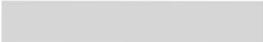


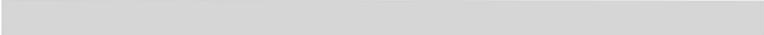


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 26 2015** OFFICE: CALIFORNIA 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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and dismissed a subsequent motion to reopen and motion to reconsider. The matter is currently before the AAO on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 25-employee construction and contracting company established in [REDACTED]. In order to employ the beneficiary in what it designates as an "Estimator/Project Manager" position, the petitioner seeks to classify him 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 failed to establish that it would employ the beneficiary in a specialty occupation position. The petitioner filed a joint motion to reopen and motion to reconsider, which was dismissed by the director on August 12, 2014. The matter is now before us on appeal.

It is noted that the director stated: "If you desire to appeal *this* decision, you may do so." (Emphasis added). As this language indicates, where, as here, an appeal is filed in response to a director's unfavorable action on a motion, the scope of the appeal is limited to the director's decision on that motion. We see, for instance, that the regulatory provision at 8 C.F.R. § 103.3(a)(2)(i) states: "The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions *within 30 days after service of the decision.*" (Emphasis added). Thus, if the petitioner wished to appeal the director's decision to deny the decision, it should have elected to file that appeal within 30 days of the director's denial decision. Here, however, the petitioner elected to file a joint motion instead and, thereby, limited the scope of the appeal to the merits of the director's decision to dismiss that motion.

The record of proceeding before us contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's June 18, 2014 denial letter; (5) the Form I-290B submitted with the petitioner's Motion to Reopen and Motion to Reconsider and supporting documents received on July 18, 2014; (6) the director's decision dated August 12, 2014 dismissing the motions and affirming her prior decision; and (7) the petitioner's appeal, consisting of the Form I-290B and allied documents submitted with it.

We have focused our review and analysis upon determining whether - based upon the record of proceeding at the time the director decided to deny the petition - the director's decision to dismiss the motion to reopen and motion to reconsider was correct.

II. LAW AND ANALYSIS

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 the following, in pertinent part:

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

Motion to Reopen: The motion must state new facts and must be supported by affidavits and/or documentary evidence that establish eligibility at the time the underlying petition or application was filed.

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).

¹ The regulation at 8 C.F.R. § 103.2(a)(1) states, in pertinent part, the following:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

C. Requirements for Motions to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(1)(i)(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 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 id.* 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 director's initial decision to deny the petition was based upon her determination that the evidence of record failed to establish that the proffered position is a specialty occupation. However, the issue currently before us is whether the director's August 12, 2014 decision was correct in dismissing the petitioner's motion to reopen and motion to reconsider upon the grounds that it did not satisfy the pertinent regulatory requirements for a motion to reopen and motion to reconsider. As will be discussed below, we find that the director's decision to dismiss the motion was correct. Accordingly, the appeal will be dismissed and the petition will be denied.

A. Motion to Reopen

As noted above, a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.²

On motion, the petitioner submitted a brief from its attorney, information regarding the construction manager occupational category provided in the *Occupational Outlook Handbook* and O*Net Online (all of which was already provided with the initial filing of the petition), four job advertisements, internet printouts regarding construction management undergraduate degree programs from five universities in the United States, a position evaluation from Dr. [REDACTED], dated July 8, 2014, and an affidavit from [REDACTED], dated July 15, 2014.

In his brief for the motion, the petitioner's counsel asserted that "newly obtained evidence that was previously unavailable clearly supports that conclusion" that the proffered position "constitutes a Specialty Occupation." We find that the record of proceeding does not substantiate counsel's claim that newly submitted evidence was not previously available, and consider this factor to be the primary impediment to satisfying the requirements of the motion to reopen. It is not clear why the petitioner would not have been able to obtain and submit all of this "newly obtained evidence" earlier in these proceedings.

On motion, the petitioner submitted a statement from [REDACTED] who stated that he is a "Member" of the petitioner. However, the record contains no evidence indicating Mr. [REDACTED] role within the company and his qualification in making statements regarding the duties of the proffered position. Furthermore, Mr. [REDACTED] listed supervisory duties previously not included in the petitioner's support letter or its response to the director's RFE.³ On motion, the petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. We therefore agree with the director that Mr. [REDACTED] statement cannot be considered "new."

Aside from Mr. [REDACTED] July 15, 2014 statement, the petitioner also submitted a letter dated July 8, 2014 from Dr. [REDACTED] for consideration as an expert opinion.⁴ We agree that Dr. [REDACTED] letter was

² See 8 C.F.R. § 103.5(a)(2).

