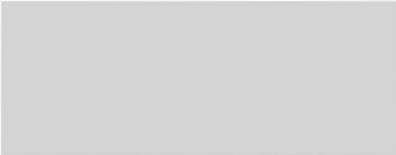




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 02 2015

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

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 AA.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the nonimmigrant visa petition. The petitioner appealed the denial to the Administrative Appeals Office (AAO), 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.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the Form I-129 visa petition, the petitioner describes itself as a gymnastics school that was established in [REDACTED]. In order to continue to employ the beneficiary in what it designates as an upper level gymnastics coach position, the petitioner seeks to extend his classification 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 reviewed the information and determined that the petitioner had not established eligibility for the benefit sought. The Director denied the petition, finding that the petitioner did not establish that the beneficiary is eligible for an extension of stay beyond the six years under section 104(c) and section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21) as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21).

The petitioner appealed the Director's decision to us. We reviewed the record of proceeding and determined that the evidence of record did not provide a basis for extending the beneficiary's stay in H-1B classification beyond the six years to which section 214(g)(4) of the Act limits admission in H-1B status. Specifically, we found that the facts established by the evidence of record did not provide a basis for applying either (1) the exemption at section 104(c) of AC21 for certain beneficiaries with an approved immigrant petition, or (2) the exemption at section 106(a) of AC21 as amended by DOJ21 for certain aliens whose labor certifications or certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays.

Our decision also included a finding that extended beyond the Director's decision, namely, that the extension petition must also be denied because it had not been filed within the validity period of the petition that it sought to extend, as required by the regulation at 8 C.F.R. § 214.2(h)(14). We determined that the prior H-1B petition expired on January 20, 2014, but that the instant petition extension was not filed until January 27, 2014, seven days after the expiration of the petition it sought to extend.

Accordingly, we dismissed the appeal in a decision issued on Tuesday, February 3, 2015. 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 Notice of Appeal or Motion (Form I-290B) to U.S. Citizenship and Immigration Services (USCIS) contesting our decision to dismiss the appeal. However, a Rejection Notice issued by the USCIS Lockbox on March 16, 2015 indicates that the

Form I-290B as received on March 5, 2015 was rejected as incomplete. The record reflects that the Form I-290B was not received by USCIS with all of the required information until Tuesday, March 24, 2015 - or 49 days after our decision dismissing the appeal - at which time the motion was accepted for filing and issued the receipt number that it now bears.

As indicated by the check mark at Box 2.f. of Part 3 of the Form I-290B, the petitioner elected to contest our decision on the appeal by a motion to reopen and motion to reconsider.

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 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, we see that the petitioner does 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.

In the March 23, 2015 letter introducing the documents now submitted on motion, the petitioner asserts that the running of the timeliness clock for the motion stopped on the date when the first attempted filing was rejected; however, the petitioner cites no legal basis for this decision, and there is none.

As the motion was untimely filed, it must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4) for not meeting 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 combined 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 4 of the Form I-290B, which states:¹

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, such instructions are incorporated into the regulations requiring its submission.

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 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. . . .

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) the aforementioned March 23, 2015 letter; (2) a March 5, 2015 letter from counsel; (3) the March 16, 2015 Rejection Notice; (4) the Form I-290B; (5) a four-page brief; (6) a copy of our February 3, 2015 decision denying the appeal; and (7) a January 25, 2014 letter that was previously submitted to USCIS.

A. Dismissal of the Motion to Reopen

The motion does not state new facts that would be presented if the proceeding were to be reopened. It follows that the motion also does not include affidavits or other documentary evidence that would support such facts as new and of such import that they would likely change the result of the appeal if it were reopened to consider them.

"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 has not met that burden.

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).

1. Regarding the AC-21 issue

The portion of the motion's brief that addresses the AC21 issue is substantially the same as the brief submitted on appeal. As such, it is merely a restatement of the petitioner's appeal. As we noted above, the reiteration of previous arguments or general allegations of error in our prior error will not suffice. By merely repeating the arguments that it made on appeal, the petitioner does not specifically identify as grounds for possible reconsideration both (1) where it believes that our decision on appeal incorrectly applied law or Service policy to the evidence of record before us when we issued on the appeal, and also (2) appropriate statutes, regulations, or precedent decisions which would support the petitioner's claim that our decision on appeal misapplied law or Service policy as specified in the motion. Neither the brief nor any document submitted on motion articulates how our decision on appeal misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record before us when we rendered that decision to dismiss the appeal. The

petitioner has therefore not submitted any document that would meet the requirements of a motion to reconsider. Accordingly, the portion of the motion seeking reconsideration of the AC21 issue must be dismissed.

2. Regarding the issue of untimely filing of the extension petition

The petitioner does not challenge our finding on appeal that the extension petition was filed seven days after the expiration of the validity of the petition whose extension was sought. Also, the petitioner does not directly contest our finding that the regulation at 8 C.F.R. § 214.2(h)(14) requires that an extension petition be denied if it was filed after the expiration of the validity period of the prior petition. Rather, noting that the late filing was caused by time lost in having to refile the petition after USCIS rejected the initial attempt to file (for the absence of a the required Form I-129 H-1B Data Fee and Filing Fee Exemption Supplement) the petitioner's counsel contends that USCIS should exercise its discretion to excuse the late filing. As the basis of that discretion the petitioner cites *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012). However, that case is not relevant: it addressed a decision in which an Immigration Judge found an alien inadmissible under section 212(a)(6)(A)(i) of the Act and denied that person's application for adjustment of status under section 245(i) of the Act. As such, neither the facts, findings, nor holdings of *Matter of O. Vasquez* relate to H-1B nonimmigrant specialty-occupation petition, which is governed by section 101(a)(15)(H)(i)(b) of the Act. Accordingly, the portion of the motion to reconsider our decision to also deny the extension petition for untimely filing must also 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.

ORDER: The combined motion is dismissed.