

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: NOV 29 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:

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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition on March 7, 2011. On appeal, the Administrative Appeals Office (AAO) affirmed the director's adverse decision on the petition on June 15, 2012. The matter is now before the AAO on a motion to reopen or reconsider. The motion will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

Regarding motions to reopen or reconsider, 8 C.F.R. § 103.5(a)(1)(ii) states in relevant part: "The official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction." The latest decision was the AAO's June 15, 2012 decision dismissing the appeal. Therefore, a review of any claims or assertions that the petitioner's motion raises is limited in scope and is restricted to the AAO's prior decision. In addition, 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 whether the validity of the AAO's decision has been, or is, the subject of any judicial proceeding. The regulation mandates that this shortcoming alone requires U.S. Citizenship and Immigration Services (USCIS) to dismiss the motions. *See* 8 C.F.R. § 103.5(a)(4).

Notwithstanding the fatal defect noted above, the AAO will consider the petitioner's motion and accompanying evidence. To the extent that the petitioner intends the current motion to be a motion to reconsider, 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).

Moreover, 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.

In the present motion to reconsider, the petitioner essentially maintains that the AAO made an error of fact. Specifically, the petitioner states in the Form I-290B that she was erroneously judged against artists generally rather than against other artists in the "emerging and unique field of

expressionist painting.” The petitioner further states that she is in the uppermost echelons of the “emerging and unique field.” The petitioner advances for the first time in the current motion, the argument that she should be judged against a smaller, sub-category of visual artists who are in the same field. In Part 6 of the Form I-140, the petitioner provided her job title as a “Fine Artist” and described it as a person who: “[c]reates original artwork using any of a wide variety of mediums and techniques.” The previous AAO decision considered the petitioner’s appeal of the director’s denial in light of the job title and description she provided. The issue of whether the petitioner falls within the small percentage at the top of her field is only relevant to a final merits determination. *Kazarian v. USCIS*, 596 F.3d 1115, 1121-22 (9th Cir. 2010). As the petitioner did not submit qualifying evidence under at least three of the ten criteria set forth at 8 C.F.R. § 204.5(h)(3)(i)-(x), the AAO did not even conduct a final merits determination. Therefore, the AAO finds no factual error as alleged. 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. 8 C.F.R. § 103.5(a)(3); see *Matter of Medrano*, 20 I&N at 219; *Matter of O-S-G-*, 24 I&N Dec. at 58-60. Accordingly, the motion to reconsider will be dismissed.

To the extent that the petitioner intends the current motion to be 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. 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> Along with the motion, the petitioner submitted the following documents:

1. Certification from the School of Plastic Arts;
2. A letter from [REDACTED];
3. A letter from [REDACTED] of the Colleton Museum & Farmers Market;
4. A letter from [REDACTED] of the Beaufort Art Association;
5. A certificate from the Unilatina International College;
6. A certificate of Participation for “Friday of Tertulia,” dated July 15, 2011; and
7. A certificate of completion for Advance Ministerial Studies, dated June 1, 2012.

Petitioner fails to explain why any of the evidence submitted with this motion could not have been discovered or presented in the previous proceeding. The petitioner has been afforded at least three

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<sup>1</sup> The word “new” is defined as “1: having recently come into existence : RECENT, MODERN. 2a (1) : having been seen, used, or known for a short time : NOVEL. <rice was a new crop for the area> .” <http://www.merriam-webster.com/dictionary/new>, accessed on November 15, 2012.

opportunities to submit evidence: at the time of the original petition filing on February 19, 2010, in response to the June 17, 2010 director's request for additional evidence (RFE) pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), and at the time she filed the appeal on April 7, 2011.

Item 1 from the above list shows the petitioner's record of study from the School of Plastic Arts, which was completed in July of 1999. Thus, item 1 was previously available for submission and the AAO need not consider it now as new evidence. Items 2 and 3 are from individuals who have known the petitioner for a number of years and the record reflects that both [REDACTED] and [REDACTED] have previously written letters of support that were similar in content to the letters the petitioner now submits with her motion as "new" evidence. Likewise, [REDACTED] of item 4, has known the petitioner for multiple years and the petitioner has not provided an explanation for why the "new" evidence from [REDACTED] was previously unavailable. Furthermore, the record reflects that another individual from the Beaufort Art Association, the same organization that [REDACTED] represents, has previously submitted a letter of support for the petitioner. Where the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the denial, subsequently submitted evidence will not be considered for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). As for item 5 from the above list, it did not comply with the terms of 8 C.F.R. § 103.2(b)(3), which provides that: "Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Without a full certified translation pursuant to 8 C.F.R. § 103.2(b)(3), this document has no probative value and the AAO will not consider item 5 as new evidence. Finally, nothing about items 6 and 7 substantiates the petitioner's assertion that she is in the uppermost echelon of the emerging and unique field of expressionist painting. In addition, these two items do not help the petitioner qualify for additional regulatory criteria as a Fine Artist, as considered in the prior AAO decision. Thus, they do not constitute as relevant, probative, and credible evidence. *See Matter of Chwawthe*, 25 I&N Dec. 369, 376 (AAO 2010).

In conclusion, 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.

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. Accordingly, the motion will be dismissed.

**ORDER:** The motion is dismissed, the AAO's June 15, 2012 decision is affirmed, and the petition remains denied.