



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

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

MATTER OF T-T-S- CORP.

DATE: SEPT. 30, 2015

MOTION OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a seafood importer, wishes to continue employing the Beneficiary in a full-time “Management Analyst” position and, therefore, seeks to extend the Beneficiary’s classification as a nonimmigrant worker in as specialty occupation. *See* Immigration and Nationality Act (INA) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, denied the petition, and subsequently denied the Petitioner’s combined motion to reopen and reconsider. The matter is now before us on appeal. The appeal will be dismissed.

I. LEGAL FRAMEWORK

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 Services (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, Notice of Appeal or Motion, 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.”¹

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 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

¹ 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.”

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.

D. Stay in H-1B Status Limited to Six Years

A beneficiary who will perform services in a specialty occupation may be admitted to the United States as an H-1B nonimmigrant. *See* section 101(a)(15)(H)(i)(B) of the Act. A specialty occupation is defined as an occupation that requires (1) theoretical and practical application of a body of highly specialized knowledge, and (2) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. *See* section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). The total number of aliens who may be issued H-1B visas or otherwise accorded H-1B status in a fiscal year may not exceed 65,000. *See* section 214(g)(1)(A)(vii) of the Act, 8 U.S.C. § 1184(g)(1)(A)(vii).

Under the Act, H-1B admission is limited to six years. *See* section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4). Generally, an H-1B petition may not be approved on behalf of a beneficiary who has spent the maximum allowable stay as an H-1B nonimmigrant in the United States, unless the beneficiary has resided and been physically present outside the United States for the immediate prior year. *See* 8 C.F.R. § 214.2(h)(13)(iii)(A). Specific limits on what is regarded as a temporary period of stay in all H classifications are included in the regulations to reflect the temporary nature of these classifications and to achieve consistency in the processing of requests for extensions of stay. However, as will be discussed, section 104(c) and section 106(a) of AC21 as amended by the DOJ21 removes the six-year limitation on the authorized period of stay of beneficiaries in H-1B classification under certain conditions.

E. Exemption for Beneficiaries with Approved Immigration Petition

More specifically, section 104(c) of AC21 reads in, pertinent part, as follows:

Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—

(1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and

(2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs,

may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

Pub. L. No. 106-313, § 104(c), 114 Stat. at 1253.

Under 104(c) of AC21, a person who is subject to a per-country limitation and who is the beneficiary of an approved immigrant petition under section 203(b)(1), (2), or (3) of the Act, 8 U.S.C. §1153(b)(1), (2), or (3), is eligible for H-1B approval beyond the statutory six-year maximum. *See* Pub. Law 106-313, 114 Stat. at 1252-53. The H-1B petitioner must demonstrate that an immigrant visa is not available to the beneficiary at the time the H-1B petition is filed.

F. Exemption for Beneficiaries with Pending Labor Certifications or Immigrant Petitions

Likewise, section 106(a) of AC21 as amended by DOJ21 removes the six-year limitation on the authorized period of stay in H-1B visa status for certain beneficiaries whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision. *See* Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002). According to the text of section 106(b) of AC21, beneficiaries may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21.

As amended by section 11030A(a) of DOJ21, section 106(a) of AC21 reads:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of *such Act* (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since *the filing of any of the following*:

(1) *Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).*

(2) *A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.*

Section 11030A(b) of DOJ21 amended section 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—

(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

Pub. L. No. 106-313, § 106(a) and (b), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (emphasis added to identify sections amended by DOJ21). A delay of 365 days or more in the final adjudication of a filed labor certification application or employment based petition under section 203(b) of the Act is considered a lengthy adjudication delay for purposes of this exemption. See Pub. Law No. 107-273, 116 Stat. at 1836.

II. DISCUSSION AND ANALYSIS

The Director denied the petition on August 14, 2014, concluding that the Beneficiary has been in H-1B status beyond the statutory six-year limitation, but that the Petitioner had not established that the Beneficiary qualifies for an extension under AC21. However, the issue currently before us is whether the Director's January 9, 2015, decision was correct in dismissing the Petitioner's combined motion to reopen and reconsider upon the grounds that it did not meet the pertinent regulatory requirements for the motion. Accordingly, we will review the record of proceeding to determine whether the Petitioner's motion to reopen and reconsider meets the regulatory requirements at 8 C.F.R. § 103.5(a)(2) and 8 C.F.R. § 103.5(a)(3).

The Petitioner's motion contesting the Director's denial of the petition consisted of (1) a copy of the Director's decision denying the petition, and (2) the following statement submitted under the title "Basis of Motion to Reconsider/Reopen":

1. There appears to be a typo in the facts stated [in] [the] last paragraph of page 1 [of the Director's decision] as to H status from June 15, 2014.
2. The Petitioner would submit that the Beneficiary is eligible for an additional one year extension, as a labor certification was filed more than a year ago (the first labor [certification]) and when a decision was learned of after many years, the same Petitioner immediately filed a second application.

