



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

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

MATTER OF S-D- INC.

DATE: JUNE 23, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a gem and jewelry business, seeks to temporarily employ the Beneficiary as a "systems analyst" under the H-1B nonimmigrant classification for specialty occupations. *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, revoked the approval of the petition. The Petitioner appealed the decision to us. We summarily dismissed the appeal. The matter is now before us on a combined motion to reopen and a motion to reconsider. In its motion, the Petitioner submits additional evidence. We will deny the combined motion.

**I. 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 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 Motion or Appeal, 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.<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 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).

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<sup>1</sup> 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 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

In support of the motion, the Petitioner submits a brief explaining that a Form I-140, Petition for Immigrant Worker, filed on behalf of the Beneficiary was approved on August 28, 2015. The Petitioner claims that the Beneficiary is, therefore, eligible for an extension of H-1B classification. However, the instant H-1B petition was filed on August 11, 2014 (approximately one year before the Form I-140 petition was approved). The Petitioner has not presented evidence that establishes eligibility at the time the underlying petition was filed.<sup>2</sup> As such, 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. The Petitioner 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. However, the Petitioner does not articulate how our January 29, 2016, decision was based on an incorrect application of law or policy. Rather, the Petitioner acknowledges that it did not submit an appeal brief or additional evidence on appeal. Further, 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.

## 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.

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<sup>2</sup> USCIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). If the Petitioner believes that it is now eligible for the approval of an H-1B petition on behalf of the Beneficiary, it may file a new petition, with a corresponding labor condition application and the appropriate fee, for USCIS to consider in accordance with the governing statutory and regulatory requirements.

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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 S-D- Inc.*, ID# 18126 (AAO June 23, 2016)