U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-H-S-, LLC

DATE: SEPT. 1, 2015

MOTION OF AAO DECISION

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

The Petitioner, a healthcare staffing and placement company, seeks to employ the beneficiary as a clinical coordinator and to classify him as a nonimmigrant worker in a specialty occupation. *See* 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, Vermont Service Center, denied the petition, and we dismissed a subsequent appeal. The matter is now before us on a motion to reconsider. The motion to reconsider will be dismissed.

The Director denied the petition, concluding that the Petitioner did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The Petitioner 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. We provided a comprehensive analysis of the Director's decision and dismissed the appeal. The petitioner now submits the instant motion to reconsider.

I. MOTION REQUIREMENTS

For the reasons discussed below, we conclude that the motion to reconsider must be dismissed.

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 U.S. Citizenship and Immigration (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 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 and must establish that the decision was based upon the incorrect application of law or policy, and that the decision was incorrect based upon the evidence of record at the time of the 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 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

The submission constituting the motion includes the following: (1) the Notice of Appeal or Motion (Form I-290B); (2) a brief submitted by the Petitioner; (3) a printout entitled "United States Court of Appeals for the Second Circuit"; (4) printouts from the New York State Worker's Compensation Board website; (5) a printout from the New York State Department of Labor website regarding unemployment insurance; (6) the Beneficiary's 2012 Form W-2, Wage and Tax Statement, and pay statements; (7) a printout entitled "The Judges for the United States Court of Appeals for the Fifth Circuit"; and (8) a copy of *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

(b)(6)

A. 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); Instructions for Motions to Reconsider at Part 4 of the Form I-290B.

In ascertaining the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the Director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

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. As the Petitioner has not submitted any document that would meet the requirements of a motion to reconsider, the motion to reconsider must be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

However, we would still be compelled to dismiss the motion even if the Petitioner's submission did meet the applicable requirements, as the arguments submitted on motion do not establish any error in our prior decision dismissing the appeal.

1. Employer-Employee Relationship

On motion, the Petitioner asserts that it has a valid employer-employee relationship with the Beneficiary pursuant to the regulations of the State of New York. More specifically, the Petitioner states the following:

> As per the IRS, New York State, and [redacted] Department of Taxation and Finance rules and instructions, we withheld [the beneficiary's] income taxes and deducted Medicare and Social Security tax contributions of his income. We also paid for his State Disability Insurance (SDI) and Unemployment Insurance (SUI) required by the NYS Department of Labor and Workers' Compensation Board pursuant to State Unemployment Insurance and State Disability Insurance laws and regulations.

These assertions are not persuasive. As discussed in our prior decision, while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an

beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. In the instant case, the Petitioner has not satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary. *See generally* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker).

2. Specialty Occupation

In addition, the Petitioner asserts that the proffered position is a specialty occupation. However, these assertions are not persuasive, as the Petitioner has not established that the proffered position qualifies as a specialty occupation under the applicable statutory and regulatory provisions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998). In addition, there are numerous inconsistencies in the record regarding the proffered position, the occupational category, and the wage rate that preclude the approval of the petition. It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

B. Judicial Proceedings

The submission does not meet the applicable requirements for a motion to reconsider for an additional reason. More specifically, the motion 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 dismissed for this reason.

III. CONCLUSION AND ORDER

As discussed above, the Petitioner's submission does not meet the requirements of a motion to reconsider. 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 motion to reconsider will be dismissed, the proceedings will not be reconsidered, and our previous decision will not be disturbed.

ORDER: The motion to reconsider is dismissed.

Cite as *Matter of N-H-S-, LLC*, ID# 15153 (AAO Sept. 1, 2015)