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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

[Redacted]

DATE:

APR 18 2013

OFFICE: TEXAS SERVICE CENTER

[Redacted]

IN RE:

Petitioner:

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:

[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 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 December 7, 2011. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on October 19, 2012. The matter is now before the AAO on a 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.

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." The regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed. Counsel failed to submit a statement regarding whether 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 appeal, the AAO found that the petitioner failed to meet 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 met the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), but he failed to establish eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix), and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x). Moreover, the AAO determined that the petitioner failed to demonstrate his intent to enter the United States and continue working in his area of expertise.

On motion, instead of contesting the specific findings in the AAO's decision, counsel essentially ignores the AAO's decision and bases his motion on the director's prior decision. For instance, counsel states that "the petitioner through his counsel files this motion to reconsider and reopen against the earlier denial decision of the director and to approve his form I-140 petition."

The plain language of the regulation at 8 C.F.R. § 103.5(a)(1)(i) states 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 this case, the prior decision is the AAO's dismissal of the petitioner's appeal on October 19, 2012, rather than the director's denial of the petition on December 7, 2011. Moreover, if counsel wanted to contest the director's findings, he had those opportunities when he filed his earlier appeal. The AAO conducted the appellate review on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.¹

In this case, counsel simply resubmitted evidence that was previously submitted. A review of the evidence that counsel 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.

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.

On motion, counsel requests another 30 days to submit additional documents and evidence. As of the date of this decision, counsel has not submitted any additional documents. Regardless, the regulation at 8 C.F.R. § 103.3(a)(2)(vii) allows for limited circumstances in which a petitioner can supplement an already-submitted appeal. This regulation, however, applies only to appeals, and not to motions to reopen or reconsider. There is no analogous regulation which allows a petitioner to submit new evidence in furtherance of a previously-filed motion. A motion must meet the regulatory requirements of a motion to reopen or reconsider *at the time it is filed*; no provision exists for United States Citizenship and Immigration Services (USCIS) to grant an extension in order to await future correspondence that may or may not include evidence or arguments.

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. 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. 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).

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 COLLEGE DICTIONARY 753 (2005)(emphasis in original).

In this case, counsel summarizes the petitioner's claims and refers to the director's decision. Regarding the awards criterion, counsel recaps the director's decision and agrees with the favorable finding of the director for this criterion. However, counsel does not even address or acknowledge the AAO's decision in which the AAO withdrew the finding of the director, in part, because of conflicting information regarding the 27th National Art and Craft Exhibition and the 15th National Cottage Excellent Entrepreneur Program. Moreover, the AAO determined that the petitioner failed to demonstrate that the awards were for "excellence in the field" pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i).

Regarding the remaining criteria addressed on motion, counsel simply quotes the director's decision and/or cites to evidence that was listed in the director's decision and then asserts that the petitioner meets the criteria. For instance, regarding the original contributions criterion, counsel states:

In its earlier decision, the director has acknowledged submission of following evidence However, we respectfully disagree with the unfavorable determination of the director on this criterion. The evidence on the record clearly demonstrated that the petitioner's contribution as a Thanka Artist is not only original, but it is of major significance in the field. The entire evidence demonstrated the major significance of his original contribution in the field of arts. Therefore, the evidence submitted meets with this criterion.

Again, counsel's motion does not even address the AAO's decision regarding this criterion; rather counsel refers to the director's decision. Moreover, counsel does not claim that the AAO's decision was based on an incorrect application of law or USCIS policy and is not supported by any pertinent precedent decisions as required for a motion to reconsider pursuant to the regulation at 8 C.F.R. § 103.5(a)(3).

Finally, regarding the petitioner's intent to enter the United States to continue in his area of expertise, counsel claims:

Unlike the director's earlier finding, the record and statement of the petitioner clearly establishes that petitioner has clear intention and opportunities to work continuously in his field as a Thanka artist in the United States which will substantially benefit prospectively the US. Thus, the director's decision is not supported by evidence on the record. The director's decision is fully arbitrary, and unfavorable exercise of the abuse of discretion. Moreover, the director's decision on December 7, 2011, was erroneous application of law and [sic] or facts therefore warrant a reversal.

The director never determined in his decision that the petitioner failed to demonstrate his intent to continue to work in his area of expertise in the United States; that determination was made in the AAO's dismissal of the appeal. Nonetheless, counsel simply dismisses the finding as arbitrary and an abuse of discretion without supporting his assertions with documentary evidence

or legal arguments. 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).

The motion to reconsider does not allege that the issues, as raised on appeal, 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. Counsel has also not asserted any new facts or provided new evidence for consideration on motion. Instead, counsel generally reiterates prior arguments and states his own opinions. 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 the motion to reconsider, the AAO will dismiss the motion to reconsider. *See also Rehman v. Gonzales*, 2006 WL 688992 (7th Cir. 2006) (No. 05 2846) (the court found that reconsideration depended on something new, if not necessarily new factual developments, then at least new arguments showing that the IJ or BIA overlooked something important; the petitioner did not have any new arguments and was merely repeating old ones.)

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. 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 October 19, 2012 is affirmed, and the petition remains denied.