



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

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

MATTER OF S-, INC.

DATE: SEPT. 29, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a trucking and freight services company, seeks to temporarily employ the Beneficiary as its general manager under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary will be employed in a primarily executive capacity in the United States. The Petitioner submitted an appeal of the Director's decision to our office. Upon receipt, we rejected the Petitioner's appeal based on a finding that it was untimely filed.

The matter is now before us on motion to reopen and motion to reconsider. In support of its motion, the Petitioner asserts that the original appeal was timely filed when the date of mailing is taken into consideration.

Upon review, we will deny the motion to reopen and motion to reconsider.

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 that establish eligibility at the time the underlying petition or application 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 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

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.”

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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 AND ANALYSIS

In denying the petition, the Director found that the Beneficiary will be primarily managing non-supervisory/non-professional employees on a regular basis. The Director found that the Petitioner submitted inconsistent evidence regarding its actual employees and, as such, could not determine whether the Beneficiary would have sufficient subordinate employees to relieve him from performing non-qualifying operational and administrative duties.

The Petitioner filed an appeal of the Director’s decision with our office. We rejected the appeal as untimely filed and found that the record indicated that the Director issued the decision on August 26, 2015, and properly gave notice to the Petitioner that it had 33 days, or until September 28, 2015, to properly file the appeal. We notified the Petitioner that the date of filing is not the date of mailing, but the actual date of receipt at the designated filing location. 8 C.F.R. § 103.2(a)(7)(i). We found that, although the Form I-290B was dated September 28, 2015, it was not received at the designated filing location until October 1, 2015, or 36 days after the decision was issued.

On motion, the Petitioner contends that, although the Director’s decision is dated August 26, 2015, it does not mean that it was mailed to the Petitioner on the same date. The Petitioner states that, on average, USCIS mails out its decisions two days after the date stamped on the first page. Therefore, the Petitioner asserts that its denial notice was not sent on August 26, 2015, but more likely than not mailed on August 28, 2015, and therefore, its appeal should have been mailed out no later than September 30, 2015, in order to have been considered timely.

In support of its motion to reopen, Counsel for the Petitioner submits copies of other notices for its other clients in an effort to demonstrate that there is a lapse in time from the date the notices are completed to the date they are mailed out of the office. The Petitioner also submitted a copy of the Director’s decision on its combined motion to reopen and motion to reconsider,² dated March 30,

² The Petitioner simultaneously filed an appeal and a combined motion to reopen and motion to reconsider the Director’s

2016, and the envelope which the Petitioner claims corresponds to this notice, which indicates that the decision notice was mailed on March 31, 2016, one day after the date printed on the decision. We note that the Petitioner did not submit any evidence that the underlying petition denial was mailed after the notice date of August 26, 2015.

In support of its motion to reconsider, the Petitioner cites to 8 C.F.R. § 103.8(b), stating, “*Effect of service by mail.* Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing.” The Petitioner contends that its 33 day clock for filing an appeal or a motion to reconsider does not commence until the notice is actually mailed by USCIS. As such, the Petitioner contends that, based on the few sample notices submitted on motion, USCIS takes an average of two days to mail out its decisions, and therefore, the Petitioner should be allowed 33 days from the date of mailing of the decision to file its appeal or motion. Here, the Petitioner contends that it should have until September 30, 2015, to mail its appeal to USCIS.

A. Denial of the Motion to Reopen

Upon review, we find that the Petitioner did not provide any new facts in this motion. While Counsel for the Petitioner submits copies of USCIS notices and envelopes, it has not clearly identified its evidence in manner that demonstrates its relevance to these proceedings. The Petitioner contention that other notices were mailed out after the date on the front of the notice is not sufficient to establish that it should be allowed additional time to submit its appeal. The Petitioner has not submitted any new facts pertaining to the instant petition or our rejection of the Petitioner’s appeal. As such, the Petitioner has not established that the evidence submitted on motion would change the outcome of this case if the proceeding were reopened. Therefore, the Petitioner has not met the requirements of a motion to reopen.

“There is a strong public interest in bringing [a case] to a close as promptly as is consistent with the interest in giving the [parties] a fair opportunity to develop and present their respective cases.” *INS v. Abudu*, 485 U.S. 94, 107 (1988). Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94). A party seeking to reopen a proceeding bears a “heavy burden” of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the Petitioner has not met that burden.

decision. The Director dismissed the motion based on a finding that it was untimely filed. The Petitioner subsequently filed a second combined motion to reopen and motion to reconsider the Director’s decision.

B. Denial of the Motion to Reconsider

Upon review, we find that the Petitioner did not properly state the reasons for reconsideration. The Petitioner briefly references one section of the regulations in an attempt to demonstrate that it should be allowed additional time to submit its appeal. However, USCIS regulations specifically state that an affected party or the attorney or representative of record must file the complete appeal within 30 days of service of the unfavorable decision. *See* 8 C.F.R. § 103.3(a)(2)(i). If the decision was mailed, the appeal must be filed within 33 days. 8 C.F.R. § 103.8(b). USCIS records indicate that the Director's decision was issued on August 26, 2015, and the Petitioner has not submitted evidence to the contrary. As the Petitioner didn't file its appeal until October 1, 2015, which was 36 days after the original decision was issued, it was untimely filed. As noted, the date of filing is not the date of mailing, but the actual date of receipt at the designated filing location. 8 C.F.R. § 103.2(a)(7)(i). Neither the Act nor the pertinent regulations grant us authority to extend the 33-day time limit for filing an appeal.

We conclude that the documents constituting this motion do not articulate how our decision on appeal misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to reject the appeal was rendered. The Petitioner has therefore not submitted any evidence that would meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider must be denied.

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.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of S-, Inc.*, ID# 24617 (AAO Sept. 29, 2016)