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

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

MATTER OF B-&B-, P.C.

DATE: SEPT. 28, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a "law practice," seeks to employ the Beneficiary in what it designates as a full-time "law clerk" position. The Petitioner seeks to classify her as an H-1B 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, California Service Center, denied the petition and we dismissed the subsequently filed appeal. The matter is now before us on a combined motion to reopen and reconsider. The combined motion will be denied.

We dismissed the appeal, concluding that the evidence of record was insufficient to establish that the Beneficiary was exempt from the H-1B numerical limitation for the 2015 fiscal year (FY 2015). More specifically, we determined that the evidence of record did not establish that the Beneficiary has a U.S. master's degree, in that her "certificate of completion" from [REDACTED] is not equivalent to an LL.M. degree. Therefore, the Beneficiary was not eligible for the master's cap exemption. We also found that the Labor Condition Application (LCA) submitted with the petition for a position described at SOC code and title 23-1012, "Judicial Law Clerks," did not correspond to the instant visa petition.

### I. MOTION REQUIREMENTS

For the reasons discussed below, we conclude that this combined motion will be denied because it 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 that "[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 that motions to reopen "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.

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<sup>1</sup> The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part, that "[e]very 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, and such instructions are incorporated into the regulations requiring its submission."

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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

The submission constituting the combined motion consists of the following: (1) the Form I-1290B; (2) a brief; (3) a declaration of [REDACTED] and (4) a one-page document from the [REDACTED] Court of Arbitration listing [REDACTED] as an arbitrator.

### A. Motion to Reopen

We find that the Petitioner's submissions on motion did not meet the requirements of a motion to reopen. In support of the motion, the Petitioner contends that the SOC code and title 23-1012, "Judicial Law Clerks," is appropriate here as an attorney at the firm, [REDACTED] is a judge at the [REDACTED] in [REDACTED] France. The Petitioner contends that "[d]uring the Beneficiary's intended employment with [the Petitioning company], the Beneficiary will be required to assist [REDACTED] during [his] judgeship at the [REDACTED] and conduct extensive research in European entertainment law and prepare legal documents." This appears to represent a new job duty, and thus a new fact, as the Petitioner has not previously expressly asserted that the Beneficiary would be performing job duties directly for [REDACTED] in his official capacity as a judge at the [REDACTED].<sup>2</sup>

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<sup>2</sup> The Petitioner's previous statements regarding the Beneficiary's duties for [REDACTED] have been vague. That is, while the Petitioner has previously explained that [REDACTED] is a judge at the [REDACTED], the Petitioner has never expressly stated that the Beneficiary would perform law clerk duties for [REDACTED] in his capacity as a judge. For instance, in the Petitioner's March 28, 2014, letter, the Petitioner stated that [REDACTED] "sits on the [REDACTED] in [REDACTED] France and has been called upon on numerous occasions as a judge," and that the Beneficiary "would be the ideal candidate in this instance for her experience and knowledge of the European legal sector." The Petitioner's July 22, 2014, letter similarly stated that [REDACTED] "sits on the [REDACTED]" and that the Beneficiary's "expertise in researching various laws in these proceedings would be of immense importance to this type of litigation." These statements fall short of asserting that the Beneficiary would perform actual duties for [REDACTED] in his official capacity as a judge.

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However, without more, we cannot find that this new job duty would likely change the result in the case, i.e., establish that the LCA corresponds to the instant visa petition. In this matter, the Petitioner previously identified itself as a law firm, not [REDACTED], in his official capacity as a judge at the [REDACTED].<sup>3</sup> With respect to the proffered position, the Petitioner previously indicated that the Beneficiary's job duties would be performed for a law firm, and did not expressly state that the Beneficiary would perform job duties for and during [REDACTED] judgeship.<sup>4</sup>

In the July 22, 2014, letter, the Petitioner described job duties that the Beneficiary would perform for its law firm which accounted for at least 35 hours of her work week (including 15 hours per week drafting "highly complex legal documentation . . . which contribute to the crucial and core elements of the firm's business," another 15 hours per week "providing the supervising attorneys with legal advice and litigation strategies," and 5 hours per week performing legal research). Thus, the Petitioner should have submitted an LCA for a full-time position that corresponded to these duties on behalf of the petitioning law firm.<sup>5</sup> The LCA submitted with the instant petition for a full-time position under the "Judicial Law Clerks" classification is not appropriate in these circumstances, and does not correspond to the proffered position, as described. As such, the Petitioner has not established that this new job duty would have changed our decision.

In addition, the Petitioner now asserts for the first time that the Beneficiary's certificate of completion "is being corrected and will lead to the imminent award of a master's degree." However, the Petitioner has not further explained this statement (e.g., what it meant by "being corrected" or "imminent"), nor has the Petitioner submitted evidence corroborating this statement. Regardless, even if the Petitioner could establish that the Beneficiary would be awarded a U.S. master's degree in the near future, this still would not change the result in this matter. In other words, the Beneficiary's future master's degree would not establish that, at the time of filing, the Beneficiary

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<sup>3</sup> For instance, in the Petitioner's March 28, 2014, letter, the Petitioner described itself as the "Petitioning Company" and a "law firm."

