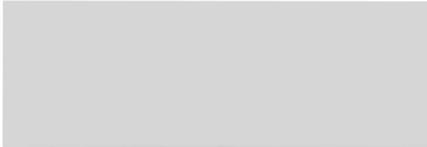




U.S. Citizenship
and Immigration
Services

(b)(6)



JUN 01 2015

DATE:

PETITION RECEIPT #: 

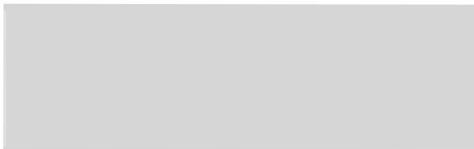
IN RE:

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is once again before us on a motion to reconsider. The motion will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a non-profit organization engaged in research and education that was established in [REDACTED]. In order to employ the beneficiary in what it designates as a management analyst position, the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a 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 had not established that the proffered position qualified as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Thereafter, the petitioner submitted a Notice of Appeal or Motion (Form I-290B). We reviewed the submission and affirmed the Director's decision. The matter is once again before us on a motion to reconsider. For the reasons discussed below, we conclude that this motion will be dismissed.

I. MOTION REQUIREMENTS

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a United States Citizenship and Immigration Services (USCIS) officer's authority to 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 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."

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.

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 AND ANALYSIS

A. Late Motion

USCIS regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). If the decision was mailed, the motion must be filed within 33 days. 8 C.F.R. § 103.8(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

In our December 17, 2014 decision, we properly gave notice to the petitioner that it had 33 days to file either a motion to reconsider or a motion to reopen.¹ The filing date for the Form I-290B currently before us is February 3, 2015, 48 days after our decision was served by mail. Thus, the motion to reconsider is untimely and must be dismissed for this reason.

B. Applicable Requirements

Furthermore, the motion does not meet the applicable requirements for motions to reconsider set forth in 8 C.F.R. § 103.5(a)(3). This regulation states, in pertinent part, that "[a] motion to reconsider

¹ A benefit request will be considered received by USCIS as of the actual date of receipt and the location designated for filing such benefit request. 8 C.F.R. § 103.2(a)(7)(i). A benefit request which is rejected will not retain a filing date. 8 C.F.R. § 103.2(a)(7)(iii).

must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy."

In the brief, the petitioner claims that the proffered position qualifies a specialty occupation, reiterates the job description for the proffered position, describes the beneficiary's qualifications for the proffered position, and references documentary evidence previously submitted. While the petitioner cites the statute and regulations that govern the specialty occupation classification, it does not articulate how our decision was based on incorrect application of law or policy.

Moreover, regarding the petitioner's references to *Matter of Bienkowski* and a 2009 AAO decision, we note that the facts in these decisions are not analogous to the instant petition. Specifically, the matters cited pertain to immigrant visa petitions and whether the beneficiaries are members of the professions as defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and as that term was interpreted in the 1960's. As indicated earlier, the issue before us is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession.² The matters cited by the petitioner, therefore, are not relevant to the instant petition.³

The petitioner does not establish that our December 17, 2014 decision was an incorrect application of law or USCIS policy. As such, the motion does not meet the applicable requirements and must be dismissed. 8 C.F.R. § 103.5(a)(4).

Finally, the regulation at 8 C.F.R. §§ 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain such a statement. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Motions for the reopening or reconsideration 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. *See 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." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

² Moreover, the decision is an unpublished decision and, as such, is not binding on us. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

³ 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.

III. CONCLUSION

Unless USCIS directs otherwise, the filing of a motion to 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 motion will be dismissed, the proceedings will not be reconsidered, and our previous decision will not be disturbed.

ORDER: The motion is dismissed.