



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

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

MATTER OF A- INC.

DATE: SEPT. 30, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a marketing company, seeks to temporarily employ the Beneficiary as an "account manager" 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 (1) the Petitioner had not demonstrated that the proffered position qualifies for as a specialty occupation; and, (2) the Beneficiary did not qualify to perform the duties of the proffered position. The Petitioner submitted an untimely appeal of the Director's decision. We rejected the appeal.

The matter is now 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 US 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:¹

Motion to Reopen: The motion must state new facts and must be supported by affidavits and/or documentary evidence that established eligibility at the time the underlying petition or application 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 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 C.F.R. chapter 1 to the contrary, 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 assertions 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

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

To properly file an appeal, the affected party must submit the Form I-290B, along with the required fee, within 30 days after service of the unfavorable decision. 8 C.F.R. § 103.3(a)(2)(i). If the decision was mailed, the appeal must be filed within 33 days. See 8 C.F.R. § 103.8(b). An appeal will be considered received by U.S. Citizenship and Immigration Services (USCIS) on the date of receipt at the location designated for filing such a request. 8 C.F.R. § 103.2(a)(7)(i). The instructions to the Form I-290B state that an appeal is not considered properly filed until it is accepted by USCIS. Neither the Act nor the pertinent regulations grant us the authority to extend the time limit for filing an appeal.

The petition was denied on October 20, 2015. In the denial notice, the Director notified the Petitioner and its counsel of the timeframe to file an appeal. USCIS received the appeal in proper form for filing on November 25, 2015, which is 36 days after the Director’s decision was issued. We therefore rejected the appeal. Thereafter, the Petitioner submitted the instant combined motion. Counsel states that he assumed that the word “filing” meant “submitted to a courier.”

A. The Motion to Reopen

While counsel’s statement provides some insights into the reason the appeal was late, on motion, the Petitioner does not submit new evidence, nor does it present new facts. Therefore, the Petitioner’s instant submission does not satisfy the requirements of a motion to reopen.² Thus, the motion to reopen will be denied.

² Even though the Petitioner checked the box for the combined motion to reopen and to reconsider, in the brief, counsel

B. The Motion to Reconsider

The submission also does not satisfy the requirements for granting a motion to reconsider. The regulations and the instructions to the Form I-290B are clear as to the timeframe for filing an appeal. Moreover, 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states in pertinent part that "[a]n appeal which is not timely filed within the time allowed must be rejected as improperly filed." The regulation is binding on USCIS in its administration of the Act, and it does not have the authority to extend the filing period.³ See, e.g., *Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C., 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned).

The Petitioner does not establish that our rejection was based upon an incorrect application of law or policy to the evidence before us when we issued that decision. Further, the submission on motion does not cite relevant statutes, regulations, or precedent decisions that would support reconsideration of our rejection when we issued that decision. Accordingly, we will also deny the motion to reconsider.

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.

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.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A- Inc.*, ID# 11961 (AAO Sept. 30, 2016)

states that "[t]his is a motion to reconsider."

³ The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the Director of the Vermont Service Center. See 8 C.F.R. § 103.5(a)(1)(ii). In this matter, the Director determined that the late appeal did not meet the requirements of a motion and forwarded the submission to us.