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

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

MATTER OF H-B-

DATE: NOV. 13, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

APPLICATION: FORM N-470, APPLICATION TO PRESERVE RESIDENCE FOR
NATURALIZATION PURPOSES

The Applicant, a lawful permanent resident, seeks to preserve his residence for naturalization purposes. *See* Immigration and Nationality Act (the Act) § 316(b), 8 U.S.C. § 1427(b). The Applicant has been a lawful permanent resident since March 14, 2007. He filed a Form N-470, Application to Preserve Residence for Naturalization Purposes, on September 4, 2009, stating that his absence from the United States is on behalf of an American firm or corporation engaged in whole, or in part, in the development of foreign trade and commerce of the United States, or a subsidiary thereof, more than 50 percent of whose stock is owned by an American firm or corporation. The Director, Denver Field Office, denied the application. The Applicant filed an appeal to this office and, on December 19, 2014, our office dismissed the appeal. The matter is now before us on a motion to reopen and a motion to reconsider. The joint motion will be denied.

I. FACTS AND PROCEDURAL HISTORY

The Director denied the application on March 20, 2014, concluding that the Applicant was not eligible for consideration under section 316(b) of the Act because he could not establish that he was physically present in the United States for an uninterrupted period of one year following his admission as a lawful permanent resident.

The Applicant filed an appeal on April 22, 2014, which we dismissed on December 19, 2014. In dismissing the Applicant's appeal, we found that the Applicant was not physically present in the United States for at least one uninterrupted year after becoming a lawful permanent resident. He became a lawful permanent resident of the United States in March 2007, and departed the United States the following month. The Applicant has not been continuously present in the United States for one year after March 2007. We further found that the Applicant did not establish that he was employed by an American firm or corporation engaged in whole, or in part, in the development of foreign trade and commerce of the United States, or a subsidiary thereof more than fifty per cent of whose stock is owned by an American firm or corporation. We noted that the record does not contain any corporate documents to demonstrate that [REDACTED] the Applicant's employer, is an American firm or corporation.

The matter is now before us once again on a motion to reopen and a motion to reconsider.

II. UNTIMELY MOTION

As a preliminary matter, we note that the instant combined motion to reopen and reconsider was filed late and therefore must be denied.

The provision at 8 C.F.R. § 103.5(a)(4), *Processing motions in proceedings before the Service*, provides that “[a] motion that does not meet applicable requirements shall be dismissed.”

The pertinent section of the motion regulations, 8 C.F.R. § 103.5(a)(1)(i), states:

[A]ny motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

Emphasis added.

The date of filing is not the date of mailing, but the date when U.S. Citizenship and Immigration Services (USCIS) receives the intended motion (1) completed, signed, and accompanied by the required fee as specified by the Form I-290B instructions; and (2) at the location that those instructions designate for filing motions.¹

Neither the Act nor the pertinent regulations grant us the authority to extend the 33-day time limit for filing a motion to reconsider. The regulations do permit USCIS, in its discretion, to excuse the untimely filing of the motion to reopen component of this joint motion were it is demonstrated that the delay was both (a) reasonable and (b) beyond the control of the petitioner. 8 C.F.R. § 103.5(a)(1)(i). However, upon review of the submissions constituting the motion we find no basis for finding that the untimely filing was either reasonable or beyond the control of the Applicant in this matter.

We issued the decision that is the subject of this motion on December 19, 2014. We note that the Applicant filed his Form I-290B, Notice of Appeal or Motion, on February 2, 2015, 45 days after our decision. Accordingly, the motion was untimely filed.

¹ See 8 C.F.R. § 103.2(a)(1) (“every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions” and with whatever fees are required by regulation); § 103.2(a)(6) (form instructions specify filing location).

As the record does not establish that the failure to file the motion to reopen within 33 days of the decision was reasonable and beyond the affected party's control, and as there is no such provision for motions to reconsider, the combined motion is untimely and must be denied for that reason.

III. MOTION REQUIREMENTS

Although the late filing of the joint motion requires the motion's dismissal, we shall also address, in summary fashion, why the joint motion would have to be denied even if it had been timely filed.

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:²

Motion to Reopen: The motion must state new facts and must be supported

² 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.

by affidavits and/or documentary evidence that establish 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.

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.

IV. DISCUSSION AND ANALYSIS

(b)(6)

Matter of H-B-

The submission constituting the combined motion consists of: (1) the Form I-290B; (2) a letter from the Applicant dated January 19, 2015; and (3) a copy of the sales tax license for the Applicant's employer, [REDACTED]

On motion, the Applicant states that he has been employed by [REDACTED] in [REDACTED] for a long time and is currently a silent partner in the business. The Applicant goes on to discuss the business's American ownership as follows:

One reason for rejection of my appeal was failure to provide the existence of such a business as [REDACTED] and of its American ownership.

....

[REDACTED] was established in [REDACTED] in [REDACTED] Colorado. It has been in business in that location for [REDACTED] years. . . . It has a DBA license from state of Colorado and has had a retail sale number established with city and country of [REDACTED] since [REDACTED]. The owner is [REDACTED] with the SSN. . . .

I also did not see anywhere in my N-470 application that I had to submit and prove the existence of the firm I am hired by and that it's an American company owned by a US citizen. I didn't realize further proof was necessary because [REDACTED] [REDACTED] is and has been owned and operated by a US citizen since [REDACTED].

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. Here, the Applicant has not submitted any new evidence. Therefore, the Applicant has not satisfied the requirements of a motion to reopen.

While the Applicant clearly understands that the reason for dismissal of his appeal is due to the lack of evidence regarding the American ownership of [REDACTED] the Applicant does not provide the deficient information and simply makes statements on motion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In order to have established merit for reconsideration of our latest decision the Applicant must both: (1) state the reasons why the applicant believes *the most recent decision* was based on an incorrect application of law or policy; and (2) specifically cite laws, regulations, precedent decisions, and/or binding policies that the applicant believes we misapplied in our prior decision. As the Applicant has not established that we committed legal error in our prior decision, we are unable to grant the Applicant's motion.

For the foregoing reasons, the instant motion does not meet the requirements of a motion to reconsider. The motion does not establish that our decision dated December 19, 2014 dismissing the appeal was in error, as required by 8 C.F.R. § 103.5(a)(3).

Finally, the motion shall also be denied because it did not meet another applicable filing requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be “[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding.” In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Again, the regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be denied for this reason.

V. CONCLUSION

Motions for the reopening or reconsideration 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. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a “heavy burden.” *INS v. Abudu*, 485 U.S. at 110.

It is the Applicant’s burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 316.2(b). Here, that burden has not been met. Accordingly, the previous decisions of the Director and our office will not be disturbed.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of H-B-*, ID# 14467 (AAO Nov. 13, 2015)