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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
and Immigration
Services

PUBLIC COPY

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[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date **OCT 20 2010**

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 this employment-based immigrant visa petition on February 11, 2009. The petitioner filed a motion to reopen and reconsider on March 16, 2009 and the Director, Texas Service Center, denied the motion on March 30, 2009. The petitioner filed an appeal on April 29, 2009. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on October 19, 2009. The matter is again 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.

The petitioner is seeking to reopen the AAO's October 19, 2009 summary dismissal. On motion, rather than addressing the AAO's decision, the petitioner attempts to address the director's decision, stating that the "director erred by misapplying discretionary authority without considering material facts." The petitioner then generally asserts that the petitioner "meets more than three criteria pursuant to 8 C.F.R. § 204.5(h)(3)." The petitioner submits additional documentation but does not specify to which of the regulatory criteria the evidence purportedly applies. On motion, the petitioner submitted the following documentation:

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.

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). All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. The petitioner's motion is not an opportunity for the petitioner to correct his own defects in the record. The AAO notes that some of the evidence submitted on motion is duplicative of previously submitted evidence such as the article about the [REDACTED] daily. It is further noted that the petitioner has submitted evidence with this motion that was originally requested by the director in a request for additional evidence (RFE) dated October 29, 2008. For instance, the petitioner submitted evidence of 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).

circulation of the Nepalese media in which the articles submitted were published, as previously requested by the director in his RFE. *Matter of Soriano* 19 I&N Dec. 764 (BIA 1988), held that a petitioner may be put on notice of evidentiary requirements by regulations, written notice such as a request for additional documentation or a notice of intent to deny. As the petitioner was previously put on notice and provided with reasonable and numerous opportunities to provide the required evidence, the cumulative and repetitive evidence submitted on motion will not be considered "new" 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, the petitioner reiterates the same arguments made in the motion before the director and on appeal. 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 legal argument or precedent decisions 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 October 19, 2009, is affirmed, and the petition remains denied.