



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

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

MATTER OF N-I-, INC.

DATE: AUG. 31, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an information technology services firm, seeks to temporarily employ the Beneficiary as an “IT consultant” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, Vermont Service Center, initially approved the petition. However, in response to new evidence and upon subsequent review, the Director issued a notice of intent to revoke (NOIR), and ultimately revoked, approval of the petition. The Petitioner then filed a combined motion to reopen and reconsider, which the Director denied, finding that the submission did not qualify as either a motion to reconsider or as a motion to reopen.

The matter is now before us on appeal. On appeal, the Petitioner contends that the petition’s approval should be reinstated.

Upon review, we will dismiss the appeal.

I. LIMITATION ON SCOPE OF APPEAL

Where, as here, an appeal is filed in response to a Director’s unfavorable action on a motion, the scope of the appeal is limited to the Director’s decision on that motion.¹ We see, for instance, that the regulatory provision at 8 C.F.R. § 103.3(a)(2)(i) states: “The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions *within 30 days after service of the decision.*” (Emphasis added.) Thus, if the Petitioner wished to appeal the Director’s decision to deny the decision, it should have elected to file that appeal within 30 days of the Director’s denial decision. Here, however, the Petitioner elected to file a combined

¹ On the instant Form I-290B the Petitioner acknowledges that it is appealing the Director’s decision dismissing the motion, dated September 19, 2015.

motion instead and, thereby, limited the scope of the appeal to the merits of the Director's decision to deny that motion. We have focused our review and analysis upon determining whether – based upon the record of proceedings at the time the Director denied the petition – the Director's decision to deny the motion to reopen and motion to reconsider was correct.

II. MOTION REQUIREMENTS

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, 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:

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.²

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).

² 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 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission."

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 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

A. The Petitioner Does Not Address the Issues Before Us on Appeal

On appeal, the Petitioner submits a brief explaining why it believes the proffered position is a specialty occupation position. The Petitioner does not, however, address the Director’s finding that its submissions in support of the combined motion to reopen and reconsider did not meet the requirements for such motions. For example, the Petitioner does not address the Director’s finding that the Petitioner did not present any evidence that could be considered “new facts.” Nor did the Petitioner address the

Director's finding that the motion was not accompanied by new evidence. In other words, the Petitioner does not address the propositions upon which the Director's decision denying the motion was based. As the Petitioner does not address the grounds upon which the Director's decision denying the motion was based, it has not overcome them. The appeal must therefore be dismissed.

B. The Director's Decision Denying the Combined Motion Was Correct

We have nonetheless reviewed the record of proceedings in order to determine whether the Director's decision denying the motion was correct. Upon review, we agree that the Director that the Petitioner's submission met the requirements of neither a motion to reopen nor a motion to reconsider.

On motion, the Petitioner provided a letter that described its business model, recited some history of this case, and reiterated its interest in employing the Beneficiary. The Petitioner also provided documentation including, but not limited to, services agreements, tax returns, Form W-2, news articles, and invoices.

1. The Submission Did Not Meet the Requirements of a Motion to Reopen

Most of the evidence submitted with the motion predated the Director's decision revoking the approval of the H-1B petition. Because that evidence could have been submitted prior to the motion it was no longer "new" evidence by the time the motion was filed.³ The few documents that do not predate the Director's decision revoking approval of the H-1B petition, such as the Petitioner's motion support letter, contain no information that could not have been previously provided. As such, they were not "new" evidence. The evidence submitted with the motion contained no "new" facts within the meaning of 8 C.F.R. § 103.5(a)(2). The Director was therefore correct that the Petitioner's submission did not qualify as a motion to reopen.

2. The Submission Did Not Meet the Requirements of a Motion to Reconsider

The Petitioner has not asserted, and the evidence submitted on motion was insufficient to establish, that the Director's decision revoking approval of the H-1B visa petition – the decision that preceded the decision denying the motion – was based on an incorrect application of law or policy, and was incorrect based on the evidence of record at the time of decision. The Director was correct that the evidence submitted on motion did not the requirement of 8 C.F.R. § 103.5(a)(3), and the Petitioner's motion did not, therefore, qualify as a motion to reconsider.

³ In fact, some of the evidence submitted on motion had been submitted previously.

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The Director correctly denied the Petitioner's combined motion, finding that it did not qualify as either a motion to reopen or a motion to reconsider. As these are the only issues before us, the instant appeal must be dismissed for this reason as well.⁴

IV. CONCLUSION

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 appeal will be dismissed.

ORDER: The appeal is dismissed.

Cite as *Matter of N-I, Inc.*, ID# 17705 (AAO Aug. 31, 2016)

⁴ The Petitioner contends that it is entitled to a refund of all filing fees if the appeal is decided in its favor because the period of requested employment expired while the motion was pending. As we are not sustaining the appeal, we will not address these assertions further.