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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 2 2 2013 Office: TEXAS 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:

[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 September 27, 2011. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on September 11, 2012. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen will be dismissed. The motion to reconsider will be dismissed. Ultimately, 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, the AAO's September 11, 2012, decision dismissing the petitioner's original appeal concluded that the petitioner failed to establish she 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 following criteria:

- 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 artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii);
- The leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii); and
- The comparable evidence provision pursuant to the regulation at 8 C.F.R. § 204.5(h)(4).

In fact, the AAO determined 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 motion, counsel simply lists the previously submitted evidence and new evidence without addressing any of the AAO's specific concerns.

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, 108 (1988)). "There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 at 107. Based on its discretion, "[T]he [USCIS] has some latitude in deciding when to reopen a case. [USCIS] should have the right to be restrictive. Granting such motions too freely will

permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case." *Id.* at 108. The result also needlessly wastes the time and efforts of the triers of fact who must attend to the filing requests. *Id.* A party seeking to reopen a proceeding bears a "heavy burden." *Id.* at 110. With the current motion, the petitioner has not met that burden.

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). The Board of Immigration Appeals (BIA) generally provides that a motion to reconsider asserts that at the time of the previous decision, an error was made. It questions the decision for alleged errors in appraising the facts and the law. The very nature of a motion to reconsider is that the original decision was defective in some regard. *See Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991). A motion to reconsider is based on the existing record and petitioners may not introduce new facts or new evidence relative to their arguments.

Additionally, 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.

A motion to reopen proceedings, however, is a fundamentally different motion. *Matter of Cerna*, 20 I&N Dec. at 402 (citing *Sanchez v. INS*, 707 F.2d 1523, 1529 (D.C.Cir.1983); *Chudshevid v. INS*, 641 F.2d 780, 783 (9th Cir.1981)). It does not contest the correctness of (or simply request a reevaluation of) the prior decision on the previous factual record. Rather, a motion to reopen proceedings seeks to reopen proceedings so that new evidence can be presented and so that a new decision can be entered, normally after a further evidentiary hearing. *Matter of Cerna*, 20 I&N Dec. at 403.

In counsel's brief on motion, counsel requests a motion to reconsider or a motion to reopen the decision. 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] New evidence is considered to be material to the present case and not previously submitted. This "new" evidence is expected to convey new value or new meaning to the case.

Regarding the motion to reopen, while the petitioner did submit new evidence on motion, each form of evidence postdates the petition filing date. A motion to reopen is designed to afford the petitioner an opportunity to submit new evidence that may not have been available previously. It is not intended to allow the petitioner to improve upon the previously deficient evidence that failed to meet the clearly identified regulatory requirements. In addition, on motion a petitioner must still establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Moreover, the AAO cannot "consider facts that come into being only subsequent to the filing of a petition." *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998) (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981)). Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d 257, 261 (4th Cir. 2008). The petitioner failed to demonstrate that the newly submitted evidence on motion was both (1) not available and could not have been discovered or presented in the previous proceeding and (2) relates to eligibility as of the date of filing. Therefore, the new evidence cannot be considered a proper basis for a motion to reopen. As a result, this evidence will not be considered. Regardless, the evidence relates to country conditions in Egypt rather than the petitioner's eligibility as an alien of extraordinary ability, the benefit the petitioner sought through filing the Form I-140 petition.

Regarding the petitioner's motion to reconsider, the petitioner failed to support the motion with any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy in accordance with 8 C.F.R. § 103.5(a)(3). As stated above, counsel simply lists the previously submitted evidence that the AAO already considered. Therefore, the petitioner has not filed a proper 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; *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)). Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The motion to reopen is dismissed. The motion to reconsider is dismissed. The decision of the AAO dated September 11, 2012, is affirmed, and the petition remains denied.

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[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.)