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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 0 1 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition on May 21, 2012. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on June 20, 2013. 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.

In the decision of the AAO dismissing the petitioner's original appeal, the AAO found that the petitioner failed to establish that the beneficiary meets at least three of the regulatory criteria pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(ii). The AAO specifically and thoroughly discussed the petitioner's evidence and determined that the petitioner failed to establish the beneficiary's eligibility for the education criterion pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A), the employment criterion pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B), the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D), the membership criterion pursuant to the regulation at 8 C.F.R. 204.5(k)(3)(ii)(E), and the significant contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F). The petitioner did not claim to meet the remaining criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C). In addition, the AAO found that the petitioner failed to demonstrate 1) its ability to pay the proffered wage as of the priority date, 2) that the beneficiary meets the requirements set forth on the ETA Form 9089, Application for Permanent Employment Certification, 3) that the Schedule A Application was filed within the validity period of the prevailing wage determination and 4) that the beneficiary qualifies for Schedule A, Group II designation.

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 failed to submit a statement regarding whether the validity of the AAO's decision has been, or is, subject of any judicial proceeding. Thus, the filing does not meet the requirements of a motion.

On motion, neither counsel nor the petitioner addresses the issue of the validity of the prevailing wage determination. In addition, beyond acknowledging the inconsistencies in the record noted in the AAO's decision regarding the beneficiary's employment history, counsel fails to provide any evidence to demonstrate where the truth lies or explanation for the inconsistencies. Thus, the petitioner has abandoned any claim regarding these matters. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005); *Hristov v. Roark*, No. 09-CV-2731, 2011 WL 4711885 at *9 (E.D. N.Y. Sept. 30, 2011).

I. MOTION TO REOPEN

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]

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot be considered a proper basis for a motion to reopen. In addition, the petitioner failed to explain why the evidence was previously unavailable and could not have been submitted earlier. The petitioner has been afforded multiple opportunities to submit this evidence: at the time of the original filing of the petition, in response to the director's requests for evidence and at the time of the filing of the appeal.

On motion, the petitioner submitted a copy of the beneficiary's diploma, transcript and a printout from the (which lists the online degree programs offered, an unsigned letter with no author's name or job title purported to be from seven letters dated prior to the director's decision, an unsigned letter purported to be from and a letter from the Nebraska.

Regarding the unsigned letters, they hold no probative value. Regarding the seven letters dated prior to the director's decision, the petitioner could have submitted these letters on appeal. In addition, they fail to provide any new information. One letter is similar to one previously submitted which confirms that the beneficiary is an active member in his church in Regarding the other six letters, the record contains letters from other congregations in response to the petitioner's request to sell its wares at different congregations. Likewise, the letter from the is also demonstrative only of the receipt of the request to sell the carvings and the 's approval, pending the approval of the individual parishes. Regarding the education documents, the petitioner previously submitted the transcripts and could have previously submitted the diploma and the website printout.

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.

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[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 NEW COLLEGE DICTIONARY, (3d Ed 2008). (Emphasis in original).

II. 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 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. *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.

On motion, counsel asserts that the AAO raised the petitioner's ability to pay as a *de novo* issue. The director, however, found that without a list of personal monthly expenses, the petitioner could not establish its ability to pay the beneficiary. The AAO noted that the petitioner did not contest the director's determination relating to ability to pay on appeal and concluded that the petitioner had abandoned this issue. The petitioner may not now raise that issue on motion. *Matter of Medrano*, 20 I&N Dec. at 220.

Also on motion, counsel generally asserts that the AAO should not apply a literal interpretation of the regulations because the regulation at 8 C.F.R. § 2045.(k)(3)(iii) allows for the submission of comparable evidence where the criteria do not readily apply to the beneficiary's occupation. Counsel cites no legal authority for the proposition that the AAO erred by applying the plain language of the regulations the petitioner claimed to meet. *See Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008) (USCIS may not utilize novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5). Moreover, counsel does not explain how the evidence the petitioner submitted is comparable. For example, where the plain language of the regulation requires evidence in the plural, as it does with memberships, counsel does not explain how a single membership is comparable. Moreover, while counsel asserts that the director erred in noting the boilerplate language used in several reference letters, counsel does not cite any legal authority differing from the legal authorities on which the AAO relied when discussing this issue.

In addition, counsel does not contest that the AAO correctly applied the plain language requirements set forth at 20 C.F.R. § 656.15(d)(1), but asserts that "the interpretation doesn't square with the breadth of EB-2 Exceptional ability." Schedule A, Group II designation, a blanket certification, is a separate benefit from the EB-2 classification, which the petitioner may

support with either a blanket or individual certification. 8 C.F.R. § 204.5(k)(4). In implementing the regulations for the higher preference extraordinary ability classification set forth at section 203(b)(1)(A) of the Act, legacy Immigration and Naturalization Service (now USCIS) stated:

> The legislative history indicates at House Report 101-723, p. 59, that Congress intended for IMMACT's "extraordinary ability" classification to be comparable to the Department of Labor's "exceptional ability" standard set out in Schedule A/Group II. Unfortunately, IMMACT also uses the term "exceptional ability" when referring to certain immigrants under the new second employment-based classification; yet IMMACT indicates that its "exceptional ability" classification is a less restrictive one than its "extraordinary ability" classification. Therefore, IMMACT's "exceptional ability" classification is necessarily also less restrictive than the Department of Labor's Schedule A/Group II "exceptional ability" standard.

Employment Based Immigration, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). Accordingly, the petitioner has not established that the AAO erred by separately evaluating the beneficiary's eligibility for Schedule A, Group II designation under the Department of Labor standards set forth for that benefit rather than the less restrictive USCIS standard for the EB-2 classification.

Counsel continues that the letters from clergy "constitute 'published material in professional publications about the alien's work in the field for which certification is sought.'" *See* 20 C.F.R. § 656.15(d)(1)(iii). Counsel provides no legal authority for the proposition that printed information distributed to mission members constitutes qualifying published material under the plain language of the regulation at 20 C.F.R. § 656.15(d)(1)(iii).

Finally, counsel states: "The AAO concludes that the offer made by is not a bona fide offer of employment because of the father/son relationship that the petitioner and beneficiary have." The AAO, however, did not determine that the relationship precluded a finding that the job offer was bona fide, stating instead that "if the appeal were not being dismissed for [the] reasons set forth herein, the bona fides of the job offer would remain an unresolved issue."

As noted above, a motion to reconsider must include specific allegations as to how the AAO erred as a matter of fact or law in its prior decision, and it must be supported by pertinent legal authority. The petitioner's filing does not meet this requirement.

III. SUMMARY

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.

The motion will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen and the motion to reconsider are dismissed, the decision of the AAO dated June 20, 2013, is affirmed, and the petition remains denied.