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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: FEB 29 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.

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 June 18, 2009. On appeal, the Administrative Appeals Office (AAO) found that the petitioner did not meet its burden of establishing eligibility for the benefit sought and dismissed its appeal on August 19, 2010. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

The regulation at 8 C.F.R. § 103.5(a)(1)(iii) informs the public of the filing requirements for a motion and provides in pertinent part:

> A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:
>
> (A) In writing and signed by the affected party or the attorney or representative of record, if any;
>
> (B) Accompanied by a nonrefundable fee as set forth in § 103.7;
>
> (C) *Accompanied 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*;
>
> (D) Addressed to the official having jurisdiction; and
>
> (E) Submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

(Emphasis added.)

A party seeking to reopen a proceeding bears a heavy burden and "must state the new facts to be provided in the reopened proceeding 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 evidence that was not available and could not have been discovered or presented in the previous proceeding. *See Matter of Singh*, 24 I&N Dec. 331, 334 (BIA 2007). Motions to reopen 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, 108 (1988)). "There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 at 107. Based on its discretion, "the INS [now the U.S. Citizenship and Immigration Services (USCIS)] has some latitude in deciding when to reopen a case. [USCIS] should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material

facts sufficient to establish a prima facie case." *Id.* at 108. The result also needlessly wastes the time and efforts of the triers of fact who must attend to the filing requests. *Id.*

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 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 proceeding. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990). 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. *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.

In the instant motion, the petitioner failed to submit a statement indicating if the validity of the AAO's August 19, 2010 unfavorable decision has been or is the subject of any judicial proceeding. The regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the instant motion must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4) without regard to the claims contained within the motion.

Notwithstanding this fundamental defect in the petitioner's motion, the AAO will review the merits of the motion. In its August 19, 2010 decision, the AAO dismissed the petitioner's appeal of the Director's denial of the employment-based immigrant visa petition, concluding that the petitioner failed to establish that the beneficiary meets at least three of the ten regulatory criteria under the regulation at 8 C.F.R. § 204.5(h)(3), and that in the AAO's final merits determination, the petitioner failed to demonstrate that the beneficiary "has sustained national or international acclaim and that his . . . achievements have been recognized in the field of expertise." *See* 8 C.F.R. § 204.5(h)(3). The AAO specifically and thoroughly discussed the criteria implicated by the evidence the petitioner submitted, including the membership in associations criterion pursuant to 8 C.F.R. § 204.5(h)(3)(ii); the published material criterion pursuant to 8 C.F.R. § 204.5(h)(3)(iii); the original contributions of major significance criterion pursuant to 8 C.F.R. § 204.5(h)(3)(v); the leading or critical role criterion pursuant to 8 C.F.R. § 204.5(h)(3)(viii); the high salary or other significantly high remuneration for services criterion pursuant to 8 C.F.R. § 204.5(h)(3)(ix); and the commercial successes criterion pursuant to 8 C.F.R. § 204.5(h)(3)(x).

In support of the instant motion to reopen and reconsider, the petitioner filed four additional documents. They are (1) the beneficiary's pay stub for the September 3, 2010 to September 9, 2010 pay period, (2) the beneficiary's pay stub for the December 25, 2009 to December 31, 2009 pay period, (3) an undated and unsigned certificate [redacted] Action Chapter of 2007 to 2008 presented to the beneficiary, noting that the beneficiary was a FNGLA board member, and (4) an undated and unsigned president's award certificate [redacted] Action Chapter of 2006 to 2007 presented to the beneficiary. Also, in its brief in support of the motion, the petitioner claimed that the beneficiary meets five of the ten regulatory criteria under 8 C.F.R. § 204.5(h)(3). The AAO will address each of the relevant criteria below.

> *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.* 8 C.F.R. § 204.5(h)(3)(ii).