<sup>4</sup> For example, the Petitioner's March 28, 2014 letter, described how its law firm "has yet to penetrate the Asian entertainment market and require[s] [the Beneficiary's] language skills, networking, and cultural knowledge of the Indian market in order to expand [the Petitioner's] representation of [REDACTED] motion picture companies and entertainment industry."

<sup>5</sup> As we noted in our prior decision, the duties of the proffered position suggest that the proffered position is either a position described in the Occupational Information Network (O\*NET) at SOC code and title 23-2011.00, "Paralegals and Legal Assistants," or 23-1011.0, "Lawyers." We further note that the Petitioner "strongly suggested" that the proffered position is different from legal clerk and paralegal occupations.

Had the Petitioner classified the proffered position under the SOC code and title 23-1011.0, "Lawyers," the prevailing wage and proffered wage in this case should have been much higher. To illustrate, the Level I prevailing wage for lawyers in the [REDACTED] CA [REDACTED] (where the petitioner's office is located), for the period 7/2013 – 6/2014, is \$85,010 per year or \$40.87 per hour. In contrast, the petitioner's proffered wage is \$59,904 per year or \$28.80 per hour. For more information regarding the wages for "Lawyers" – SOC (ONET/OES Code) 23-1011, in the [REDACTED] CA [REDACTED] for the relevant time period, see <http://www.flcdatacenter.com/OesQuickResults.aspx?&year=14&source=1> (last visited Sept. 25, 2015).

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was eligible for the FY 2015 master's cap exemption. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

The new facts presented on motion 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. at 473; *see also Maatougui v. Holder*, 738 F.3d at 1239-40. Here, the Petitioner has not met this burden. No other facts that could be considered "new" have been asserted on motion. As such, the Petitioner's motion to reopen will be denied.

#### B. Motion to Reconsider

The Petitioner's motion also does not 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's stated reasons for reconsideration are insufficient to establish that our decision was incorrect. The Petitioner does not dispute our finding that the Beneficiary does not have a U.S. master's degree, as her "certificate of completion" from [REDACTED] is not equivalent to a LL.M. degree. The Petitioner concedes that the Beneficiary did not comply with all the requirements for issuance of her master's degree, and that this deficiency "is being corrected and will lead to the imminent award of a master's degree."

The Petitioner nevertheless requests us to consider the Beneficiary's "certificate of completion" from [REDACTED] in lieu of a degree under the doctrine of "substance over form." The Petitioner explains that "under the doctrine of substance over form, courts must make a more specific inquiry, finding what the facts are and deciding whether those facts fall within the intended scope of the statute provision at issue." However, the Petitioner has not sufficiently explained and established how this doctrine is relevant to the facts of this case. The Petitioner stated that this is a "judicially developed tax-benefit rule," which does not appear applicable here.<sup>6</sup> Moreover, while the Petitioner indicated that under this doctrine, we should consider whether the facts "fall within the intended scope of the statute provision at issue here," the Petitioner has not explained and documented what is the "intended scope" of the relevant statute here. In particular, the Petitioner has not provided evidence establishing that the exemption at section 214(g)(5)(C) of the Act was intended to extend beyond those who did not actually earn a U.S. master's degree or higher.

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<sup>6</sup> For instance, the Petitioner cited to *Hillsboro Nat'l Bank v. Comm'r*, 103 S.Ct. 1134, 1144 (1983), in which the Court described the "basic purpose of the tax benefit rule" when calculating tax deductions.

Finally, we are not persuaded by the Petitioner's alternative assertion that the Beneficiary has the "equivalent to that of a Master's Degree from a US Institution of higher education" by virtue of her previous academic qualifications (i.e., her foreign bachelor's and master's degrees). Under the plain language of the statute at section 214(g)(5)(C) of the Act, this exemption is limited to those who have "earned a master's or higher degree from a United States institution of higher education." The Petitioner has not cited to any statutes, regulations, and/or precedent decisions to support the extension of this exemption to individuals who have obtained the *equivalent* of a U.S. master's degree or higher. *Cf.* 8 C.F.R. § 214.2(h)(4)(iii)(C) and (D) (specifically allowing equivalency determinations for purposes of establishing a beneficiary's qualifications to perform services in a specialty occupation). We also observe that the Petitioner has not provided evidence to demonstrate that it is a competent authority to make such determinations regarding the Beneficiary's foreign degrees.

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.

### C. Judicial Proceedings

The submission does not meet the applicable requirements for the combined motion 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

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.

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-&B-, P.C.*, ID# 13636 (AAO Sept. 28, 2015)