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



U.S. Citizenship
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Services

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FEB 17 2010

FILE: [REDACTED]
LIN 07 062 52772

Office: NEBRASKA SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 March 24, 2008. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on May 29, 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, the petitioner only specifically discussed two criteria that he felt he fulfilled, the receipt of lesser nationally or internationally recognized prizes or awards for excellence and the authorship of scholarly articles. The petitioner did not specifically address any other criteria in which the AAO failed to analyze or cite to specific errors on the part of the director in his motion to reopen. Therefore, even if he were to persuade us on two grounds, which he does not, he is required to meet at least three of the ten criteria at 8 C.F.R. § 204.5(h)(3). With regard to his receipt of lesser nationally or internationally recognized prizes, the petitioner argued that he was "finally honored" with the IBRO Fellowship and that it should have been clear to the AAO that he would be granted such fellowship. In order to support the petitioner's contention that his articles received sustained acclaim, he submitted the following documentation:

1. An article from *Nature Neuroscience*, dated May 2008, entitled "Cortical activity patterns predict speech discrimination ability," which cites to the article co-authored by the petitioner entitled, "Effect of auditory cortex lesions on the discrimination of frequency-modulated tones in rats."
2. An article from *Nature Neuroscience*, dated February 2007, entitled "Synapse-specific reconsolidation of distinct fear memories in the lateral amygdala," which cites to the petitioner's article in item 1,
3. An article from the *National Institute of Health Public Access*, dated November 2007, entitled "Context Modulates the Expression of Conditioned Motor Sensitization, Cellular Activation, and Synaptophysin Immunoreactivity," which cites to another article co-authored by the petitioner entitled, "Topography of cortical projections to the dorsolateral neostriatum in rats: multiple overlapping sensorimotor pathways."
4. An article from *Frontiers in Neuroanatomy*, dated May 2008, entitled "Histochemical characterization, distribution and morphometric analysis of NADPH diaphorase neurons in the spinal cord of the agouti," which cites to an article co-authored by the petitioner entitled, "NADPH-diaphorase-positive neurons in the auditory cortex of young and old rats,"
5. An article from *The Journal of Neuroscience*, dated December 10, 2008, entitled "The Sensory Insular Cortex Mediates the Stress-Buffering Effects of Safety Signals But Not Behavioral Control," which cites to the article co-authored by the petitioner named in item 3,
6. An article from the *Australian Acoustical Society*, dated April 2006, entitled "Efferent Control of Hearing," which cites to an article co-authored by the petitioner entitled, "Changes in neuronal activity of the inferior colliculus in rat after temporal inactivation of the auditory cortex."
7. An article from *Neuroscience*, dated June 12, 2008, entitled "The distribution of nitric oxide synthase in the inferior colliculus of a guinea pig," which cites to an article co-

- authored by the petitioner entitled, "Changes in the acoustically evoked activity in the inferior colliculus of the rat after functional ablation of the auditory cortex," and
8. An article from *Physiological Research*, dated 2008, entitled "Coding of Communications Calls in the Subcortical and Cortical Structures of the Auditory System," which cites to the article co-authored by the petitioner discussed in items 1 and 2.

In addition to providing the additional citations above to articles that the petitioner co-authored, the petitioner also submitted a letter of support from the [REDACTED] dated June 18, 2009.

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

Moreover, the petitioner must establish eligibility at the time of filing the immigrant visa petition. A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katighak*, 14 I&N Dec. 45, 49 (Comm. 1971). All of the citations provided in items 1 through 8 occurred after the filing of the petitioner's petition, which was December 27, 2006. As such, these additional citations will not be considered.

Similarly, although the petitioner also argued that his IBRO Fellowship constituted the receipt of a lesser nationally or internationally recognized prize or award for excellence he was not awarded his IBRO Fellowship until after the petition was filed. As previously indicated, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katighak*, 14 I&N Dec. at 49. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Moreover, although the petitioner has stated that he received such fellowship in his motion to reopen, no additional documentation was provided to support his receipt of such fellowship. Further, no additional documentation was provided to establish that the IBRO Fellowship is a nationally or internationally recognized prize or award of excellence in his field. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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).

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.

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, the petitioner failed to support his motion with any precedent decisions or other argument 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 May 29, 2009, is affirmed, and the petition remains denied.