U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 05 2010

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied this employment-based immigrant visa petition on May 8, 2008. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on June 16, 2009. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

On motion, counsel submitted the following documentation:

1. An article, dated August 2009, *Fresh Summer Wines 178 Best Buys*, from Wine and Spirits Magazine, which ranks the 2006 Finger Lakes Dry Riesling Tierce (Tierce) as 94th;
2. Information from Wine Spectator, dated January 31 – February 28, 2009, reflecting that there were only 3 wines which earned a rating between 90-94 in 2008;
3. An article, dated May 28, 2009, *N.Y. Wines Win 2 Top Awards at Eastern Competition*, from www.democratandchronicle.com, reflecting that the 2006 Tierce was named best white wine at the 2009 International Eastern Wine Competition (IEWC);
4. An article, dated June 4, 2009, *Finger Lakes Riesling Sweeps Awards*, from www.timesunion.com, reflecting that the 2006 Tierce won an award at the 2009 IEWC; and
5. An article, dated June 2009, *A Study in Riesling*, from Wines and Vines, which is about Tierce and briefly includes the beneficiary's involvement with the wine.

Counsel further claims on motion:

> Although these documents are from publications subsequent to the filing of the original immigrant visa petition, they all relate to the 2006 Tierce wine, which collaboration and wine was created prior to the submission of the petition. Although evidence of the recognition of this unique collaboration was submitted as part of the original petition, these supplemental submissions nevertheless relate to the original creation of the 2006 Tierce wine project.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

We are not persuaded by counsel's assertions that the documents submitted on motion should be considered because they relate to the 2006 Tierce wine project. The employment-based petition was originally filed on May 24, 2007. While the record appears to reflect that the Tierce wine was developed in 2006, the submitted documentation by counsel on motion relates to events occurring after the filing of the petition. For example, the award at the 2009 IEWC occurred from May 18-20, 2009. In fact, regarding item 1, the article was published in the magazine in August 2009, after the AAO dismissed the original appeal. As such, we will not consider the evidence to establish the petitioner's eligibility. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r. 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Therefore, a review of the evidence that counsel submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2) and will not be considered a proper basis for a motion to reopen.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are 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." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the petitioner has not met that burden. The motion to reopen will be dismissed.

In the motion to reconsider, counsel reiterates the same arguments made in the original appeal and claims that the AAO did not properly evaluate the evidence. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. See *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a de novo legal determination reached in its decision that may not have been addressed by the party. Further 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. 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 must show how a change in law materially affects the prior decision. See *Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

In this case, counsel failed to support his motion with any precedent decisions or other evidence to establish that the decision was based on an incorrect application of law or USCIS policy. The motion to reconsider will be dismissed.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The motion to reopen and the motion to reconsider are dismissed, the decision of the AAO dated June 16, 2009, is affirmed, and the petition remains denied.