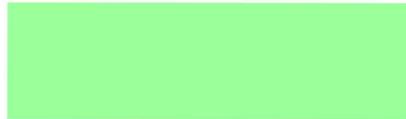


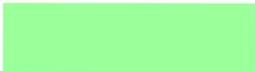
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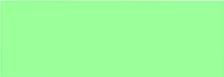
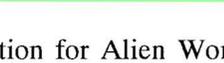
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

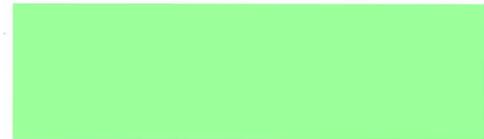


DATE: JUN 10 2013 OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
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:



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. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on December 18, 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 awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) and the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), but she failed to establish eligibility for 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 original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), 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 petitioner did not claim to meet any of the other regulatory categories of evidence pursuant to the regulation at 8 C.F.R. §§ 204.5(h)(3).

In the instant motion, counsel submits a brief primarily addressing the director's decision. These arguments do not address the AAO's most recently issued decision. For instance, counsel claims that the basis of the motion is to determine whether "the USCIS Texas Service Center on an Immigrant Petition for Alien Worker . . . is based upon the 'erroneous conclusion of law or fact in the decision.'"

On motion, the AAO will only consider arguments and evidence relating to the grounds underlying the AAO's most recent decision. Counsel's opportunity to contest the director's findings was the previously filed appeal. 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 rather than the director's denial of the petition. The petitioner bears the burden of establishing that the AAO's December 18, 2012 dismissal was itself in error. If the petitioner can demonstrate that the AAO erred by dismissing the appeal, then there would be grounds to reopen and reconsider the proceeding. The petitioner has not done so in this proceeding.

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 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.

Counsel did not submit any documentary evidence in support of his motion to reopen. As counsel failed to submit any affidavits or other documentary evidence as required pursuant to the regulation at 8 C.F.R. § 103.5(a)(2), counsel failed to meet the applicable filing requirements for a motion to reopen and, therefore, the motion to reopen will be dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4).

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).

On motion, counsel briefly summarizes the petitioner’s claims and refers only to the AAO’s decision regarding the favorable findings of the awards criterion. For instance, although the director determined that the petitioner met the high salary criterion, the AAO withdrew the decision of the director noting specific evidentiary ineligibility. On motion, counsel does not address any of the AAO’s findings regarding this criterion and instead refers back to the

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 753 (2005)(emphasis in original).

director's favorable determination and states that the petitioner "reaffirm[s] and present[s the] preceding argument that we agree and concur with a favorable determination on this criterion as well."

Similarly, regarding the commercial successes criterion, counsel states:

The director determined that "no evidence has been provided for this criterion". [sic] We discussed previously that that Director has not reviewed the file properly. The NOID [notice of intent to deny] response clearly included documentary evidence that showed that [the petitioner] has been part of movies that have attained commercial success.

On appeal, the AAO concurred with counsel and acknowledged that a review of the record reflected that the petitioner submitted documentary evidence at the initial filing of the petition and in response to the director's notice of intent to deny. The AAO then analyzed the evidence and explained why the evidence failed to demonstrate the petitioner's eligibility for the commercial successes criterion. Counsel's motion does not address any of those specific findings and makes no claim regarding how 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). Instead, counsel briefly asserted that the Nepalese movie industry is relatively new, and the petitioner "may not be able to produce box office receipts to prove her commercial success." Counsel failed to submit any documentary evidence to support his assertions. 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).

For the remaining criteria, counsel fails to provide any argument that addresses the specific findings made by the AAO and discusses only the determinations made by the director, either quoting the director's decision or citing to evidence that was listed in the director's decision and asserting that the petitioner meets the criteria.

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*, 441 F.3d 506 (7th Cir. 2006) (reconsideration depends on something new, if not necessarily new factual developments, then at least new arguments showing that something of import was overlooked).

(b)(6)

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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 December 18, 2012 is affirmed, and the petition remains denied.