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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

B2

[redacted]

DATE: MAY 03 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: 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:

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, Texas Service Center, denied the employment-based immigrant visa petition on April 15, 2009. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on January 6, 2010. 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 motions 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 she meets at least three of the regulatory criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). The AAO specifically and thoroughly discussed the petitioner's evidence and determined 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), and the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v). 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, counsel listed the documentary evidence that was submitted at the time of the original filing of the petition and on appeal. In addition, counsel summarized her original arguments on appeal and the finding of the AAO for each of the criteria. On motion, counsel submitted the following documentary evidence:

1. Screenshots from www.unhcr.org regarding Belize;

2. Screenshots from http://lcweb2.loc.gov regarding mass communication in Belize;

3. Screenshots from www.world-newspapers.com regarding newspapers in Belize;

4. Screenshots from www.wikipedia.com regarding newspapers in Belize;

5. CDs entitled *I Believe* and *Vision*;

6. A Certificate of Registration from the United States Copyright Office, dated November 16, 1999, for *Take Up Your Vision*;

7. Screenshots from www.hilltoprecords.com regarding background information about Hilltop Records;

8. An application for registration with the United States Copyright Office, dated February 3, 2010, for *I Believe*;

9. An application for registration with the United States Copyright Office, dated March 2, 2010, for *Gospel*;

10. A letter, dated January 7, 2010, from the petitioner requesting to participate at Pastors Singing for Jesus on February 6, 2010;

11. A letter, dated November 16, 2009, from for the screening of the petitioner's song for the upcoming CD entitled, and

12. An advertisement for the on November 21, 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]

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 two different opportunities to submit this evidence: at the time of the original filing of the petition and at the time of the filing of the appeal. 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. The AAO notes regarding items 8 -12 that they reflect events occurring after the filing of the petition on February 11, 2009. Eligibility must be established at the time of filing. Therefore, the AAO will not consider these items as evidence to establish the petitioner's eligibility. 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

[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).

I&N Dec. 114 (BIA 1981), that the cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. In fact, regarding items 8 – 10, the documentation reflects events occurring after the AAO's dismissal of the petitioner's original appeal.

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).

On motion, counsel argues that based on the population of Belize, the petitioner's documentary evidence was sufficient to establish eligibility. Specifically, regarding the awards criterion, counsel argues that "a single letter can be sufficient to establish eligibility for this criterion." Furthermore, counsel argues that the petitioner is eligible for the membership criterion since the [redacted] "is the only artists association in the country of Belize." Moreover, regarding the published material criterion, counsel argues that "[t]he fact that only one article was published about [the petitioner] should be analyzed in the context of the small size of the country. Finally, regarding the original contributions criterion, counsel argues that the submission of the petitioner's CDs and copyright applications are sufficient to establish eligibility for the criterion.

The motion to reconsider does not allege that the issues, as raised on appeal, involved the application of precedent to a novel situation, or that there is new precedent or a change in law that affects the AAO's prior decision. 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. Because the respondent has failed to raise such allegations of error in her motion to reconsider, the AAO will dismiss the motion to reconsider.

The AAO notes that even if the petitioner were to submit supporting documentary evidence showing that her single prize met the awards criterion, that her single membership with met the membership criterion, that her single article met the published article criterion, and that her CDs met the original contribution criterion, which she clearly has not, section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. §§ 204.5(h)(3)(i), 204.5(h)(3)(ii), 204.5(h)(3)(iii), and 204.5(h)(3)(v) requires more than one award, more than one membership, more than one article, and more than one original contribution. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation.[2]

The AAO further notes that 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 plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires "[d]ocumentation of the alien's membership in associations in the field for which is classification is sought, which *require outstanding achievements of their members, as judged by recognized national or international experts* in their disciplines or fields [emphasis added]," the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished material about the alien in *professional or major trade publications or other major media*, relating to the alien's work in the field for which classification is sought [emphasis added]," and the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of *major significance in the field* [emphasis added]." Hence, it is insufficient to merely submit a third-party letter that generally claimed that the petitioner won a $1,000 cash prize without submitting documentary evidence demonstrating that she received nationally or internationally recognized prizes or awards for excellence. Similarly, it is insufficient to demonstrate that the petitioner is a member of ABAF without establishing that the petitioner is a member of associations that require outstanding achievements of their members, as judged by recognized national or international experts. Likewise, it is insufficient to submit to submit a single article without submitting documentary evidence establishing that the petitioner had published material about her regarding her work in professional or major trade publications or other major media. Finally, it is insufficient to submit evidence that she wrote songs or compiled a CD without submitting documentary evidence reflecting that she has made original contributions of major significance in the field. It is incumbent on the petitioner to satisfy every

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[2] *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

element of each claimed criterion.

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 January 6, 2010, is affirmed, and the petition remains denied.