U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-P.Z-R-S-, INC.

DATE: SEPT. 29, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an organization that trains and races horses, seeks to employ the Beneficiaries as "thoroughbred racehorse grooms" under the H-2B nonimmigrant classification for temporary nonagricultural services or labor. *See* Immigration and Nationality Act section 101(a)(15)(H)(ii)(b), 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The H-2B program allows a qualified U.S. employer to bring certain foreign nationals to the United States to fill temporary nonagricultural jobs. The Petitioner's service or labor need must be a one-time occurrence, seasonal, peak load, or intermittent.

The Director, Vermont Service Center, denied the petition, concluding that the Petitioner did not establish that it had an H-2B temporary need for labor or services as defined in the applicable regulations. The Petitioner then filed a combined motion to reopen and reconsider. After considering the combined motion, the Director affirmed the decision to deny the petition. The Petitioner then filed an appeal, which we dismissed upon concluding that the Petitioner had not demonstrated an H-2B "seasonal" temporary need.

The matter now before us is the Petitioner's combined motion for us to reopen the proceedings and to reconsider our decision to dismiss the appeal.

The combined motion will be denied.

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 that establish 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 and must establish that the decision was

[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."

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).

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. SUBMISSIONS ON MOTION

On motion, the Petitioner submits a brief and additional documentation, including:

- An article entitled [redacted] dated April 3, 2016, from [redacted] Internet site;
- An article entitled [redacted] dated December 4, 2015, from [redacted] Internet site;
- An article entitled [redacted] dated January, 29, 2014, from the [redacted] Internet site for sports;
- An [redacted] publication reporting on racing stakes at [redacted] from December 5, 2015 to April 2, 2016.
- A sheet displaying [redacted] "2016 Spring/Summer Calendar" and "2016 Spring/Summer Stakes Schedule."

In reaching our decision to deny the combined motion, we have considered the content of the letter and of all of the attachments submitted on motion.

III. ANALYSIS

The petition was filed for an H-2B temporary "seasonal" need. The scope of employment within the H-2B "seasonal" need category is subject to the following provisions at 8 C.F.R. § 214.2(h)(6)(ii), *Temporary services or labor*:

(A) *Definition.* Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) *Nature of petitioner's need.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

Further, the particular scope of an H-2B "seasonal" temporary need, we turn to the provision at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*), which states:

> *Seasonal need.* The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

In dismissing the appeal, we applied the applicable regulatory provisions to the facts before us at that time and determined that the Petitioner had not submitted sufficient evidence that the services for which the Petitioner asserted its need for the Beneficiaries to perform were "traditionally tied to a season of the year by an event of pattern and is of a recurring nature." In this regard, the dismissal decision noted (1) "a lack of evidence supporting the Petitioner's claim, such as an agenda, racing schedule, or events program," and (2) that the Petitioner had "not established the period(s) of time during each year in which it does not need the services or labor."

A. Motion to Reopen the Proceedings

For the purposes of this motion, we recognize the above described documentary attachments as supporting the Petitioner's assertion on motion that its need for the Beneficiaries services is "tied to the meet during December through April at We note that the Petitioner requested that the petition be approved from October 1, 2011 to March 31, 2012; yet all of the documentation submitted on appeal was produced several years after the requested validity period and does not relate to or reference the requested period.

Moreover, even accepting the documentation as showing new facts to be provided if the proceedings were to be reopened, we cannot conclude that reopening the proceedings for consideration of those

facts would, in the language of Part 4 of the Form I-290B, "establish eligibility at the time the underlying petition was filed." We also find that any such new facts as represented in the submissions would not possess such significance that, if we were to reopen the proceedings to include them, they would likely lead to an outcome other than our again dismissing the appeal. In this regard, we specifically find that the evidence submitted on motion would not have such content, weight, and importance that its addition to the totality of the evidence would establish that the Petitioner's need for horse-groomer services meets the H-2B seasonal temporary-need requirement that the need be for a period in which permanent workers of the Petitioner do not provide such services.[2] The documents submitted as new evidence do not negate the evidence already in the record that the Beneficiaries would supplement the Petitioner's permanent horse groomers.

