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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

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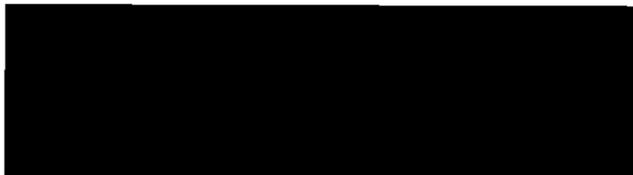
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DATE: **JAN 13 2012** OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
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:



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 the employment-based immigrant visa petition on February 5, 2008. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on April 2, 2009. The matter is now before the AAO on a motion to reconsider. The motion 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.

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). 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 original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), 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 Form I-290B, Notice of Appeal or Motion, counsel indicated in Part 2 that she was filing a motion to *reconsider* the decision of the AAO. Moreover, in counsel's brief that was entitled, "Motion for Reconsideration," counsel "requested that the Service *reconsider* its decision [emphasis added]." In addition, counsel stated "in light of the *new evidence* submitted by the Petitioner, it is requested that the Director's decision of denial be *reconsidered* and the Petition approved [emphasis added]."

The regulation at 8 C.F.R. § 103.5(a)(3) provides:

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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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).

Furthermore, 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 counsel’s motion to reconsider, counsel claimed that the petitioner was eligible for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii) and submitted additional documentary evidence such as recommendation letters, authored material by the petitioner, and the citation of his work by others. However, counsel never claimed in her brief that the AAO’s decision was based on an incorrect application of law or Service policy, and counsel did not support her brief with any pertinent precedent decisions. Instead, counsel requested the AAO to reconsider the specified regulatory criteria at 8 C.F.R. § 204.5(h)(3) based on the additional documentation.

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 counsel 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 the regulation at 8 C.F.R. § 103.5(a)(2) provides that “[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.” 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

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).

Even if the AAO considered counsel's motion as a motion to reopen, 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). The petitioner has been afforded three different opportunities to submit this evidence: at the time of the original filing of the petition, in response to the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), and at the time of the filing of the appeal. A review of the evidence that counsel submitted 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.

It is noted that the AAO determined that the petitioner failed to meet the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi). A review of the record of proceeding reflects that the petitioner submitted documentary evidence showing that he co-authored articles in published SPIE (International Society for Optical Engineering) conference proceedings. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires "[e]vidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media." Pursuant to *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), the petitioner submitted sufficient documentary evidence to demonstrate that he meets the plain language of the regulation for this criterion. However, the record of proceeding reflects that the petitioner established eligibility for one of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3).

It is further noted that counsel submitted several documents reflecting the patents of others who cited the petitioner's work. However, the patents were granted after the filing of the initial petition on March 12, 2007. 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 (Reg'l Comm'r 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 USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

In addition, the AAO notes that in the decision regarding the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the AAO discussed, in part, the discrepancies regarding the year that the petitioner received [REDACTED]

[REDACTED] Specifically, the petitioner submitted a document reflecting that he received the award in 2002; however the petitioner submitted five reference letters indicating that the petitioner received the award in 2001. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop*,

Inc. v. Nelson, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). On motion, counsel claims:

[T]he discrepancy comes from the fact that the Petitioner's paper had been read and presented [redacted] symposium, while the jury did not issue its decision as to the winner until the following year. As a result, the award was presented to [the petitioner] at [redacted]

Counsel submitted a document that purportedly listed the winners of the award from 2001 – 2009. However, the document is not persuasive evidence to demonstrate when the petitioner received the award as there is no indication of the source for the information. It appears that the document is self-compiled; therefore it carries no evidentiary weight in this proceeding. Moreover, counsel failed to submit any documentary evidence to support her assertions. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). Counsel failed to submit competent, objective evidence to establish when the petitioner received the award and failed to overcome the discrepancies on motion. Moreover, even if the petitioner were to submit supporting documentary evidence showing when he received the award, as well as meeting all of the elements of this criterion including that the award is nationally or internationally recognized for excellence, which he 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) requires more than one nationally or internationally recognized prize or award for excellence. 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. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of “letter(s).” 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. *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). In the case here, the petitioner claimed eligibility for this criterion based on a single award.

Finally, the AAO notes that counsel did not contest the findings of the director for the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). The AAO, therefore, considers this issue to be abandoned. *See Sepulveda v. U.S. 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 court found the plaintiff’s claims to be abandoned as he failed to raise them on appeal to the AAO).

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. As the motion does not meet the requirements of the regulation at 8 C.F.R. § 103.5(a)(2), the motion to reopen would have been 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 reconsider is dismissed, the decision of the AAO dated April 2, 2009, is affirmed, and the petition remains denied.