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

PUBLIC COPY

[redacted]

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DATE: APR 10 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a second appeal. The appeal will be rejected.

The record indicates that the AAO issued the decision on the first appeal on December 2, 2010. The petitioner then filed the present appeal on June 21, 2011.

The petitioner's appeal must be rejected. The AAO does not exercise appellate jurisdiction over its own decisions. The AAO exercises appellate jurisdiction over only the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(effective March 1, 2003). Accordingly, the appeal is not properly within the AAO's jurisdiction.

As noted in the AAO's cover letter, the petitioner had the option of filing a motion to reopen or a motion to reconsider the AAO's most recent decision within 33 days of service pursuant to 8 C.F.R. § 103.5 but neither the Form I-290B itself nor the petitioner's brief indicated an intent to file a motion.

Therefore, as the appeal was not properly filed, it will be rejected. 8 C.F.R. §103.3(a)(2)(v)(A)(*1*).

In the alternative, the filing does not meet the requirements of a motion to reconsider or a motion to reopen. 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, 402-403 (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.

The present filing does not allege that the issues, as raised on appeal, involved the application of precedent to a novel situation, or that there is a new precedent or a change in law that affects the AAO's previous decision.

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] The only new evidence the petitioner submits with the present filing is a letter from his employer praising his work for that entity and evidence of an interview that postdates the filing of the petition. The petitioner fails to explain why the letter from his employer could not have been discovered or presented in the previous proceeding on appeal. Regarding the June 19, 2008 interview, the petitioner must demonstrate his eligibility as of the date of filing, July 27, 2007. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971); s*ee also Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998) *citing Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981) (USCIS cannot "consider facts that come into being only subsequent to the filing of a petition.") A review of the evidence that the petitioner submits with the present motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2) or that relates to eligibility as of the date of filing and, therefore, cannot 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 filing, the petitioner has not met that burden.

Here, even if the AAO considered the appeal to be a motion, it did not meet the requirements of a motion to reopen or a motion to reconsider.

ORDER: The appeal is rejected.

[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).