³ We further note that these supervisory duties conflict with the Level I (entry-level) wage level the petitioner provided on the Labor Condition Application (LCA) for the proffered position.

⁴ We note that Mr. [REDACTED] and Dr. [REDACTED] submissions on motion post-dated the decision that is the subject of the motion, and accordingly, we have discounted them as evidence regarding the merits of the petition.

not "new" and that it therefore did not meet motion to reopen requirements. However, even if Dr. [REDACTED] letter was "new," it still would not have changed the outcome of the case. We first note that the duties Dr. [REDACTED] lists in his position evaluation are the same as revised duties stated in Mr. [REDACTED] statement submitted on motion. Furthermore, Dr. [REDACTED] description of the position upon which he opines does not indicate that he considered, or was even aware of, the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as discussed above, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. In any event, he nowhere discusses this aspect of the proffered position. We consider this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for his ultimate conclusion as to the educational requirements of the position upon which he opines.

The LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Construction Managers" occupational category, SOC (O*NET/OES) Code 11-9021, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. The *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.⁵

Thus, the proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that he will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. The author's omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of his assertions. The petitioner's LCA wage-level designation does not support

⁵ U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited Jan. 26, 2015).

Dr. [REDACTED] conclusion that the proffered position requires "extremely high level of knowledge, skills and business competencies." Dr. [REDACTED] omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of his assertions.

We further agree with the director that the job advertisements and degree programs submitted on motion were not "new" and therefore did not meet motion to reopen requirements. In addition to satisfying the minimum requirements at 8 C.F.R. § 103.5(a)(2), the petitioner must also establish that the new facts to be proven in a motion to reopen possess such significance that they would likely change the results of the case. *Matter of Coelho* at 473; *see also Maatougui v. Holder* at 1239-40. Such is not the case here.

On appeal, counsel states that evidence submitted "with the motion to reopen and/or reconsider can properly be considered new evidence as it was created and submitted solely to explain the Service's misapplication of the law, and to corroborate the evidence already on record." We disagree with counsel; the evidence submitted on motion was not "new." As noted above, on motion, the petitioner submitted significantly different duties for the proffered position and an evaluation based on these revised duties. The director considered the evidence and properly concluded that the evidence submitted on motion did not reveal facts that could be considered new under 8 C.F.R. § 103.5(a)(2).

On appeal, the petitioner submitted, in addition to the documents already existed in the record of proceeding, a letter dated August 25, 2014 from [REDACTED] discussing the industry standard for construction firms, the definition of "normal," and synonyms for "standard." Submissions on appeal did not establish evidence was "new," and therefore, did not meet the motion to reopen requirements.

"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. The director correctly decided that the petitioner and counsel did not meet that burden.

B. Motion to Reconsider

Again, the regulation at 8 C.F.R. § 103.5(a)(1)(i)(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.

It is worth specifically noting that a motion to reconsider is not a vehicle for introducing evidence on the merits of the petition that was not before the director at the time of his or her decision to deny the petition: as quoted above, "A motion to reconsider a decision on an application or petition must . . . establish that the decision was incorrect based on the evidence of record at the time of the initial decision."

We find that the petitioner's submissions on motion did not meet the requirements of a motion to reconsider. Our review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. Counsel generally stated that the service "failed adequately to consider the job duties of the proffered position when it determined that it was not a specialty occupation." Counsel further stated that the motion included "evidence and facts that were previously overlooked, misinterpreted, or disregarded by the Service." Counsel asserted that evidence submitted on motion demonstrates that "the proffered position meets three of the four criteria listed in 8 C.F.R. § 214.2(h)(4)(iii)(A).

On motion, the petitioner did not specifically and sufficiently articulate why the director's decision denying the petition was based on an incorrect application of law or USCIS policy; nor did the petitioner cite to any relevant statute, regulation or relevant precedent decision that would support a contention that the director's decision to deny the petition was based upon a misapplication of statute, regulation, or policy to the evidence of record before the director at the time of the decision to deny the petition. In addition to already submitted evidence, on motion, the petitioner submitted revised duties and an evaluation based on these revised duties, along with four job advertisements and construction managers degree program information for consideration rather than explaining how the director's adverse 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.

Again, 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) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 4 of the Form I-290B.

We find that the director did not err in dismissing the motion for reconsideration, as the documents constituting that motion for reconsideration did not articulate how the director's decision to deny the petition misapplied any particular pertinent statutes, regulations, policies or precedent decisions to the evidence of record that was before the director when the director rendered the decision to deny the petition.

IV. CONCLUSION AND ORDER

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 appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.