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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

[redacted]

B2

DATE: JUL 13 2012 OFFICE: TEXAS SERVICE CENTER [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:

[redacted]

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition on August 3, 2009. On appeal, the Administrative Appeals Office (AAO) found that the petitioner did not meet his burden of establishing eligibility for the benefit sought and dismissed his appeal on June 23, 2010. The matter is now before the AAO on a motion to reopen. The motion will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

I. Requirements of a Motion

The regulation at 8 C.F.R. § 103.5(a)(1)(iii) informs the public of the filing requirements for a motion and provides in pertinent part:

A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:

(A) In writing and signed by the affected party or the attorney or representative of record, if any;

(B) Accompanied by a nonrefundable fee as set forth in § 103.7;

(C) Accompanied 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;

(D) Addressed to the official having jurisdiction; and

(E) Submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

A party seeking to reopen a proceeding bears a heavy burden and "must state the new facts to be provided in the reopened proceeding 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 evidence that was not available and could not have been discovered or presented in the previous proceeding. *See Matter of Singh*, 24 I&N Dec. 331, 334 (BIA 2007). Motions to reopen 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." *Abudu*, 485 at 107. Based on its discretion, "the INS [now the U.S. Citizenship and Immigration Services (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.*

While the petitioner claims to be filing a motion to reopen, the AAO notes that a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the previous decision was based on an incorrect application of law or 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. *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.

In the instant motion, the petitioner fails to submit a statement indicating if the validity of the AAO's June 23, 2010 unfavorable decision has been or is the subject of any judicial proceeding pursuant to 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the instant motion must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4) without regard to the claims contained within the motion.

II. Eligibility for the Classification Sought

Notwithstanding this fundamental defect in the petitioner's motion, the AAO will review the filing to see whether it meets the other requirements of a motion. The petitioner seeks classification as an "alien of extraordinary ability" in athletics, as a kettlebell (girevoy or girya) trainer, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined that the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act; 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i)-(x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

In its June 23, 2010 decision, the AAO dismissed the petitioner's appeal, concluding that he had failed to meet at least three of the ten regulatory criteria under the regulation at 8 C.F.R. § 204.5(h)(3), and, in the final merits determination, that he had failed to demonstrate that he has sustained national or international acclaim or that he is within a small percentage at the very top of the field of kettlebell trainers. *See* 8 C.F.R. § 204.5(h)(3). The AAO specifically and thoroughly discussed the criteria implicated by the evidence the petitioner submitted, including the prizes or awards for excellence criterion under 8 C.F.R. § 204.5(h)(3)(i), the membership in associations criterion under 8 C.F.R. § 204.5(h)(3)(ii); the published material about the alien criterion under 8 C.F.R. § 204.5(h)(3)(iii); the participation as a judge criterion under 8 C.F.R. § 204.5(h)(3)(iv); the original contributions of major significance criterion under 8 C.F.R. § 204.5(h)(3)(v); and the leading or critical role criterion under 8 C.F.R. § 204.5(h)(3)(viii).

In support of the instant motion to reopen and reconsider, counsel has filed a two-page letter and the following documents: (1) a translation of the petitioner's diploma from the [redacted] College of Physical Culture and Sports, dated June 28, 1985, and (2) a translation of the petitioner's diploma of young specialist from Kherson State University, dated June 6, 2005. Translations for both diplomas were previously submitted when the petitioner filed the petition on June 23, 2008. The translations were originally provided on a "New York Business Center" letterhead and were notarized by [redacted] on June 5, 2008. The translations filed on appeal are provided on a "1st Translation Center" letterhead and are notarized by [redacted] on July 9, 2010. In his two-page letter, counsel fails to explain the submission of a second translation for the two diplomas. The AAO notes that although the two translations provided on appeal are formatted differently from the translations provided in June 2008, the contents are the same.

After a careful and thorough review of the record, the AAO dismisses the petitioner's motion, finding that he has not shown that a motion to reopen is warranted based on previously unavailable evidence. Even if the petitioner had indicated that the filing also constituted a motion to reconsider, the AAO would find that the petitioner has also failed to show that a motion to reconsider is warranted based on errors in the AAO's June 23, 2010 decision.

