Act.

On motion, the Petitioner asserts that it relied in good faith on guidance previously provided by USCIS indicating that an amended petition is not necessary when the location of a Beneficiary's employment changes. The Petitioner further states that it filed an amended petition on September 17, 2014, which USCIS records confirm.

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

[1] We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

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 4 of the Form I-290B, which states:

> **Motion to Reopen**: The motion must state new facts and must be supported by affidavits and/or documentary evidence demonstrating eligibility at the time the underlying petition . . . was filed.[2]

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.

[2] 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, and such instructions are incorporated into the regulations requiring its submission."

These provisions are augmented by the related instruction at Part 4 of the Form I-290B, which states:

> **Motion to Reconsider**: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions when filed and must establish that the decision was based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence of record at the time of decision.

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 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. DISCUSSION

For the reasons discussed below, the combined motion will be denied.

A. Motion to Reopen

In support of the combined motion, the Petitioner submits a brief explaining why it believes our decision to dismiss the appeal was erroneous. The Petitioner also submitted evidence of the Beneficiary's employment at the new work location which is the subject of the revocation. While the Petitioner has provided, for example, a new letter from [redacted] dated after the dismissal of the appeal, the letter cannot be considered "new facts" in that it is the same letter submitted prior to the revocation albeit with a new date. The Petitioner also submitted recent pay stub details for the Beneficiary's employment at the new work location, however, the Petitioner previously submitted pay stub evidence for the same employment. The submitted Work Order confirms the Beneficiary's employment at the [redacted] location, but the Petitioner has not explained the significance of this evidence to the motion to reopen. We also note that the Petitioner submitted a letter explaining that its previous attorney advised it that "amendment was not needed for change of location" and that it changed attorneys "[o]nce it realized the errors done by [the previous attorney] . . . ." Even if the documents submitted on motion could be considered "new facts," the Petitioner has not established that the new facts possess such significance that they could change the outcome of the adjudication.

The Petitioner's motion does not satisfy the requirements of a motion to reopen, and accordingly, the motion to reopen will be denied.

B. Motion to Reconsider

Nor does the Petitioner's motion satisfy the requirements of a 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 must 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); Instructions for Motions to Reconsider at Part 4 of the Form I-290B.

Here, the Petitioner's stated reasons for reconsideration are insufficient to establish that our decision was incorrect.

First, we note that on April 9, 2015, we issued the precedent decision *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015). That decision did not change the law; it merely clarified the existing law. *Simeio* made explicit, *inter alia*, that a change in the place of employment of a beneficiary to a geographical area requiring a new LCA is a material change and requires that an amended or new H-1B petition be filed with that corresponding LCA.

Second, on July 21, 2015, USCIS issued a policy memorandum, "USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*," to guide determinations by USCIS employees. That guidance states, in pertinent part:

> **Pre-*Simeio* changes in the place of employment requiring certification of a new LCA:** If a petitioner's H-1B employee moved to a new area of employment (not covered by an existing, approved H-1B petition) on or before the date of publication of *Matter of Simeio Solutions, LLC* (April 9, 2015), USCIS will generally not pursue *new* adverse actions (e.g., denials or revocations) solely based upon a failure to file an amended or new petition regarding that move after July 21, 2015. USCIS will, however, preserve adverse actions already commenced or completed prior to July 21, 2015 and will pursue new adverse actions if other violations are determined to have occurred.

The policy memo further states that notices of intent to revoke (NOIRs) and revocations issued prior to July 21, 2015, remain in effect.

The action in the instant case commenced on August 13, 2014, when the Director issued the NOIR in this case.[3] It was therefore commenced prior to *Simeio* and the July 21, 2015, policy memo, and

[3] The Director's revocation and the dismissal of the appeal also occurred prior to July 21, 2015.

the adverse action is, therefore, preserved. The instant visa petition is bound by the law in existence prior to *Simeio* and as clarified in *Simeio*.

To summarize, the Petitioner changed the Beneficiary's worksite without first submitting an amended Form I-129. Because the Beneficiary was working in a location for which the instant petition was not approved, the Beneficiary was no longer employed by the Petitioner in the capacity specified in the petition. Further, by employing the Beneficiary in a location for which the I-129 was not approved, the Petitioner violated the terms and conditions of the approved petition. The approval of the visa petition was, therefore, correctly revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(*1*) and 8 C.F.R. § 214.2(h)(11)(iii)(A)(*3*).

The documents constituting this motion do not articulate how our decision on appeal misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to dismiss the appeal was rendered. Accordingly, the Petitioner's motion to reconsider will be denied.

III. CONCLUSION

The combined motion does not meet the requirements for a motion to reopen or a motion to reconsider. Therefore, the combined motion will be denied.

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 denied, the proceedings will not be reopened or reconsidered, and our previous decision will not be disturbed.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of S-C- Inc.*, ID# 14756 (AAO Dec. 10, 2015)