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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 03 2011

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, with a fee of $630. 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, Nebraska Service Center, denied this employment-based immigrant visa petition on January 5, 2009. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on October 26, 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.

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 if the validity of the decision of the AAO has been or is subject of any judicial proceeding. As such, the motion must be dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4).

Notwithstanding the above, in the decision of the AAO dismissing the petitioner's original appeal, the AAO found that the petitioner failed to establish that he meets at least three of the regulatory criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). Specifically, the AAO found that the petitioner failed to establish eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), and the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). In fact, the AAO found that the petitioner failed to establish eligibility for any of the criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3).

On motion, regarding the AAO's findings that the petitioner failed to establish that he received any prizes or awards for his finishes of fourth, fifth, and sixth at competitions, counsel argues:

> The [redacted] referenced in the Dismissal is the [redacted] It is under the auspices of the [redacted] that these events took place. Without sanction by the [redacted], these events would be merely local or regional in nature. Enclosed is a copy of the [redacted] July 2006 Competition Calendar listing the events, among others, that the petitioner entered and placed in.

As indicated above, the petitioner submitted the July 2006 Competition Calendar from [redacted] We note here that this was the only documentary evidence submitted on motion. 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). 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 three different opportunities to submit this evidence: at the time of the original filing of the petition on March 19, 2007, in response to the director's request for additional evidence issued on August 18, 2008, and at the time of the filing of the appeal on February 6, 2009. 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.

Furthermore, 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. Regardless, the documentary evidence submitted by the petitioner fails to establish that the petitioner received any prizes or awards from his fourth, fifth, and sixth place finishes. The July 2006 Competition Calendar from NDCA submitted by the petitioner only reflects information for the events, such as the names, addresses, and dates, and does not provide information regarding any prizes or awards. As the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the alien's receipt of lesser nationally or internationally recognized *prizes* or *awards for excellence* in the field of endeavor [emphasis added]," the petitioner must establish that his fourth, fifth, and sixth place finishes are nationally or internationally recognized prizes or awards for excellence. Merely submitting documentary evidence reflecting the petitioner's finishes in dance competitions is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) without documentary evidence establishing that his finishes are nationally or internationally recognized prizes or awards for excellence.

Moreover, counsel argues that the AAO failed to consider the documentary evidence submitted in response to the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8). However, the documentary evidence, as addressed in the AAO's decision, related to events occurring after the filing of the petition. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r. 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

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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 II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

Therefore, the AAO correctly did not consider the petitioner's documentary evidence that reflected events occurring after the filing of the petition. The filing of a motion to reopen does not permit the petitioner to become eligible based on events occurring after the filing of the original petition.

In addition, counsel argues that the AAO failed to give proper weight and consideration to the petitioner's evidence and argues that meeting at least three of the ten criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3) is sufficient to demonstrate sustained national or international acclaim. 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, counsel failed to support the motion with any precedent decisions or other comparable evidence to establish that the decision was based on an incorrect application of law or USCIS policy. We note that in 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[2] With respect to the criteria at 8 C.F.R. §§ 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.*

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed

[2] Specifically, the court stated that the AAO had unilaterally imposed novel, substantive, or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

> If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at 1119.

Thus, sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. Therefore, submitting evidence that establishes that the petitioner meets at least three of the regulatory criteria is insufficient to establish the petitioner's eligibility pursuant to section 203(b)(1)(A) of the Act without documentation reflecting that the petitioner has sustained national or international acclaim and his achievements have been recognized in the field.

We also note that counsel claimed that "the petitioner never indicated that his O1 nonimmigrant visa status confers upon him automatic immigrant status under INA 203(b)(1)(A)." However, as indicated in the AAO's decision, counsel did, in fact, argue that the petitioner's O-1 nonimmigrant status was a persuasive factor in determining the petitioner's eligibility pursuant to section 203(b)(1)(A) of the Act. Specifically, counsel stated that "[the petitioner] has already been determined to be an alien of extraordinary ability by the Service. This prior determination by the Service, which must be considered a persuasive factor, together with other proofs presented, has clearly been ignored in the formulation of the denial." As such, we are not persuaded by counsel's argument.

Finally, we note that counsel failed to address the other findings of the AAO as they pertained to the awards criterion. Furthermore, counsel failed to address the membership criterion, the published material criterion, the original contributions criterion, the artistic display criterion, and the high salary criterion. Accordingly, we deem those issues to be abandoned. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005). Even if counsel were to prevail on the awards criterion raised on motion, and we do not imply that he would, such a conclusion would not overcome the AAO's ultimate conclusion that the petitioner does not meet at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

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 motion to reconsider are dismissed, the decision of the AAO dated October 26, 2009 is affirmed, and the petition remains denied.