



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

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

MATTER OF B-M-G-, INC.

DATE: OCT. 30, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an information technology business, seeks to temporarily employ the Beneficiary as a "Computer User Program Analyst/Support" 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, Vermont Service Center, denied the petition. The Petitioner filed an appeal, which we dismissed. The matter is now before us on a combined motion to reopen and reconsider. The motion will be denied.

**I. MOTION REQUIREMENTS**

Before discussing the particular joint motion before us, we shall first review the requirements for its two components, namely (1) a motion to reopen the proceeding and (2) a motion for reconsideration of the decision that is the subject of the motion.

**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.<sup>1</sup>

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 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

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<sup>1</sup> 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 I to the contrary, and such instructions are incorporated into the regulations requiring its submission.”

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. ANALYSIS

In support of the motion, the Petitioner submits a brief explaining why it believes our decision to dismiss the appeal was erroneous. The Petitioner asserts, in pertinent part:

Although, the AAO, as previously stated, agreed that the Director misunderstood the nature of the Petitioner’s products, the AAO, inexplicably, erroneously, and unnecessarily searched for other bases to affirm the Director’s denial. In fact, the AAO dug up bases, not mentioned or even alluded to by the Director. Equally important, as admitted by the AAO, the AAO contradicted the Director’s finding that the proffered position is a specialty occupation.

To the Petitioner’s dismay and disbelief, the AAO issued a non-precedent decision dismissing Petitioner’s appeal and affirming the Director’s denial of the petition.

We say to the Petitioner’s dismay and unbelief, because as has been stated, clearly, the sole, or at least the foundational basis, for the denial of the petition is a result of the Director’s misunderstanding or mistaken belief about the Petitioner’s projects. In other words, if the Director had not misunderstood the nature of the Petitioner’s internal projects in which Beneficiary was to work, then the Director would not have questioned whether Petitioner had work available for the Beneficiary. When the sole or primary basis for a denial of a petition fails, then the Petition has met its burden of proof by the preponderance of the evidence and the petition should be approved.

The Petitioner did not, however, present any evidence that could be considered “new facts.” As such, the Petitioner’s motion does not satisfy the requirements of a motion to reopen. Consequently, 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 has not adequately established why our decision to dismiss the appeal was erroneous. The Petitioner states that we “inexplicably, erroneously, and unnecessarily searched for other bases to affirm the Director’s denial. In fact, [we] dug up bases, not mentioned or even alluded to by the Director.” However, the Petitioner has not specifically identified and explained what portion(s) of our decision was erroneous, and why. Merely asserting that our decision was erroneous, without more, is insufficient in these proceedings. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *In re Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

We acknowledge that our decision discussed a basis for denial that was not mentioned by the Director. Nevertheless, we also agreed with the Director’s finding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation and dismissed the appeal on that basis as well. That we made new findings of fact and/or conclusions of law upon our review of the record does not establish that our decision was erroneous. We conduct appellate review on a *de novo* basis. See *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); see also 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989). We may deny an application or petition that does not comply with the technical requirements of the law even if the Director does not identify all of the grounds for denial in the initial decision. See *Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001).

The Petitioner asserts that our reliance upon *Spencer* is inapplicable, because the Director only identified one underlying ground for denial in the initial decision. The Petitioner’s reasoning is unpersuasive. *Spencer* supports our authority to deny a petition on grounds beyond those identified by the Director, regardless of the actual number of grounds enumerated by the Director. *Id.* Moreover, the Petitioner asserts that *Spencer* supports the proposition that when the Petitioner has overcome the only predominant ground enumerated by the Director, then the Petitioner has met its burden of proof and the petition should be approved. However, contrary to the Petitioner’s contention, we affirmed the Director’s finding that the “evidence of record does not establish that the job offered qualifies as a specialty occupation.” We stated in our decision on appeal that it could “not be found that the proffered position qualifies as a specialty occupation” and we dismissed the appeal on that ground. The Petitioner has not cited to any other authoritative sources to support its motion to reconsider.

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.

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Finally, the motion does not meet the applicable requirements for an additional reason. More specifically, the motion to reconsider does not contain a statement pertinent to whether the validity of the unfavorable decision has been or is the subject of any judicial proceeding, which is required by 8 C.F.R. §103.5(a)(1)(iii)(C). Thus, the motion must also be denied for this additional reason.

### 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 B-M-G-, Inc.*, ID# 14880 (AAO Oct. 30, 2015)