As noted in the AAO's August 19, 2010 decision, in its May 21, 2009 response to the Director's Request for Evidence, the petitioner indicated that it "did not make a claim of extraordinary ability under subcategory two [pursuant to] 8 C.F.R. § 204.5(h)(3)(ii) . . . and [the beneficiary] did not argue that his membership in [redacted] should qualify under 8 C.F.R. § 204.5(h)(3)(ii)." Similarly, the petitioner, in its July 2009 appeal to the AAO, made no argument that the beneficiary's membership in [redacted] establishes that he meets this criterion. The petitioner, however, makes this argument in the instant motion. The AAO concludes that the petitioner has abandoned this issue, as it did not timely raise it on appeal. *Sepulveda v. United States Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, 9 (E.D.N.Y. Sept. 30, 2011) (the United States District Court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

Even if the AAO were to conclude that the petitioner had not abandoned this issue, it nonetheless would conclude that the petitioner had not shown that the beneficiary meets this criterion. In the instant motion, the petitioner claimed that the beneficiary has been a member of the [redacted] for over five years. The petitioner further claimed that the beneficiary served on the [redacted] Board of Directors from 2006 to 2008[1] and received its president's award from 2006 to 2007. Along with the motion, the petitioner submitted: (1) an undated and unsigned certificate the [redacted] Action Chapter of 2007 to 2008 presented to the beneficiary, noting that the beneficiary was a FNGLA board member, and (2) an undated and unsigned president's award certificate the [redacted] Action Chapter of 2006 to 2007 presented to the beneficiary. The petitioner, however, has provided no explanation as to its failure to submit either of the two certificates when it responded to the Director's Request

[1] It is unclear if the petitioner, in the instant motion, intended to claim that the beneficiary was a board member from *2006* to 2008, or if it made a typographic error in the motion, because the undated and unsigned certificate notes that the beneficiary was a board member from *2007* to 2008, and there is no other evidence relating to the beneficiary's board membership from *2006* to 2007.

for Evidence in May 2009 or when it appealed the Director's denial of visa petition in July 2009. In short, the petitioner has not established that the two unsigned and undated certificates constitute new evidence, such that it was not previously available or could not have been discovered or presented in the previous proceeding. *See Matter of Singh*, 24 I&N Dec. at 334. As such, the AAO declines to consider them.

Even if the AAO were to consider these two certificates, it nonetheless would find them insufficient to show that the beneficiary meets the criterion under 8 C.F.R. § 204.5(h)(3)(ii). First, service on an association's board is not a membership in the association. Second, the two certificates do not show that the [redacted] requires outstanding achievements of its members, as judged by recognized national or international experts in their disciplines or fields. *See* 8 C.F.R. § 204.5(h)(3)(ii). Specifically, the petitioner has not provided evidence indicating how someone becomes and/or remains a [redacted] member. There is no evidence indicating who may join or remain a [redacted] member, or if the [redacted] requires "outstanding achievements" from any of its members. The AAO notes that neither the June 6, 2008 letter from [redacted] of the [redacted] nor the two undated and unsigned certificates shed any light on this matter.

Accordingly, the AAO denies the petitioner's motion and reaffirms its finding that the petitioner has not provided documentation of the beneficiary's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields. *See* 8 C.F.R. § 204.5(h)(3)(ii).

> *Published 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. Such evidence shall include the title, date, and author of the material, and any necessary translation.* 8 C.F.R. § 204.5(h)(3)(iii).

When the petitioner initially filed the employment-based immigrant visa petition, it claimed that the beneficiary meets the published material criterion under 8 C.F.R. § 204.5(h)(3)(iii). After the Director concluded otherwise, the petitioner appealed this issue to the AAO. In its August 19, 2010 decision, the AAO dismissed the petitioner's appeal, finding that the petitioner had not provided any published material *about* the beneficiary, relating to his work in the field of horticulture. The AAO further concluded that "[s]imply submitting articles that relate to the beneficiary's field, without documentary evidence reflecting published material about the beneficiary relating to his work, is insufficient to meet the plain language of this regulatory criterion." As the petitioner did not raise any issue relating to the AAO's August 19, 2010 findings on the published material criterion under 8 C.F.R. § 204.5(h)(3)(iii) in the instant motion, the AAO will not address it. The AAO's previous findings on the issue remain unchanged.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field. 8 C.F.R. § 204.5(h)(3)(v).

