



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF J-E- INC.

DATE: DEC. 24, 2015

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an acupuncture clinic, seeks to temporarily employ the Beneficiary as an "Acupuncturist" 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, denied the petition. The Petitioner appealed the denial 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.

We dismissed the appeal, concluding that the evidence of record was inadequate to establish the substantive nature of the proffered position, and thus, that the proffered position qualified as a specialty occupation. In particular, we found that the Petitioner had not established the truthfulness of the statements attested to in the Forms I-129, I-290B, and supporting documentation, and that the evidence of record contained numerous unresolved discrepancies regarding the proffered position and its constituent duties. We also addressed numerous inconsistencies regarding the minimum educational requirements for the proffered position which further precluded the proffered position from being considered a specialty occupation.

On motion, the Petitioner asserts that our decision "was incorrect because the position met at least one of the four criteria listed under 8 C.F.R. § 214.2(h)(4)(iii)(A)," specifically, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). The Petitioner reiterates some of the same job duties which were previously listed for the proffered position. The Petitioner also reiterates its need for a licensed acupuncturist, and summarizes the licensing requirements set forth by the California Acupuncture Board. The Petitioner then concludes that "[i]t is clear from some of the job duties . . . and the requirements set forth by the California Acupuncture Board that an acupuncturist [meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)]."

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

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.¹

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.

¹ 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.

In support of the motion, the Petitioner submits a brief explaining why it believes the proffered position qualifies as a specialty occupation. The Petitioner has not, however, presented any evidence that could be considered “new facts.” For instance, the job duties presented on appeal were the same as some of those previously listed. The Petitioner also previously provided the same information regarding California acupuncture licensing requirements, which the Director addressed in her decision. As such, the Petitioner’s motion does not satisfy the requirements of a motion to reopen. The motion to reopen will be denied.

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. On motion, the Petitioner asserts that the proffered position qualifies as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). However, the Petitioner does not articulate how our May 12, 2015, decision was based on an incorrect application of law or policy. Our May 12, 2015, decision was based upon the numerous unresolved discrepancies regarding the proffered position and other credibility considerations which precluded the Petitioner from establishing the substantive nature of the proffered position and, consequently, our decision did not specifically address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), or any other criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, the Petitioner specifically acknowledges that "[t]he dismissal of the appeal was based on some discrepancies found on the application and supporting documents submitted by the Petitioner," but does not further address or resolve any of these discrepancies.

As stated above, the reiteration of previous arguments or general allegations of error will not suffice. See *Matter of O-S-G-*, 24 I&N Dec. at 60. The Petitioner must state the specific factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision. *Id.* The Petitioner has not done so here.

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 J-E- Inc.*, ID# 15236 (AAO Dec. 24, 2015)