With regard to the prizes or awards for excellence criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(i), counsel states in his two-page letter that the petitioner's "achievements have been recognized in the field, as he has received several awards and recognitions." He further asserts that the petitioner "is presenting copies of awards and confirmation of substantial achievements in his fields [sic]." Counsel does not assert that the petitioner is submitting "new" evidence, as defined above, or explain how the petitioner's awards are nationally or internationally recognized.

With regard to the membership in associations criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(ii), counsel states in his two-page letter that the petitioner "is a member of several professional organizations in Ukraine, Latvia and the U.S. which deal in the [k]ettlebell athletic field, the [petitioner] is an accomplished trainer." The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) states that the alien must be a member of an association that requires outstanding

achievements of its members as judged by national or international experts. On motion, counsel makes no mention of the requirements for admission to membership or the judges of admission to those memberships.

Counsel has not challenged the AAO's findings relating to the published material about the alien criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the participation as a judge criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(iv), or the leading and critical role criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(viii). In fact, counsel has not referenced any of these criteria in his two-page letter.

With regard to the original contributions of major significance criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(v), counsel states that the petitioner "won numerous competitions and also trained students who won both national and international competitions." Counsel further asserts that the petitioner "received compensation and [b]onuses form [sic] his students' winnings." Counsel does not address the AAO's conclusion that the petitioner's talent as a competitor and trainer are not "original" or acknowledge that the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires evidence of a high salary or significantly high other remuneration *in relation* to others in the field.

In the instant motion, counsel fails to state new facts or provide any previously unavailable evidence in support of his assertion that the petitioner meets any of the criteria. As such, the AAO finds that a motion to reopen is not warranted. *See* 8 C.F.R. § 103.5(a)(2). In fact, counsel states: "we rely upon the initially submitted evidence."

Moreover, in the instant motion, counsel fails to state any reason for reconsideration. Counsel makes no assertion that the AAO's June 23, 2010 decision contained erroneous facts or was based on an incorrect application of law or USCIS policy. As such, a motion to reconsider is not warranted. *See* 8 C.F.R. § 103.5(a)(3); *Matter of Cerna*, 20 I&N Dec. at 403. The AAO finds that in filing the instant motion, counsel is submitting, in essence, the same arguments presented on appeal and is seeking reconsideration, but he has not alleged any error in the prior AAO decision. This assertion is not a valid basis for reconsideration of the AAO's June 23, 2010 decision. *See Matter of O-S-G-*, 24 I&N Dec. at 58.

Finally, counsel's mere statement in his two-page letter that the petitioner is eligible for the employment-based immigrant visa, without providing any legal support establishing that the AAO's June 23, 2010 decision was decided in error, does not require the AAO to conduct a full analysis of all the criteria counsel claims the petitioner meets. *See Desravines v. United States Att'y Gen.*, No. 08-14861, 343 F. App'x 433, 435 (11th Cir. 2009) (finding that issues not briefed on appeal by a *pro se* litigant are deemed abandoned); *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir. 1979) (deeming abandoned an issue raised in the statement of issues but not anywhere else in the brief).

III. Conclusion

Pursuant to the regulation at 8 C.F.R. § 103.5(a)(1), a motion must be accompanied by a statement indicating if the validity of the AAO's unfavorable decision has been or is the subject of any judicial proceeding. As the petitioner has failed to submit such a statement accompanying his motion to reopen and reconsider, the regulation at 8 C.F.R. § 103.5(a)(4) requires that the motion be dismissed.

Moreover, the AAO finds that the petitioner has not met its "heavy burden" of showing that the instant motion to reopen should be granted, because the petitioner has not stated new facts to be provided in the reopened proceeding, nor has he sufficiently supported the new facts with affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). Furthermore, the AAO finds that the petitioner has not shown that a motion to reconsider should be granted, because the petitioner has not stated any valid reason for reconsideration, nor has he sufficiently supported any reason for reconsideration with pertinent precedent decisions establishing that the AAO's June 23, 2010 decision contained erroneous facts or was based on an incorrect application of law or USCIS policy. *See* 8 C.F.R. § 103.5(a)(3). Accordingly, the instant motion to reopen and reconsider will be dismissed.

The burden of proof in visa petition proceeding 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 reconsider is dismissed. The decision of the AAO dated June 23, 2010 is affirmed, and the petition remains denied.