



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

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

MATTER OF MGKI-, INC.

DATE: JULY 21, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a “procurement and processor of scrap metal for export” company, seeks to extend the Beneficiary’s temporary employment as a “logistics analyst” 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, denied the petition. The Director concluded that the proffered position is not a specialty occupation. The Petitioner appealed the Director’s decision to our office and we dismissed the appeal. Subsequently, the Petitioner submitted a motion to reopen, which we denied. Then, the Petitioner submitted a motion to reconsider our denial of the motion to reopen, which we also denied.

The matter is again before us on a motion to reopen and a motion to reconsider. In its motion, the Petitioner submits a brief and asserts that the Director erred in denying the petition and we erred in dismissing the appeal.

We will deny the combined motion.

I. LAW

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 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.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.

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

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. ANALYSIS

For the reasons discussed below, the combined motion will be denied.

The issue here is limited to whether our decision dated February 25, 2016, to deny the motion to reconsider was incorrect.² In that decision, we concluded that the Petitioner did not articulate how our decision to deny the Petitioner’s prior motion to reopen misapplied any pertinent statutes, regulations, or precedent decisions based on the previous factual record.

In support of the combined motion before us, the Petitioner submits a brief with supporting evidence explaining why it believes the proffered position qualifies as a specialty occupation. The Petitioner has not, however, presented any evidence that could be considered “new facts.” For instance, the job duties presented in support of this motion are the same as those previously listed. Further, the documents that the Petitioner now submits as new evidence do not change the result of our decision to deny the prior motion to reconsider. For example, the Petitioner submits its profit and loss statement, revenue forecast and industry analysis, a new bill of sale and purchase contract, and photographs and reports of material procured before and after the Beneficiary’s employment, stating that the proffered position is primarily that of a market research analyst. While the documents may provide further information regarding the Petitioner’s business, they do not establish that the proffered position qualifies as a specialty occupation. Specifically, we noted in denying the motion to reconsider, that even if we were to assume that the proffered position is a market research analyst position, the Petitioner has not established that the particular position is a specialty occupation.

² The scope of this motion cannot be expanded to consider whether the Director’s decision to deny the petition on specialty occupation grounds was correct or to consider our initial decision to dismiss the appeal or subsequent decisions to deny the prior motions.

The Petitioner further requests that we consider the Beneficiary's bilingual abilities, his master's degree in business administration (MBA) and relevant work experience. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent.

As the Petitioner has not provided new facts that possess sufficient significance to change the result of our prior decision on February 25, 2016, to deny the motion to reconsider, the Petitioner's motion does not satisfy the requirements of a motion to reopen. The motion to reopen will be denied.

Nor does the Petitioner's motion 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 did not articulate how our February 25, 2016, decision to deny the prior motion to reconsider was based on an incorrect application of law or policy. Accordingly, the Petitioner's motion to reconsider will also be denied.

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.

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 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 MGKI, Inc.*, ID# 18059 (AAO July 21, 2016)