In the instant motion, the petitioner argued that the AAO, in its August 19, 2010 decision, failed to give "expert letters the weight they deserve to prove the beneficiary's original . . . contributions of [] major significance in the field." The petitioner further claimed that the AAO "did not have a specific, cogent reason for finding each of the letters deficient," and argued that "when considered on the whole with the patents and other evidence, the petitioner has established the beneficiary's original business/scientific contributions of major significance in the field." The petitioner claimed in its motion that it "submitted several expert letters of reference."

In its August 19, 2010 decision, the AAO reviewed all reference letters, and "cite[d] representative examples of the beneficiary's recommendation[/reference] letters." Specifically, the AAO decision cited letters written by [redacted] In considering the petitioner's evidence, the AAO concluded that the inconsistencies in the record undermined the reliability of the petitioner's evidence. Specifically, in her March 8, 2008 letter, [redacted] claimed that "as a result of [the beneficiary's] effort, involvement and extraordinary skills in his field," "11 patented plant's certificates [were] assigned and granted to [the petitioner.]" The petitioner's other evidence, however, clearly shows that the petitioner had filed five of the eleven patents with the U.S. Patent and Trademark Office in 1996 and 1997, *before* 1998, when the beneficiary began working either as the petitioner's part-time assistant grower, as claimed in the beneficiary's curriculum vitae, or as an intern, as claimed in [redacted] March 9, 2008 letter. The petitioner has not explained how the beneficiary could have been involved with the filing of the five patents that predate his employment with the petitioner. The petitioner has provided no insights to this matter in the instant motion.

Also, contrary to [redacted] claim relating to the beneficiary's involvement in eleven patents, none of the patent documents lists the beneficiary as the inventor.[2] Again, the instant motion is silent on this matter. As previously noted in the AAO's August 19, 2010 decision, the petitioner provided inconsistent documents and "it is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts [or

[2] The AAO has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215, 221 n.7 (Comm'r 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* A patent recognizes the originality of the idea, but it does not state that the beneficiary made a contribution of *major significance* in the field through his development of the idea.

evidence], absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has provided no such evidence to explain or reconcile the inconsistent and unreliable evidence.

Furthermore, none of the reference letters or the related documents, including Edenspace's March 10, 2008 online printouts, establishes that the beneficiary has made any *original contributions of major significance* in the field of horticulture. Based on the reference letters and related documents, it appears that the beneficiary was involved in the development and production of Edenfern™ - a fern that cleans up arsenic-laden sites, and the re-introduction of Lauae fern in Hawaii.

As the AAO concluded in its August 19, 2010 decision, the petitioner has introduced no evidence to demonstrate that the beneficiary's involvement in the two plants constitutes either *original contributions* or *contributions of major significance* in the field of horticulture. Indeed, the Edenspace's March 2008 online printout, entitled Case Study: Arsenic, does not credit the beneficiary as having initially identified Edenfern™, because it was the "[s]cientists from the *University of Florida* [who] originally identified this fern [redacted] for which Edenspace has licensed exclusive rights for the cleanup of arsenic contaminated soil, sludge, and water." (Emphasis added.) The petitioner provided an extract of Lena Q. Ma's 2001 article, entitled *A Fern that Hyperaccumulates Arsenic*. The extract, however, does not mention the beneficiary or lists him as one of the authors of the article. Also, the petitioner has not submitted any evidence indicating that the beneficiary, who according to his curriculum vitae attended the [redacted] *College* from 1998 to 2003, was ever associated with the University of Florida, much less worked as a scientist for the University of Florida. In fact, none of Edenspace's online printouts about Edenfern™ mentions the beneficiary or the petitioner, much less supports the petitioner's claim that the beneficiary has made *original contributions of major significance* in the field of horticulture.[3] Also, the petitioner's Vice President of Sales and Marketing, [redacted], claimed, in his March 11, 2008 letter, that "[t]he original samples of this fern [Edenfern™] were given to the *University of* [redacted] by [the petitioner]." (Emphasis added.) This claim contradicts the Edenspace's March 10, 2008 online printouts. Again, the petitioner has provided no evidence to explain or reconcile the inconsistent and unreliable evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92. Similarly, the petitioner has not provided evidence establishing that the beneficiary's involvement in the re-introduction of a plant in Hawaii constitutes either *original contributions* or *contributions of major significance* in the field of horticulture. As concluded in the AAO's August 19, 2010 decision, the reference letters provided only general statements without offering any specific information to establish how the beneficiary's involvement in the two plants constitutes either original contributions or contributions of major significance in the field of horticulture.