In denying the motion on January 9, 2015, the Director acknowledged that a typo was present in the denial notice letter and that the date of June 15, 2014 should have read as June 15, 2004. However, the Director stated that a typo in the stated year is not sufficient to overcome the reasons for denial nor does it establish a new fact in order to support a request to reopen the proceeding.

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We agree with the Director; specifically, we find that the Director's typo does not change the result in the case, as the basis for denying the petition is not whether the Beneficiary has reached the six-year limitation in H nonimmigrant status, but whether the Beneficiary is eligible for an extension beyond the six-year limitation. Therefore, the Director's misstatement of the date of the Beneficiary's entry into H-1B status does not have a substantive bearing on the merits. The mistake was clerical, was acknowledged, and corrected in the Director's decision on the motion, and was not prejudicial to the proper disposition of the petition.

Further, the Petitioner also indicated that the Beneficiary is eligible for an additional one-year extension as a labor certification was filed more than one year ago, but the Petitioner did not submit documents to substantiate its statements. However, we note that in response to one of the requests for additional evidence issued by the Director, the Petitioner had submitted an email from the U.S. Department of Labor (DOL) that, on April 15, 2014, it had received the ETA Form 9089, Application for Permanent Employment Certification (ETA Case Number [REDACTED]). Since this was already submitted and in the record, it is not considered a new fact. Further, assuming *arguendo* that it was a new fact, it would not change the result in this case.² Therefore, the Petitioner's motion did not meet the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2).

Moreover, the combined motion did not include supporting documentary evidence to demonstrate that the decision was based on an incorrect application of the law or service policy in order to reconsider the denial. Therefore, we find that the Director's decision to deny the combined motion was correct.

On appeal, the Petitioner submitted a letter and a print-out from DOL which reflects that, on April 15, 2014, the Petitioner had filed the aforementioned permanent labor certification. In the letter, the Petitioner also emphasizes that the Beneficiary has been working in H-1B status for the Petitioner "for many years." The letter closes with a request to extend the Beneficiary's H-1B status for an additional one-year increment: "We are simply requesting the issuance of their license (which they have had since 2002) for a one year period while we complete the necessary on-going procedures with BCIS."

While the issue before us is whether the Director's decision to deny the combined motion was correct, which we affirm, we will briefly address why the Beneficiary does not qualify for a one-year extension beyond the six-year limitation. We note that the record reflects the following facts:

- The Beneficiary has been in the United States in H-1B classification from June 2004 to the present (without interruption).³

² Specifically, the ETA Form 9089 was filed after filing the instant petition to extend the H-1B status, and had not been pending for more than 365 days.

³ On the Form I-129, the Petitioner indicated that the Beneficiary has been in the United States in H-1B status since August 9, 2002, but did not submit documentary evidence to substantiate its statement. Further, the Petitioner did not

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- On April 18, 2007, the Petitioner filed a Form I-140, Petition for Immigrant Worker, (receipt number [REDACTED]).
- On December 17, 2008, USCIS denied that Form I-140 petition.
- On February 12, 2009, the petitioner filed an appeal.
- On August 8, 2012, we dismissed the appeal of the denial of the Form I-140 petition.⁴
- On December 18, 2013, the Petitioner filed the instant petition, seeking to extend the Beneficiary's H-1B classification for an additional year.
- On April 15, 2014, the Petitioner filed with DOL the ETA Form 9089 (ETA Case Number [REDACTED]).

The exemption provision at section 104(c) of AC21 is not relevant to this appeal, as the circumstances before us do not involve a beneficiary who has an approved immigrant petition but whose acquisition of an immigrant visa is delayed by per-country limitations.

Further, the evidence of record does not establish that the provisions at section 106(a) of AC21 apply to this case. When the Petitioner filed the instant petition on December 18, 2013, there was no pending labor certification or petition that would qualify the Beneficiary for an extension. Specifically, USCIS denied the Form I-140 on December 17, 2008; we dismissed the appeal on August 8, 2012; and the service records indicate that the denial was upheld by a court on June 21, 2013.

In addition, the ETA Form 9089 filed in April 2014 does not trigger an exemption under section 106(a) of the AC21 since this was filed after the filing of the instant petition on December 18, 2013. 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 or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

When the instant petition was filed, there was no permanent labor certification, petition for an immigrant visa, or application for permanent residence status pending with regard to the Beneficiary, and therefore there were no adjudication delays to trigger the exemption provisions at section 106(a). Therefore, the Petitioner did not establish that the Beneficiary is eligible to extend his H-1B classification based on section 106(a) of AC21. In sum, the record of proceeding does not establish a basis for us to sustain the appeal.

contest the Director's finding that the Beneficiary has been in H-1B status since June 2004.

⁴ USCIS records indicate that we dismissed the appeal on August 29, 2012, under Form I-290B receipt-number [REDACTED]. Those records also indicate that, as of June 21, 2013, a court upheld the decision denying the Form I-140 petition.

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III. 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.

ORDER: The appeal is dismissed.

Cite as *Matter of Matter of T-T-S- Corp.*, ID# 13652 (AAO Sept. 30, 2015)