U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B2

[redacted]

DATE: DEC 17 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on October 2, 2008. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on October 21, 2009. The AAO dismissed the petitioner's first two motions to reopen and reconsider on April 12, 2011, and on July 11, 2012. The matter is again before the AAO on a motion to reopen and reconsider. The motion to reopen will be dismissed. The motion to reconsider will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

In order to properly file a motion with U.S. Citizenship and Immigration (USCIS), 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 failed to submit a statement regarding if the validity of the decision of the AAO 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).

The AAO dismissed the most recent motion to reopen due to the unsupported claims of the petitioner's former counsel regarding evidence that the petitioner provided. Former counsel asserted that the submitted evidence was "new" as the petitioner was previously unaware of the submitted evidence and due to the remote location where the petitioner's spouse resided, she was unable to timely provide the evidence. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported assertions of counsel in a brief are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). 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]

The AAO dismissed the previous motion to reconsider due to the petitioner's failure to comply with the regulatory requirements of a motion to reconsider. Specifically, the motion did not allege the manner in which the AAO erred in its previous decision and he failed to support claims of such error with any precedent decisions.

The petitioner's statement accompanying the present motions reiterates his previous claim that his spouse resided in a remote area in Nepal, and due to the country conditions, she was unable provide the documents to him within the initial proceedings. The petitioner continues to assert that the

[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.)

evidence submitted with his previous motion should be considered "new" evidence as it "was not available and could not have been discovered or presented in the previous proceeding." That the petitioner was unable to come into possession of the evidence is not equivalent to it not being available to the petitioner. The evidence submitted with the prior motion included (1) two 2009 letters from [redacted] attesting to the age of *The Rising Nepal* but not the actual circulation data, (2) a previously submitted "Vignettes" article in *The Rising Nepal*, (3) a 2004 award from the Nepal Art Foundation in Bhaktapur and a July 9, 2010 letter relating to that award, (4) evidence relating to a judging experience in Kathmandu in 2005, (5) a previously submitted "Music for Peace" certificate issued in 1998, (6) a September 5, 1998 letter relating to the "Music for Peace" award, (7) a July 7, 2005 letter from [redacted] of the Nepal Medical Association affirming a judging experience already documented in the record, (8) a Certificate of Appreciation from the Association of Nepalis in America (ANA) that postdates the filing of the petition and (9) several letters from individuals in the United States.

The submitted evidence from the ANA postdates the petition filing date. A petitioner must establish the elements for the approval of the petition at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12). A petition may not be approved if the petitioner was not qualified at the priority date, but expects to become eligible at a subsequent time. *See Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). It is also unclear (1) how the evidence relating to the 1998 "Music for Peace" certificate, the "Vignettes" article and documents from the Nepal Medical Association should be considered new when the petitioner had submitted the same or similar evidence previously in this proceeding, or (2) how he depended upon his wife, under dangerous conditions in Nepal, to obtain the documents that are from U.S. sources when the evidence originated from the United States. Further, the petitioner was advised as early as the director's request for evidence that circulation data was required for the published material. The petitioner fails to explain why he was only able to obtain additional evidence regarding the circulation of *The Rising Nepal* from Nepal. Regardless, the letter submitted with the last motion does not provide that information.

The remaining evidence includes documents pertaining to the previously unclaimed 2004 award and the previously unclaimed 2005 judging experience. The petitioner makes no attempt in his current motion to address the AAO's previous conclusion that the petitioner had not supported his assertion that his wife was previously unable to obtain evidence from a "remote" location in Nepal. The AAO notes that the record includes the petitioner's Form I-485, Application to Register Permanent Residence or Adjust Status. On this form, he indicated that his wife was born in Kathmandu and that his last residence abroad was in Kathmandu, where he lived from 1990 through 2006. The AAO affirms its previous finding that the petitioner has not established that his wife had to acquire evidence from a remote location in Nepal. Finally, the AAO notes that the petitioner has submitted additional evidence from Nepal in response to the director's request for evidence, on appeal, and in support of the first two motions, revealing that the petitioner has been able to acquire evidence from Nepal throughout this proceeding.

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, 108 (1988)). "There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 at 107. Based on its discretion, "[T]he [USCIS] has some latitude in deciding when to reopen a case. [USCIS] should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case." *Id.* at 108. The result also needlessly wastes the time and efforts of the triers of fact who must attend to the filing requests. *Id.* A party seeking to reopen a proceeding bears a "heavy burden." *Id.* at 110. With the current motion, the petitioner has not met that burden.

Motion to Reconsider

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 USCIS policy. 8 C.F.R. § 103.5(a)(3). The Board of Immigration Appeals (BIA) generally provides that a motion to reconsider asserts that at the time of the previous decision, an error was made. It questions the decision for alleged errors in appraising the facts and the law. The very nature of a motion to reconsider is that the original decision was defective in some regard. *See Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991).

Additionally, a motion to reconsider cannot 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, 220 (BIA 1990, 1991). 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 could 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. *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 must show how a change in law materially affects the prior decision. *Id.* at 60.

The petitioner has not provided any pertinent precedent decision in support of his reasons for reconsideration. Consequently, he has failed to meet the regulatory requirements for a motion to reconsider.

Motion to Reopen

A motion to reopen is a fundamentally different motion than a motion to reconsider. *Id.* at 402 (citing *Sanchez v. INS*, 707 F.2d 1523, 1529 (D.C.Cir.1983); *Chudshevid v. INS*, 641 F.2d 780, 783

(9th Cir.1981)). It does not contest the correctness of (or simply request a reevaluation of) the prior decision on the previous factual record. Rather, a motion to reopen proceedings seeks to reopen proceedings so that new evidence can be presented and so that a new decision can be entered, normally after a further evidentiary hearing. *Matter of Cerna*, 20 I&N Dec. at 403. "A motion to reopen must state the *new* facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence." (Emphasis added) 8 C.F.R. § 103.5(a)(2). The petitioner presents the same facts within this motion that he presented in a previous proceeding and has submitted no new evidence. Therefore, he has failed to meet the regulatory requirements for filing a motion to reopen.

Within the present motion, the petitioner also references elements of the original appellate decision by the AAO that were not contained within the previous motion proceeding. The present motion may only address the elements contained in the most recent AAO decision. As that decision merely restated the director's findings regarding the petitioner's eligibility for purposes of explaining the shortcomings of the appeal, the AAO will not consider such claims in the present motion.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)). Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The motion to reopen is dismissed. The motion to reconsider is dismissed. The decision of the AAO dated July 12, 2012, is affirmed, and the petition remains denied.