Accordingly, the AAO reaffirms that the petitioner has not provided evidence of the beneficiary's

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[3] The AAO finds [redacted] May 15, 2009 letter, which discusses the beneficiary's knowledge and expertise in broad and vague terms, insufficient to establish that the beneficiary has made either original contributions or contributions of major significance in the field of horticulture.

original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field of horticulture. *See* 8 C.F.R. § 204.5(h)(3)(v).

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.* 8 C.F.R. § 204.5(h)(3)(vii).

In the instant motion, the petitioner argued that,

> The Director did not consider the [p]etitioner's and the [b]eneficiary's Edenfern™ evidence of [] display of the alien's work in the field of artistic exhibitions or showiness. The brochures were not considered. Ferns and plants are intrinsically artistic, but the Director did not consider them as such.

This is the first time the petitioner argued that the beneficiary meets the criterion under 8 C.F.R. § 204.5(h)(3)(vii). It did not raise this argument when it filed the employment-based immigrant visa petition in November 2008. It did not raise this argument when it responded to the Director's Request for Evidence on May 21, 2009. And it did not raise this argument when it appealed the Director's denial of visa petition in July 2009. The AAO therefore concludes that the petitioner has abandoned this issue, as it did not timely raise it on appeal. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885 at * 9.

Even if the AAO were to conclude that the petitioner had not abandoned this issue, it nonetheless would conclude that the petitioner had not shown that the beneficiary meets this criterion. The petitioner argued that the "alien's work in the field at artistic exhibitions or showcases" includes a 2008-2009 color calendar with the petitioner's logo and business information and a number of colorful brochures. A review of the calendar and brochures indicates that they were aimed to educate consumers of the varieties of plants that the petitioner provided and/or to encourage consumers to purchase plants from the petitioner. Indeed, most of the brochures include plant pricing information and ordering instructions. The petitioner has not provided any legal basis to support its argument that the sales and marketing material, which on its face contains no indication that the beneficiary was involved in its designing or printing, constitutes evidence of display of the beneficiary's work in the field at artistic exhibitions or showcases. Similarly, the petitioner has provided no legal authority to support its claim that "Ferns and plants are intrinsically artistic . . . ."

Accordingly, the AAO concludes that the petitioner has not provided evidence of the display of the alien's work in the field at artistic exhibitions or showcases. *See* 8 C.F.R. § 204.5(h)(3)(vii).

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii).

In the instant motion, the petitioner argued that it – [redacted] – is an organization

or establishment that has a distinguished reputation. Specifically, the petitioner claimed that,

> . . . [redacted] is the sole fernery [in] the United States to obtain the patent to produce and distribute the Edenfern™. This fern is an arsenic-cleaning fern. This fern is purchased heavily by the Federal government to plant in toxic clean up sites. The Edenfern™ has been showcased nationally . . . .

