U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-E-, INC.

DATE: SEPT. 14, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a fast-food restaurant, seeks to employ the Beneficiary as a financial manager 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).

On May 12, 2011, the Director of the Vermont Service Center denied the nonimmigrant visa petition. The Petitioner appealed this denial to the Administrative Appeals Office (AAO), and we dismissed the appeal on November 7, 2012. On December 6, 2012, the Petitioner filed a motion to reopen and reconsider, which we denied on July 14, 2014. On August 14, 2014, the Petitioner again filed a motion to reopen and reconsider, which we denied on February 6, 2015. The matter is once again before us on a motion to reopen and reconsider. The combined motion will be denied pursuant to 8 C.F.R. § 103.5(a)(2), (3), and (4).

The Director denied the petition, finding that the proffered position was not a specialty occupation, and we dismissed the Petitioner's subsequent appeal. Subsequently, the Petitioner filed two motions to reopen and reconsider, which were also denied. The decision that is the subject of the instant motion is our most recent decision issued on February 6, 2015, which denied the Petitioner's previous motion and affirmed our prior determinations that the Director's denial of the petition was correct.

Although counsel indicated that he submitted the instant motion in response to our February 6, 2015, decision, he did not assert any mistakes of law or fact in that decision. Rather, counsel referenced an unspecified November 12, 2012 decision, and stated that we "failed to apply the tasks and descriptions of 'Financial Managers' to the duties of the beneficiary's job offer." We did not issue a decision to the Petitioner on November 12, 2012 and presume he is referring to our November 7, 2012 decision dismissing the appeal. Regardless, for the motion, we will focus on our decision to deny the Petitioner's most recent motion because, in accordance with the regulations governing motions, as the latest agency decision, that decision is the proper subject of this combined motion.

As indicated by the check mark at box F of Part 2 of the Form I-290B, counsel for the Petitioner elected to file both a motion to reopen and a motion to reconsider.

I. EVIDENTIARY STANDARD

As a preliminary matter, and in light of counsel's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within its purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

> Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.
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> The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.
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> Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.
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> Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions on motion that the petition at issue should be reopened or reconsidered.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the Petitioner has not satisfied the requirements for either a motion to reopen or a motion to reconsider. Accordingly, the combined motion will be denied.

II. MOTION REQUIREMENTS

We will now discuss why the submission constituting the combined motion does not satisfy the substantive requirements for either a motion to reopen or a motion to reconsider. For the reasons discussed below, we conclude that the motion must be denied 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 3 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.

[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 I to the contrary, such instructions are incorporated into the regulations requiring its submission.

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 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.

III. DISCUSSION AND ANALYSIS

The submission constituting the motion consists of the following: (1) a letter signed by the Petitioner's counsel; (2) the Form I-290B; (3) a six-page brief submitted by counsel; and (4) documentary evidence, which consists of copies of the following:

1. Our decision dated February 6, 2015, denying the Petitioner's previous combined motion;
2. Former counsel's undated response letter to the Director's January 12, 2011, request for evidence (RFE);
3. The Petitioner's support letter, dated August 1, 2010;
4. The Beneficiary's educational credentials and his resume;
5. Internet printouts of four job announcements;
6. Our decision dated November 7, 2012, dismissing the Petitioner's appeal;
7. Financial documents for , , , and .

A. Denial of the Motion to Reopen

Upon review of the evidence, we observe that most of the documents submitted on motion were previously a part of the record of proceeding or previously available. The new submissions on motion are four internet job announcements and financial documents from 2014.[2]

In any event, we find that neither the Form I-290B, nor the brief on motion, nor any document submitted on motion "state[s] new facts" or constitutes new facts to be provided if the proceeding were to be reopened. It logically follows that, without showing such new facts to be provided if the motion were to be reopened, the motion also does not establish new facts so significant as to likely change the outcome of this case if the proceeding were reopened for their consideration. Even if they constituted evidence of new facts to be provided in a reopened hearing – which is not the case – the documents submitted on motion have little or no probative value towards establishing the proffered position as satisfying the statutory and regulatory provisions for a specialty occupation.[3]

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[2] Financial documents from 2012 and 2013 would have been available for submission for the previous motion filed on August 14, 2014.

[3] Even if these submissions did constitute the type of "new facts" supported by documentary evidence discussed in 8 C.F.R. § 103.5(a)(2), they still would not satisfy the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). For example, regarding the job advertisements, the Petitioner did not supplement the record of proceeding to establish that the advertising organizations both conduct business in its industry and also are similar to it. Nor did the Petitioner sufficiently establish that the primary duties and responsibilities of the advertised positions parallel those of the proffered position. Therefore, these submissions do not establish that organizations similar to the Petitioner in the Petitioner's industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions. Similarly, the financial documents submitted on motion do not demonstrate how the financial manager position as described requires the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. Nor do they demonstrate a past hiring history by the Petitioner of normally requiring a bachelor's degree in a specific specialty, or its equivalent, for the position.

Moreover, counsel provides no statements addressing the findings we articulated in our February 6, 2015, decision. Counsel outlines no new facts upon which the motion to reopen is based, and further does not to support the motion with accompanying affidavits or documentary evidence in support of new facts. In sum, counsel has not made any assertions regarding the manner in which the motion meets the regulatory 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. With the current motion, the petitioner and its counsel have not met that burden.

B. Denial 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).

As stated earlier, although counsel indicated that he submitted the combined motion in response to our February 6, 2015, decision, counsel did not assert any mistakes in law and mistakes of fact in that decision. Rather, counsel referenced a prior decision, and stated that we "failed to apply the tasks and descriptions of 'Financial Managers' to the duties of the beneficiary's job offer." The documents constituting this motion do not articulate how our February 6, 2015, decision denying the previous motion misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to deny the motion was rendered. The petitioner has therefore not submitted any document that would meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider must be denied.

IV. CONCLUSION

It should be noted for the record 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 will be denied, the proceedings will not be reopened or reconsidered, and our previous decisions will not be disturbed.

ORDER: The motion is denied.

Cite as *Matter of M-E-, Inc.*, ID# 13332 (AAO Sept. 14, 2015)