B. Motion to Reconsider Our Decision to Deny the Petition

Asserting that dismissal of the appeal was based "on the erroneous interpretation of the evidence and the statements presented," the Petitioner states:

> [T]he Petitioner has established that the service is traditionally to a peak racing season each year from November through April, and is of a recurring nature. The period of time is not subject to change or unpredictable. The Petitioner specified the period of time during each year when it does not need the services. In fact, the excerpt included in the dismissal details how during the season there is a migration of literally thousands of horses and in order to safely and properly attend to the additional horses stabled in Florida, the Petitioner needs the additional temporary workers.

The "excerpt included in the dismissal," is the petition-denial decision's recitation of the Petitioner's statement of need in the application for temporary labor certification. It reads:

> The prime racing season for our stable in Florida when there are more races, starters, and larger purses, begins each year approximately on November 1st and goes at full strength until April. This recurring peak season of racing is due to the normal temperature and working conditions of the racetracks that make up our racing agenda in Florida. During this recurring peak load period,[3] horse racing and training is continuous at [redacted] and [redacted] as horses from around the country head to Florida. In order to safely and properly attend to the additional horses we stable and race at the above Florida tracks,

[2] We note that if the Petitioner were to file a petition for an H-2B peakload temporary need, it would have to satisfy the particular regulatory requirements at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), including the requirement "to establish" that "the temporary additions to staff will not become a part of [its] regular operation."

[3] At this point, the Director's decision included the following footnote: "As previously noted, the Petitioner indicated on both the Form I-129 and the temporary labor certification that its temporary need for the services of the Beneficiaries is a season[al] need as defined at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*), and not a peakload need as defined at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*)."

> and center during this annual recurring prime season, the workers need to be at the racetrack and stable facilities a few weeks prior to the crunch to help prepare the stalls, move the horses[,] and start the horses' training schedules. During the above-mentioned season, there is a migration of literally thousands of horses for said prime, peak racing season, and each worker being able to care for 1-5 horses at a time, temporary workers will be needed to augment the permanent work force. Each year the need for a qualified groom work force increases dramatically during this approximately 6-month recurring annual period from November to April.

Based upon our review of the grounds that the Petitioner's claims for reconsideration, the applicable regulations, and the record of proceedings as constituted at the time of the appeal, we find no basis for reconsidering our decision to dismiss the appeal.

We note, in particular, that the evidence of record as constituted on appeal did not sufficiently establish that the Petitioner's need for horse groomers for Florida racing tracks was confined to a particular season of the year. In fact, the Petitioner's statements of need as presented in the Form I-129 and in the application for temporary labor certification indicated that the Petitioner's need for and employment of horse groomers was not confined to just the "prime, peak" Florida racing season for which the petition was filed.

Further, we find that the factual aspects of the record showing that the Beneficiaries would be supplementing the Petitioner's permanent horse-groomer staff reflect that the Petitioner's need would not encompass a period when none of its permanent staff would include horse groomers, as required by the H-2B seasonal-need requirement at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*) that the claimed season not include a period when the Petitioner was employing permanent workers who provided the specified services or labor (here, those provided by horse groomers). The decision accurately identified this critical deficiency by stating that the Petitioner had not established the periods of time when it would not need the services or labor.

We conclude, therefore, that the Petitioner has not met its burden to establish that the decision to dismiss the appeal was based upon an incorrect application of law or policy to factual record at the time the decision was rendered.

IV. 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.[4]

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[4] 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.[5]

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of N-P.Z-R-S, Inc.*, ID# 10767 (AAO Sept. 29, 2016)

[5] This decision does not prejudice or otherwise prevent the Petitioner from filing a new petition on behalf of the Beneficiaries or other individuals, especially if the facts and circumstances have since changed such that eligibility for the immigration benefit can be established.