Although the petitioner claimed to have obtained the patent to "produce and distribute" Edenfern™, this claim, however, is contradicted by [redacted] the petitioner's Vice President of Sales and Marketing, who stated that "[t]he plant . . . is *exclusively distributed* by [redacted]" (Emphasis added.) Moreover, neither the letter from [redacted] nor any of the Edenspace's March 2008 online printouts specifically states that the petitioner "is the sole fernery [in] the United States to obtain the patent to produce *and* distribute the Edenfern™." (Emphasis added.) Even assuming *arguendo* that what the petitioner claimed were true, the AAO notes, as it did in its August 19, 2010 decision, that the size of the petitioner, generated revenue, and geographic national or internal locations can be a factor in determining the petitioner's "distinguished reputation." In this case, the petitioner has failed to submit sufficient documentary evidence demonstrating that it has a distinguished reputation. Furthermore, the plain language of 8 C.F.R. § 204.5(h)(3)(viii) requires the petitioner to show the beneficiary's leading or critical role in more than one organization or establishment. The petitioner has not made such a showing.[4]

Accordingly, the AAO reaffirms that the petitioner has not submitted evidence that the beneficiary has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. *See* 8 C.F.R. § 204.5(h)(3)(viii).

> *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.* 8 C.F.R. § 204.5(h)(3)(ix).

As discussed in the AAO's August 19, 2010 decision, the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires that the beneficiary already have commended the high salary or other significantly high remuneration for services at the time the employment-based immigrant visa petition was filed on November 7, 2008. The record remains devoid of any independent, objective evidence that the beneficiary was already receiving a high salary or significantly high remuneration in relation to others in the field of horticulture as of November 2008.

Even if the AAO could overlook the petitioner's failure to provide the abovementioned evidence, the AAO would nonetheless conclude that the petitioner failed to meet the high salary or other

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[4] As the petitioner has not claimed, or presented sufficient evidence showing, that the beneficiary has performed in a leading or critical role for the [redacted] the AAO will not address this matter.

significantly high remuneration for services criterion. As discussed in the AAO's August 19, 2010 decision, based on the plain language of 8 C.F.R. § 204.5(h)(3)(ix), the AAO is to consider this criterion by reviewing the beneficiary's salary or other remuneration for services *in relation to others in the field.* Regional soil and plant scientist wage statistics, such as the August 20, 2008 Online Wage Library – FLC Wage Search Results online printout that the petitioner provided, do not meet this requirement.

The AAO also notes that [redacted] indicated in her March 9, 2008 letter that the petitioner intended to appoint the beneficiary to be the president of the company and intended to offer him an annual salary of $120,000 plus other benefits. Taking [redacted] letter at face value, the $120,000 salary offer would not merely compensate the beneficiary's work as the petitioner's scientist, but also as the president of the company. The beneficiary's pay stub for the December 25, 2009 to December 31, 2009 pay period, submitted along with the instant motion, lists his year-to-date earnings as $115,499.64. It is, however, unclear from this pay stub or the pay stub for the September 3, 2010 to September 9, 2010 pay period, also submitted along with the instant motion, if the beneficiary's earnings related solely to his employment as the petitioner's scientist, or as its president, or both. As the petitioner has not provided evidence of the beneficiary's salary or remuneration for services as a soil and plant scientist, even if the AAO were to accept the regional soil and plant scientist wage online printout as evidence of others' salary or remuneration for services in the field of horticulture, the AAO lacks sufficient evidence to conclude that the beneficiary, as a soil and plant scientist, has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

Accordingly, the AAO reaffirms that the petitioner has not provided evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. *See* 8 C.F.R. § 204.5(h)(3)(ix).

> *Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.* 8 C.F.R. § 204.5(h)(3)(x).

When the petitioner initially filed the employment-based immigrant visa petition, it did not claim that the beneficiary meets the commercial successes criterion pursuant to 8 C.F.R. § 204.5(h)(3)(x). In its May 21, 2009 response to the Director's Request of Evidence, the petitioner claimed that the beneficiary meets this criterion. The Director, however, concluded otherwise in his June 18, 2009 decision. On appeal, the petitioner again failed to advance the argument that the beneficiary meets this criterion. On August 19, 2010, the AAO concluded that the petitioner failed to establish that the beneficiary meets this criterion, noting the petitioner's failure to advance the argument on appeal, and the inapplicability of this criterion to the beneficiary's occupation. As the petitioner did not raise any issue relating to the AAO's August 19, 2010 findings on the commercial successes criterion under 8 C.F.R. § 204.5(h)(3)(x) in the instant motion, the AAO will not address it. The AAO's previous findings on the issue remain unchanged.

