(b)(6)

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

DATE: MAY 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 on April 20, 2009. The Administrative Appeals Office (AAO) summarily dismissed the appeal on November 9, 2009, reopened the matter on its own motion on March 16, 2010, and dismissed the appeal on its merits on September 16, 2010. On July 17, 2012, the AAO dismissed the petitioner's October 18, 2010 motion to reopen and reconsider and affirmed the AAO's prior decision on the merits. The matter is now before the AAO on a second motion to reopen or reconsider.

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." A motion must address the issues raised in the decision it seeks to reopen. *See Matter of O-S-G-*, 24 I. & N. Dec. 56, 59 (BIA 2006) (holding that a motion on a reaffirmation must explain how the Board of Immigration Appeals erred in affirming the Immigration Judge's decision). The latest decision was the AAO's July 17, 2012 decision dismissing the initial motion to reopen and reconsider. Therefore, a successful motion must overcome the AAO's most recent 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. With the current motion, despite the AAO's citation of this requirement in its July 17, 2012 decision, the petitioner once again failed to submit a statement regarding whether the validity of the director'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 this omission, the motion

The Form I-290B and the accompanying statement indicate that the current motion is a motion to reopen. Counsel, however, raises at least one claim of an incorrect application of law. Even if the AAO were to consider the filing a joint motion to reopen and reconsider, the motion would be dismissed. To the extent that the current motion is 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. at 58. Instead, the moving party must specify the factual and legal issues that were decided in error or overlooked in the decision the motion seeks to reconsider or must show how a change in law materially affects the prior decision. *Id.* at 60.

In the current motion, counsel raises largely the same assertions from the last motion. USCIS may dismiss a motion that repeats assertions USCIS has previous rejected. *See Liu v. Gonzales*, 439 F.3d 109, 111 (2d Cir. 2006) *citing Strato v. Ashcroft,* 388 F.3d 651, 655 (8th Cir.2004); *Ahmed v. Ashcroft,* 388 F.3d 247, 250-51 (7th Cir.2004); *Sswajje v. Ashcroft,* 350 F.3d 528, 533 (6th Cir.2003).

Counsel's new assertion of error relating to the AAO's most recent decision concerns the AAO's statement that, "the petitioner failed to show how the evidence submitted with the last motion relates to the facts as they were in November 2007." In the current motion, counsel maintains that the successes demonstrated by the 2009 and 2010 articles about the petitioner's athletes were the direct result of the training and coaching that the students received from the petitioner prior to the 2007 filing date. The AAO finds no error in the prior determination to rely on *Matter Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971) and reject the 2009 and 2010 articles as new evidence. The petitioner must demonstrate his eligibility as of the filing date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. In this matter, that means that he must demonstrate his sustained national or international acclaim as of that date. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. at 49; *see also Matter of Izummi,* 22 I&N Dec. 169, 175-76 (Assoc. Comm'r 1998) (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981) for the proposition that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that his athletes will subsequently demonstrate athletic achievements based on his current guidance. 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).

Counsel asserts that the petitioner submitted documentation regarding the petitioner's high salary throughout these proceedings but that USCIS did not contest this criterion in the July 17, 2012 decision. In the July 17, 2012 decision, the AAO specifically concluded that the petitioner abandoned the salary criterion on appeal and therefore, the matter was not properly before the AAO on motion. In fact, neither the petitioner nor counsel previously raised this claim in the proceeding relating to the underlying petition that is the subject of this motion. Therefore, the petitioner's claims relating to the salary criterion are not properly before the AAO. *See Matter of Medrano*, 20 I&N Dec. at 220.

Accordingly, the petitioner has failed to meet the requirements of a motion to reconsider.

To the extent that the petitioner requests the current motion to be considered as 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. In this instance, the AAO has already considered and rendered a decision on a motion to reopen and reconsider that the petitioner submitted. The petitioner has failed to show in the current motion that the most recent AAO decision dismissing the first motion was erroneous.

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] The AAO dismissed the petitioner's previous motion largely because the petitioner failed to explain how the evidence was not available and could not have been discovered in the previous proceeding. The AAO further noted that counsel had not overcome the AAO's determination that the petitioner's accomplishments as an athlete, while not irrelevant, could not serve to establish his eligibility as a coach because they are separate areas of expertise. On motion, counsel simply reiterates that there is a correlation between athletics and coaching, a correlation the AAO never questioned. The AAO continues to find persuasive the reasoning in *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002) (upholding a finding that extraordinary ability as a baseball player does not imply extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach).

In the current motion, virtually all evidence relating to the underlying merits of the petition has been previously submitted and has already been considered and rejected in the last motion. The one item that counsel submits for the first time is a 2012 article about one of the petitioner's athletes. As an initial matter, the record already includes evidence about or from that athlete in support of the petition. Hence, there is already evidence in the record indicating that the athlete in the article has benefitted from the petitioner's coaching. Thus, the 2012 article, while postdating the filing of the petition, also adds nothing new to the record of proceeding.

Finally, the petitioner introduces documentation relating to his poor health in 2002, 2003, 2007 and 2008, which allegedly precluded him from submitting a more complete visa petition at the time of filing. The petitioner's health in these years has no bearing on the petitioner's ability to submit evidence at the time of the appeal in 2009.

---

[1] 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 April 11, 2013.

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 July 17, 2012 decision is affirmed, the AAO's September 16, 2010 decision is affirmed, and the petition remains denied.