



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

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

MATTER OF C-E- CORP.

DATE: SEPT. 26, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an environmental abatement of hazardous materials company, seeks to extend the Beneficiary's temporary employment as an "environmental asbestos engineer" 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, denied the petition. The Director concluded that the Petitioner had not demonstrated that the proffered position qualifies as a specialty occupation position. We dismissed a subsequent appeal affirming the Director's decision. In addition, we found that: (1) the labor condition application (LCA) does not correspond to the H-1B petition; and (2) the Petitioner had not demonstrated that the Beneficiary is qualified to work in the proffered position.

The matter is now before us on a motion to reopen and a motion to reconsider. In its motion, the Petitioner asserts that the H-1B petition should be approved.

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 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.

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.

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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. DISCUSSION

We will deny the combined motion because the motion does not merit reopening or reconsideration.

With the instant motion, the Petitioner provided the following statement:

The government is respectfully requested to reopen and reconsider its adverse decision for the following reasons: First, the Petitioner previously obtained an H1B approval for this Beneficiary, and was seeking simply to extend the Beneficiary’s H1B status. The government should adhere to its original grant of H1B status since it was properly made. Petitioner is a small minority owned business, and it requires an applicant who has a university degree to perform the tasks indicated in the petition. Second, the Petitioner could not file an amended labor condition to correct the error in the original filing because the ICERT system would not permit an amended filing retroactive to the period covered by the H1B1 filing. The technicalities of the ICERT system do not permit retroactive filings. The Petitioner only had notice of the need to make a retroactive filing after the petition was denied.

### A. Motion to Reopen

The Petitioner has not presented any evidence that could be considered “new facts.” Specifically, the Petitioner has not stated new facts or provided evidence to establish that the proffered position qualifies as a specialty occupation position. Further, rather than providing evidence that the Petitioner had a valid LCA when it filed the H-1B petition, as required by 8 C.F.R. § 214.2(h)(4)(i)(B)(1), it appears to admit that the Petitioner did not have the required LCA, certified for the period of employment requested in the H-1B petition and for the correct prevailing wage.

Moreover, the Petitioner did not submit new evidence that the Beneficiary is qualified to work in the proffered position.<sup>1</sup>

The Petitioner states no new facts supported by affidavits and/or documentary evidence demonstrating eligibility at the time the H-1B petition was filed. In fact, it has not addressed any of the bases of our decision on appeal. It does not, therefore, qualify as a motion to reopen.

#### B. Motion to Reconsider

The Petitioner's motion does not 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's stated reasons for reconsideration are insufficient to establish that our decision was incorrect. On motion, the Petitioner asserts that it "previously obtained an H1B approval for this Beneficiary, and was seeking to simply extend the Beneficiary's H1B status." We are aware that the instant H-1B petition is an extension petition. However, a prior approval does not compel the approval of a subsequent petition or relieve the Petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 Fed. Reg. 2,606, 2,612 (Jan. 26, 1990) (to be codified at 8 C.F.R. pt. 214). A prior approval does not preclude USCIS from denying an extension of the original visa based on a reassessment of eligibility for the benefit sought. *See Tex. A&M Univ. v. Upchurch*, 99 F. App'x. 556 (5th Cir. 2004).

As the instant motion does not address any of the bases of the decision it challenges, it does not establish that the decision was incorrect based on the evidence of record when it was made, and does not qualify as a motion to reconsider.

### III. CONCLUSION

The combined motion does not meet the requirements for a motion to reopen or a motion to reconsider and will be denied on that basis.

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<sup>1</sup> Specifically, 8 C.F.R. § 214.2(h)(4)(iii)(C)(2) requires that, if the Beneficiary will rely on a degree awarded in a foreign country, the equivalency of the Beneficiary's foreign degree to a U.S. degree must be evaluated. The record does not contain such an evaluation.

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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 denied.

Cite as *Matter of C-E- Corp.*, ID# 124696 (AAO Sept. 26, 2016)