In the instant motion to reopen and reconsider, the petitioner also argued that a letter dated May 19, 2009, written by [redacted] should qualify as comparable evidence under 8 C.F.R. § 204.5(h)(4). Specifically, the petitioner claimed that "[t]he letter written by [redacted] [sic] submitted by [the] petitioner is a clear example of evidence of the [beneficiary's] participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought." The petitioner raised this argument for the first time in the instant motion. It did not raise this argument when it filed the employment-based immigrant visa petition in November 2008. It did not raise this argument when it responded to the Director's Request for Evidence on May 21, 2009. And it did not raise this argument when it appealed the Director's denial of visa petition in July 2009. The AAO therefore concludes that the petitioner has abandoned this issue, as it did not timely raise it on appeal. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885 at 9.

Even if the AAO were to conclude that the petitioner had not abandoned this issue, it nonetheless would find that [redacted] letter does not constitute comparable evidence to establish the beneficiary's eligibility, as required under 8 C.F.R. § 204.5(h)(4). Specifically, the plain language of the regulation states that only when the petitioner can show that "the [ten] standards [or criteria, as enumerated in 8 C.F.R. § 2045.(h)(3),] do not readily apply to the beneficiary's occupation," may the petitioner submit comparable evidence. The petitioner has not established that the ten criteria do not readily apply to the field of horticulture. Indeed, the petitioner made no argument in his motion relating to the applicability of the ten criteria to the field of horticulture. Rather, the petitioner repeatedly stated that the ten criteria do not readily apply to the *beneficiary*. The AAO finds the petitioner's reading of the regulation contrary to the plain language of the regulation. Moreover, the AAO is not persuaded by the petitioner's characterization of [redacted] letter. Contrary to the petitioner's claim, [redacted] made no mention of the beneficiary ever "participat[ing], either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought."[5]

Accordingly, the AAO concludes that the petitioner has not shown that the ten criteria enumerated in 8 C.F.R. § 204.5(h)(3) do not readily apply to the field of horticulture or that the petitioner has submitted comparable evidence to establish the beneficiary's eligibility.

Pursuant to 8 C.F.R. § 103.5(a)(1), a motion must be accompanied by a statement indicating if the validity of the AAO's unfavorable decision has been or is the subject of any judicial proceeding. As the petitioner failed to submit such a statement accompanying his motion to reopen and reconsider, the regulations at 8 C.F.R. § 103.5(a)(4) requires that the motion be dismissed. Moreover, the AAO finds that the petitioner has not met its "heavy burden" of showing that the instant motion to reopen should be granted, because the petitioner has not stated new facts to be provided in the reopened proceeding, nor

[5] To the extent that the petitioner now claims that the beneficiary meets the criterion under 8 C.F.R. § 204.5(h)(3)(iv), the AAO deems that the petitioner has abandoned this issue, as it did not timely raise it on appeal. *Sepulveda.*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885 at * 9.

has the petitioner sufficiently supported the new facts with affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). Furthermore, the AAO finds that the petitioner has not shown that the instant motion to reconsider should be granted, because the petitioner has not stated any valid reason for reconsideration, nor has the petitioner sufficiently supported any valid reason for reconsideration with pertinent precedent decisions establishing that the AAO's August 19, 2010 decision was based on an incorrect application of law or USCIS policy. *See* 8 C.F.R. § 103.5(a)(3). Accordingly, the instant motion to reopen and reconsider will be dismissed.

The burden of proof in visa petition proceeding 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 reconsider is dismissed. The decision of the AAO dated August 19, 2010, is affirmed, and the petition remains denied.