U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-S-, INC.

DATE: JAN. 30, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of software development and database administration services, seeks to employ the Beneficiary as a database administrator. It requests classification of the Beneficiary as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This classification allows a U.S. employer to sponsor a member of the professions holding an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition, concluding that the record did not establish that the Beneficiary met the education and experience requirements of the offered position. The Petitioner appealed the matter to us and we dismissed the appeal. Specifically, although we held that the evidence in the record established that the Beneficiary met the education requirements of the offered position, it did not establish that the Beneficiary met the experience requirements.

The matter is now before us on motion to reopen and reconsider. On motion, the Petitioner states that we ignored the facts submitted regarding the Beneficiary's work experience. The Petitioner has submitted on motion an updated "experience certificate" regarding the Beneficiary's experience, an affidavit from the Beneficiary, and a letter from the Beneficiary's father.

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

I. LAW

A. Requirements for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) limits 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.

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 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)], when filed, also 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 when filed 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]

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.

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[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.

C. 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 demonstrating 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).

II. ANALYSIS

A. Motion to Reconsider

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy and establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3) (detailing the requirements for a motion to reconsider). Here, the Petitioner has not cited any statutes, regulations, or precedent decisions to establish that our prior decision was incorrect based on the evidence in the record. Therefore, we will deny the motion to reconsider.

B. Motion to Reopen

A motion to reopen must state the new facts to be provided in the reopened proceeding and must be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Any new facts submitted must also be of such significance that they would likely change the outcome of the case.

"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 (1988)). A party seeking to reopen a proceeding bears a "heavy burden" of proof. *INS v. Abudu*, 485 U.S. at 110.

In this case, we find that the information submitted on motion is not supported by independent documentary evidence that would change the outcome of the case. Specifically, the Petitioner has not provided sufficient evidence to resolve a discrepancy concerning the Beneficiary's claimed prior employment or to establish that the Beneficiary possesses the experience required for the offered position.

Part H.6 of the ETA Form 9089, Application for Permanent Employment Certification (labor certification), states that 12 months of experience in the job offered of database administrator is required. Part K of the labor certification states that the Beneficiary worked for [redacted] in [redacted], India, as a database administrator from August 1, 2006, to August 31, 2008. Part K of the labor certification indicates that the Beneficiary worked for the Petitioner as a database administrator beginning June 1, 2010.

The record contains an "experience certificate" from [redacted], dated September 1, 2008, and another one dated May 30, 2015, which both state that the Beneficiary worked there as a database administrator from August 2006 to August 2008. However, as we noted in our previous decision, the Beneficiary stated during a nonimmigrant H-4 visa application and interview process in [redacted] India in July 2008 that he worked for his father's motorcycle store during this same period of time. He did not indicate that he worked at [redacted] on that visa application. We also note that the Director addressed this issue in a notice of intent to deny (NOID) on May 28, 2015, and in the decision denying the petition.

On motion, the Petitioner submits an "experience certificate" from [redacted], dated September 30, 2016, containing the same language as the other two certificates in the record, but adding that the Beneficiary was employed there on a full-time basis. Also, the Petitioner submits a letter from the Beneficiary's father, stating that the Beneficiary helped him part-time over the weekends in their motorcycle spare parts store from June 2005 to August 2008. It is unclear why the Beneficiary would have disclosed his part-time weekend employment with his father, rather than his alleged full-time employment with [redacted] during his H-4 visa interview. While the Beneficiary attempts to provide an explanation for this in his affidavit, stating that perhaps he misunderstood the question and indicated that he is a graduate working with his father, the additional "experience certificates" from [redacted] are insufficient evidence to resolve this discrepancy. The Petitioner must support its assertions with relevant, probative, and credible evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). While the Beneficiary states that he is unable to find pay statements from [redacted], it is unclear why [redacted] could not provide evidence of his pay statements or other relevant evidence to sufficiently demonstrate that the Beneficiary gained qualifying experience there. A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361.

We also examined the Beneficiary's experience with the Petitioner in our prior decision. The record contains a letter from the Petitioner, dated June 11, 2015, stating that the Beneficiary worked there as a "systems analyst/database administrator" from June 1, 2010, to September 30, 2012. We indicated previously that under 20 C.F.R. § 656.17(i)(3)(i), a petitioner could not rely on a beneficiary's

experience gained while working for the employer in a position that is "substantially comparable" to the position offered. We held that the evidence in the record did not establish that the Beneficiary's experience with the Petitioner was in a position that is not "substantially comparable" to the position offered. The Petitioner has not provided any response or evidence related to this finding.

For the foregoing reasons, we find that the Petitioner has not established that the Beneficiary meets the experience requirements for the job offered and has not provided any new facts supported by documentary evidence that would change to outcome of the case. As such, we will deny the motion to reopen.

III. CONCLUSION

In visa petition proceedings, the petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner did not meet that burden.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of D-S-, Inc.*, ID# 186733 (AAO Jan. 30, 2017)