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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: JUL 11 2012 OFFICE: NEBRASKA 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:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 October 2, 2008. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on October 21, 2009, and dismissed a subsequently filed motion to reopen and motion to reconsider on April 12, 2011.[1] The matter is now before the AAO on a second 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.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that "when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the *prior decision* [emphasis added]." In the case here, the prior decision is the AAO's dismissal of the petitioner's motion to reopen and motion to reconsider on April 12, 2011.

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, prior counsel failed to submit a statement regarding if the validity of the decision of the AAO has been or is subject of any judicial proceeding. It is noted that the AAO indicated in its previous decision that the petitioner failed to submit the judicial proceeding statement.

Notwithstanding the above, regarding the previous motion to reopen, the AAO determined:

> A review of the evidence that the petitioner submits on motions reveals no fact 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, in response to the director's request for additional evidence, 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. Furthermore, although the petitioner claims eligibility for three additional criteria on motion, he failed [to] explain why the three criteria were never claimed

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[1] It is noted that attorney [redacted] originally filed the motion to reopen and motion to reconsider on behalf of the petitioner on May 16, 2011. However, on November 14, 2011, the AAO received a letter from [redacted] advising that his license to practice law was suspended and withdrew his appearance as counsel for this case. Specifically, on October 18, 2011, the Board of Immigration Appeals (BIA) suspended [redacted] from practicing law before the BIA, the Immigration Courts, and the Department of Homeland Security. See http://www.justice.gov/eoir/discipline.htm. Accessed on July 3, 2012, and incorporated into the record of proceeding. Therefore, [redacted] is not recognized as the attorney of record for this proceeding.

previously or why he could not previously submit evidence pertaining to the three additional criteria.[2]

Regarding the current motion to reopen, prior counsel submitted additional documentary evidence and claimed that "the Petitioner was not aware of it [sic] existence," and the petitioner "is dependent upon his wife" to obtain the documentation but was not available in time for earlier submission because of his wife's remote location in Nepal. Prior counsel failed to submit any documentary evidence regarding his claims. 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). Moreover, the majority of the documentation pertains to events occurring after the filing of the petition on April 2, 2007, such as an invitational letter from the [redacted] dated April 20, 2011, to perform on May 8, 2011. 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. Furthermore, the petitioner submitted several recommendation letters from individuals who indicated that they reside in the United States. The petitioner provided no claims as to why this evidence could not have been submitted earlier. In addition, prior counsel failed to address, as raised in the AAO's prior decision, why the three criteria were never claimed previously or why he could not previously submit evidence pertaining to the three additional criteria.

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.[3] 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. For the reasons stated above, the petitioner failed to demonstrate that any of the documentary evidence can be considered "new" pursuant to the regulation at 8 C.F.R. § 103.5(a)(2). Furthermore, the petitioner failed to establish that the documentary evidence overcomes any of the grounds of dismissal of the petitioner's previous motion. Therefore, the petitioner's current motion to reopen will be dismissed.

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[2] The petitioner claimed eligibility for the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

[3] 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).

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).

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. However, prior counsel did not claim that the AAO's dismissal of the previous motion was based on an incorrect application of law or USCIS policy, nor was it supported by any pertinent precedent decisions. The motion to reconsider does not allege that the issues, as raised on the previous motion, 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 petitioner has failed to raise such allegations of error in his motion to reconsider, the AAO will dismiss the motion to reconsider.

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 April 12, 2011, is affirmed, and the petition remains denied.