



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

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

MATTER OF M-E-, INC.

DATE: MAR. 28, 2016

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a fast-food restaurant, seeks to temporarily employ the Beneficiary as a “finance manager” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 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, concluding that the position offered to the Beneficiary did not qualify as a specialty occupation. The Petitioner appealed the denial to us, and we dismissed the appeal. Thereafter, the Petitioner filed motions on December 6, 2012; August 14, 2014; February 6, 2015; and March 10, 2015. We denied the motions.

The matter is again before us on a combined motion to reopen and reconsider. 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 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.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 [Department of Homeland Security] 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 that were decided in error or overlooked. *See Matter of O-S-G-*, 24 I&N Dec. at 60.

II. DISCUSSION

Our review here is limited to the most recent decision in the record of proceedings. 8 C.F.R. § 103.5(a)(1)(i) and (ii). That is, our September 14, 2015, decision is the subject of the combined motion currently before us.² Thus, while the Petitioner primarily focuses on the Director's denial of the petition and our decision dismissing the appeal, we note that its assertions pertinent to those matters will not be considered because the propriety of those decisions is not before us.

In support of the motion, the Petitioner submitting the following documentation:

- A cover letter;
- A brief;
- Our prior decisions;
- Printouts from the U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) that were published on January 8, 2014;
- USCIS Annual Report to Congress - Fiscal Year 2012;
- 2012 and 2013 tax returns;
- 2014 financial documents; and
- Documents previously submitted.

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

² Our decisions prior to September 14, 2015, are not under review. Whether to reopen or reconsider those decisions would not be considered unless the petitioner prevailed on the instant motion.

A. Denial of the Motion to Reopen

In this motion, the Petitioner asserts that the occupational category “Financial Managers” as described in the *Handbook* is similar to the entries for “Accountants and Auditors” and “Budget Analysts.” The Petitioner claims that the Beneficiary’s duties would include tasks from all three occupational categories. The Petitioner quotes the 2012 USCIS Annual Report to Congress as stating that specialty occupations may include accountants and, according to the Petitioner, this statement in the report is relevant to the matter here. The Petitioner asserts that the *Handbook*’s standards on these referenced occupations and the USCIS Annual Report were previously unavailable – and that had this information been submitted, the petition would have been approved.

We are not persuaded by the Petitioner’s assertion as it has not presented evidence that could be considered “new facts.” First, the Petitioner previously had the opportunity to describe the duties of the proffered position and explain how it selected the occupational category designated on the labor condition application.³ The petitioner’s assertion of a new argument does not constitute new “facts.” Further, most of the documents provided on motion were previously submitted by the Petitioner, and the new submissions (i.e., the excerpt from the *Handbook* and the USCIS Annual Report to Congress) bear dates prior to March 10, 2015, indicating that these documents existed and could have been provided with prior filings.⁴ Moreover, the Petitioner’s arguments focus on the denial of the petition, rather than on our most recent decision (which is the subject of the motion before us). Finally, the Petitioner has not established that the information provided with the instant motion would change the results of the case.⁵ As such, the Petitioner’s motion does not satisfy the requirements of a motion to reopen.

B. Denial of Motion to Reconsider

The Petitioner asserts that USCIS erred in concluding that the proffered position does not qualify as a specialty occupation and reiterates some of its previous arguments. The Petitioner, however, does not address the denial of the prior motion. It does not state any specific factual and legal issues raised on motion that were decided in error or overlooked in the decision. The Petitioner does not articulate

³ A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998).

⁴ The *Handbook* and the USCIS Annual Report to Congress existed and could have been provided with prior filings. More specifically:

- The *Handbook* was first published in 1949 and has been regularly updated.
- For over a decade, USCIS has published an annual report for Congress regarding the H-1B classification in accord with requirement imposed by the American Competitiveness and Workforce Improvement Act of 1988, Pub. L. No. 105-277, div. C, tit. IV §416(c)(2), 112 Stat. 2681.

⁵ The occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the H-1B regulations, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

how the denial of the prior motion was based on an incorrect application of law or policy when it was rendered. Accordingly, the Petitioner has not met the requirements for a motion to reconsider.

III. 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 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 M-E-, Inc.*, ID# 16275 (AAO Mar. 28, 2016)