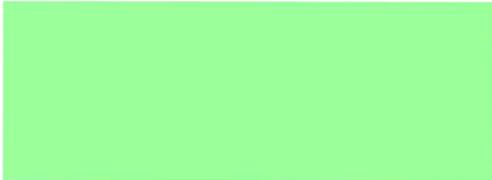


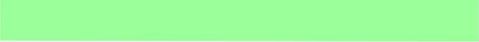


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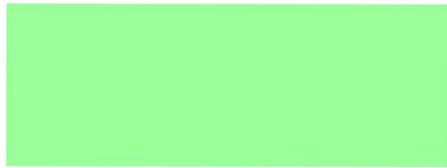


DATE: **JAN 08 2015** OFFICE: VERMONT SERVICE CENTER FILE: 

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,

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 and we dismissed the appeal. The matter is again before us 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 "Gasoline station and convenience store" with four employees established in [REDACTED]. In order to continue to employ the beneficiary in a position to which the petitioner assigned the job title "Staff Accountant," the petitioner seeks to classify him 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 us. We reviewed the record of proceeding and determined it did not contain sufficient evidence to establish that the petitioner would employ the beneficiary in a specialty occupation position. Accordingly, we dismissed the appeal in a decision issued on Thursday, May 22, 2014. In this decision, we also 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 our decision to dismiss the appeal. The motion was received by USCIS on June 27, 2014. However, that motion was rejected as having been filed on an outdated version of the Form I-290B.

The petitioner subsequently submitted the correct form on Thursday, July 10, 2014, which is 49 days after our decision was issued.¹

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

¹ The record of proceeding indicates that the submission had previously been rejected by USCIS as improperly filed.

Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

Every benefit request submitted to USCIS must be executed and filed in accordance with the form instructions and with the required fee(s). *See* 8 C.F.R. § 103.2(a)(1) and (6). 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. *See* 8 C.F.R. § 103.2(a)(7)(i) and (b)(1). 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 us the 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 this applicable filing requirement.

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, we conclude 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.

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:²

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)(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.

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, such instructions are incorporated into 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* 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.

III. DISCUSSION AND ANALYSIS

The submission constituting the combined motion consists of the following: (1) invoices and other business documents showing that the petitioner purchases stock, pays its employees, and otherwise conducts business; (2) a letter, dated June 19, 2014, from counsel; (3) additional copies of documents previously submitted; and (4) a brief.

The June 19, 2014 letter from counsel states:

The AAO has erred in denying this petition. The proffered position of Staff Accountant is a specialty occupation and we will demonstrate that the job clearly meets any of the four factors set forth in 8 C.F.R. 214.2(h)(4)(iii)(A) for determining whether a job is a specialty occupation. A brief along with supporting documents is enclosed herewith.

The argument contained in the brief filed with the instant motion is identical to the argument in the brief filed with the appeal.

A. Dismissal of the Motion to Reopen

We observe that most of the evidence submitted with the motion was previously submitted. As such, it does not qualify as "new" evidence by any definition. The remaining evidence, documents showing that the petitioner does business, has little bearing on whether the proffered position is a specialty occupation position. In short, the evidence submitted has little or no probative value towards establishing the proffered position as satisfying the statutory and regulatory provisions for a specialty occupation. As such, the petitioner has not established that the documents submitted

would change the outcome of this case if the proceeding were reopened to consider them. In any event, counsel made no argument pursuant to the slight evidence submitted with the motion that had not been submitted previously.

"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.

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. Accordingly, the motion to reopen must be dismissed.

B. 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) (detailing the requirements for a motion to reconsider).

Counsel abstractly asserted that we erred in finding that the proffered position has not been shown to be a specialty occupation position. The documents constituting this motion do not, however, 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. The petitioner has therefore not submitted any document that would meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider must be dismissed.

IV. 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 our previous decision will not be disturbed.

(b)(6)

NON-PRECEDENT DECISION

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ORDER: The combined motion is dismissed.