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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

DATE: JUL 30 2012 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
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:



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, Texas Service Center, denied the employment-based immigrant visa petition on November 4, 2008. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on September 21, 2009. On April 14, 2011, the AAO granted the petitioner's motion to reopen and motion to reconsider and affirmed its prior decision. The matter is now before the AAO on a second motion to reopen and 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 specifically and thoroughly discussed the petitioner's evidence and 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).

In the decision of the AAO affirming the denial of the original appeal, the AAO specifically and thoroughly discussed the petitioner's evidence and found that the petitioner minimally satisfied only the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv) and the authorship of scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi).

On motion, the petitioner submitted a brief which generally reasserts previous claims, a translation of a portion of an interview with the manager and Editor-in-Chief of the journal *Understanding Cancer* and an abstract from the 2010 American Society of Clinical Oncology Annual Meeting. The AAO notes that, along with the timely filed motion, the petitioner submitted a letter requesting "more time...to file a motion to reconsider or a motion to reopen." The petitioner submitted additional evidence on December 19, 2011 and March 20, 2012. Although the regulation at 8 C.F.R. § 103.5(a)(1)(iii) allows for the motion to be accompanied by a brief, the regulations do not allow additional time to submit a brief or additional evidence after the filing of a motion. Compare 8 C.F.R. § 103.3(a)(2)(vii), which allows the AAO to grant additional time to submit a brief after the filing of an appeal. Page 2 of the instructions to the Form I-290B clearly explains that "[a]ny additional evidence must be submitted with the motion" and there is no provision for an extension. Notwithstanding the above, the additional evidence will be discussed below.

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.<sup>1</sup>

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. Regarding the certified translation of the interview, the petitioner previously submitted both the certified translation and a copy of the original document in Farsi. Therefore, this cannot be considered new evidence. With regard to the abstract, this occurred after the filing of the petition on July 27, 2007. The petitioner also refers to another abstract that “is not finish[ed] yet” in her brief. 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 (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 U.S. Citizenship and Immigration Services (USCIS) cannot “consider facts that come into being only subsequent to the filing of a petition.” *Id.* at 176.

The AAO notes that the petitioner included a purported list of citations to her articles in her brief, but does not submit any evidence as to the source. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

Finally, regarding the evidence submitted after the filing of the motion, the petitioner submitted a letter of recommendation and a letter from the Editor in Chief of *Understanding Cancer* confirming that the petitioner’s name was “mistakenly omitted from the list of the Editorial Board” in English for the “Vol 2, Issue No.5, [W]inter 2002” issue. Regarding the letter of recommendation, there is no explanation as to why this letter could not previously have been submitted. Regarding the letter from the Editor in Chief, the petitioner was put on notice of the omission of her name in English on September 21, 2009. The petitioner provides no explanation for her failure to contact the Editor in Chief for more than two years. Regardless, even if the AAO were to consider these letters, the petitioner would still fail 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), as the petitioner’s position as an editor relates to a criterion that the AAO already found she meets.

As stated above, 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.

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<sup>1</sup> 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).

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 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. 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 motion to reconsider does not allege 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 her motion to reconsider, the AAO will dismiss the motion to reconsider.

### ***Oral Argument***

The regulations do not provide for oral argument in connection with a motion.

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 14, 2011 is affirmed, and the petition remains denied.