



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

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

MATTER OF A-G-O-I-, LLC

DATE: DEC. 29, 2015

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a Texas limited liability company, seeks to continue to employ the Beneficiary as its executive director. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition. The matter subsequently came before us on appeal. We dismissed the appeal and the Petitioner filed a second appeal. We rejected the second appeal and the Petitioner filed a motion to reconsider, which is currently before us. The motion will be denied.

I. THE ISSUE

The issue in the matter at hand is whether we properly rejected the Petitioner's second appeal.

II. 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 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 3 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.

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 3 of the Form I-290B, which states:

Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

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).

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, 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-López 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.

III. DISCUSSION

A. Procedural History

The record shows that the Petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, on December 26, 2012. The Director denied the petition on November 5, 2013, based on the following three grounds: (1) the Petitioner did not establish that it would employ the Beneficiary in a qualifying managerial or executive capacity; (2) the Petitioner did not establish that the Beneficiary was employed abroad in a qualifying managerial or executive capacity; and (3) the Petitioner did not establish that it had the office space available to house all of its employees and run its operation.

On December 5, 2013, the Petitioner filed an appeal seeking review and withdrawal of the Director’s decision. After reviewing the record on appeal, we determined that there was a sufficient basis to withdraw the Director’s third finding regarding the issue of an adequate business premises. We therefore based our decision on the Director’s two remaining findings regarding the Beneficiary’s managerial or executive capacity in his former employment with the foreign entity and his proposed position with the petitioning U.S. entity. We ultimately concluded that the Petitioner did not establish that the Beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity and dismissed the appeal.

Rather than filing a motion to reopen or a motion to reconsider, or a combined motion to reopen and reconsider, the Petitioner instead filed a second appeal asking us to conduct a second appellate review and to withdraw our original decision. On June 9, 2015, we issued a decision rejecting the Petitioner’s second appeal. We declined to consider the merits of the appeal based on our lack of jurisdiction to review our own appellate decision on appeal.

The Petitioner now files a motion to reconsider, asserting that there is no express law or regulation that prohibits the filing of a subsequent appeal.

B. Analysis

As a threshold matter, it is noted that we conduct our review of each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The term “appeal” is defined as a proceeding undertaken to have a decision reconsidered by a higher authority or the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal. Black’s Law Dictionary (10th Ed. 2014). Applying this definition to the facts in the matter at hand, we find that by filing a second appeal the Petitioner improperly sought a second *de novo* review from the same administrative agency – the AAO – that issued the original appellate decision. Such action is expressly prohibited in the Form I-290B instructions, which state, “An adverse decision from the AAO may not be further appealed to the AAO.”² The instructions found on the cover page of our original decision expressly informed the Petitioner that it could file a motion on a Form I-290B. The instructions did not include any circumstances for the filing of an appeal in response to our appellate decision. Moreover, while 8 C.F.R. § 103.1(f)(3)(iii)(J) expressly states that we have appellate jurisdiction over petitions for temporary workers, there is no regulation that grants us appellate jurisdiction over our own decisions that result from the Petitioner’s filing of the Form I-290B.

As we previously stated in our June 9, 2015 decision, where we rejected the Petitioner’s second appeal, there is no statutory or regulatory provision that permits a petitioner to file, and for us to review, more than one appeal with regard to the same petition. *See* 8 C.F.R. § 103.3(a)(1)(ii). In fact, the very absence of language regulating such a filing is in itself an indication that the Petitioner is not permitted to file an appeal of an appeal where an agency would be asked to conduct appellate review of its own decision. Although 8 C.F.R. § 103.5(a) expressly discusses the Petitioner’s right to file a motion to reopen or reconsider, pursuant to which we are permitted to conduct a limited review of our own appellate decision, the Form I-290B that the Petitioner filed on October 28, 2014 clearly indicates that the Petitioner intended to file an appeal rather than a motion. In addition, the instructions found on the cover sheet that precedes all of our decisions expressly states that the Petitioner is limited to filing a motion in cases where it either seeks to present new facts for consideration or believes that our decision on appeal was incorrect in terms of our application of current law or policy.

Furthermore, we note that even if we were to have treated the previously filed second appeal as a motion to reopen or reconsider, such a motion would have been dismissed based on the Petitioner’s failure to meet the requirements of a motion.

As instructed at 8 C.F.R. § 103.5(a)(2), a motion to reopen must be accompanied by new facts and be supported by affidavits or other documentary evidence. The record in this matter shows that the only evidence submitted in support of the prior filing was an appellate brief in which the Petitioner restated information that was provided earlier either on appeal or in response to the Director’s request for evidence.

² *See* Form I-290B Instructions, p. 4 (01/23/14).

The Petitioner also did not meet the requirements of a motion to reconsider, which, pursuant to 8 C.F.R. § 103.5(a)(3), must be supported by any pertinent precedent decisions establishing that our original decision was based on an incorrect application of law or Service policy based on the evidence of record at the time of the initial decision. The brief submitted in support of the Petitioner's second appeal was based in large part of the contention that we failed to apply the definition of "executive capacity" to the Beneficiary's job description, despite the Petitioner's earlier claims in support of the original appeal, filed on December 5, 2013. However, a review of page 8 of our original decision, dated September 25, 2014, indicates that the term "executive capacity" was specifically contemplated and applied to the facts as presented in the record through the date of the appeal. Thus, the Petitioner's claim that we failed to properly consider its assertions under the applicable statutory provisions is incorrect and without merit. Moreover, the Petitioner's reliance on our unpublished decisions falls short of meeting the requirements specified at 8 C.F.R. § 103.5(a)(3), which instruct the Petitioner to support its legal arguments with "pertinent precedent decisions."

Regardless, in considering the merits of the motion to reconsider which is currently before us, we similarly find that the Petitioner's references to unpublished decisions issued by this agency are insufficient to meet the requirements of a motion to reconsider. In light of the Petitioner's submission of deficient evidence in support of the instant motion to reconsider, the motion will not be granted.

IV. 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 motion to reconsider will be dismissed, the proceedings will not be reconsidered, and our previous decision will not be disturbed.

ORDER: The motion to reconsider is denied.

Cite as *Matter of A-G-O-I, LLC*, ID# 15096 (AAO Dec. 29, 2015)