



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

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

In Re: 9449691

Date: JUNE 30, 2020

Motion on Administrative Appeals Office Decision

Form I-129, Petition for Nonimmigrant Worker (H-1B)

The Petitioner, an information technology services company, seeks to temporarily employ the Beneficiary as a “software developer, applications” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both: (a) the theoretical and practical application of a body of highly specialized knowledge; and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The California Service Center Director denied the petition, concluding that the Petitioner had not established an employer-employee relationship with the Beneficiary, and that the proffered position did not qualify as a specialty occupation. The Petitioner filed an appeal with our office, asserting that the Director’s decision was erroneous. After we issued a notice of intent to dismiss (NOID) on the basis that the Petitioner did not pay all the requisite filing fees, we ultimately dismissed the appeal on that same basis. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss the motions.

I. MOTION REQUIREMENTS

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

II. ANALYSIS

As the basis for dismissing the Petitioner’s appeal associated with paying the incorrect American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) fee was thoroughly discussed in our previous decision, and it is unnecessary that we repeat that here. However, we determined that the

same individual owns and controls the petitioning company as well as other companies, and that this met the ACWIA definition of an affiliate. Because the total number of employees belonging to all of the affiliates equaled or exceeded 25 personnel, the Petitioner was required to pay a higher ACWIA fee than it paid when it filed the present petition.

We further determined that because the Petitioner did not pay the correct fees at the time it filed the petition in 2018, the petition was not properly filed and this was not a deficiency that the Petitioner could rectify after-the-fact. *See Matter of G-S-, Inc.*, ID# 4643726 (AAO Sept. 19, 2019). For the reasons discussed below, we conclude that the Petitioner has not overcome our findings within the appeal dismissal through new evidence in its motion to reopen, nor has it established that the decision was based on an incorrect application of law or USCIS policy as required to meet the requirements for filing a motion to reconsider.

Within the present motion, the Petitioner presents the same arguments that it offered in response to our NOID. For motions to reopen under the regulation at 8 C.F.R. § 103.5(a)(2), we interpret “new facts” to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute “new facts.” As a result, the Petitioner’s claims to reopen the decision—presenting the same arguments it previously offered—cannot be considered a proper basis for a motion to reopen.

Turning to the second motion, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision, or alternatively show how a change in law materially affects the prior decision. *Id.* at 60. The Petitioner does not claim that our decision was based on an incorrect application of law or policy, or that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. Instead, the Petitioner again attempts to remedy the fee issue, which it cannot do. The Petitioner was required to pay the appropriate fee at the time it filed the original petition. We therefore consider this issue to be abandoned and we will not offer further analysis on this topic. *See Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005).

Additionally, in order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must 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 and, if so, the court, nature, date, and status or result of the proceeding.” Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that “[a] motion that does not meet applicable requirements shall be dismissed.” In this case, the Petitioner did not submit a statement regarding if the validity of our appellate decision has been or is subject of any judicial proceeding. As such, the motions must be dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.