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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: OCT 23 2013 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:  
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Handwritten signature of Ron Rosenberg in black ink.

Ron Rosenberg  
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, with a full discussion of the claimed criteria. The petitioner filed a motion on the AAO's decision on October 12, 2012, which the AAO dismissed on January 22, 2013. The matter is now before the AAO on a motion to reopen and 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 did not include a statement regarding if the validity of the decision of the AAO has been or is subject of any judicial proceeding. As such, the present motions must 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 U.S. Citizenship and Immigration (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. *Matter of O-S-G-*, 24 I&N Dec. 56, 57-58 (BIA 2006).

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 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.

On motion, counsel does not assert that the AAO used an incorrect interpretation of the law. Thus, the motion to reconsider must be dismissed.

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> The new facts relating to a motion to reopen must address the AAO's latest decision dismissing the petitioner's appeal for failure to identify an error in law or an error in fact within the director's decision. 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)); see also *Selimi v. Ashcroft*, 360 F.3d 736, 739 (7th Cir. 2004). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

Within the present motions, the petitioner must first overcome the AAO's most recent decision relating to the previous motions the AAO dismissed on January 22, 2013. The AAO dismissed the petitioner's motions based on her submission of new evidence with the motion that postdated the petition's priority date and did not relate to her eligibility as of that 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 (4<sup>th</sup> Cir. 2008). The petitioner does not demonstrate that the newly submitted evidence accompanying the October 12, 2012 motion was both: (1) not available and could not have been discovered or presented in the previous proceeding; and (2) that it related to her eligibility as of the petition's filing date, August 21, 2009.

Within the present motion to reopen, counsel does not address the reasons that the AAO dismissed her previous motion; that she submitted new evidence with her previous motion that postdated the petition's priority date and did not relate to her eligibility as of that date. Instead, through counsel, she requests additional time to submit evidence at a future date due to the difficulties of obtaining documents from Egypt. Without addressing and overcoming the reasons for the previous motion dismissal, the petitioner does not provide a basis for this motion to reopen. As such, her motion to reopen must be dismissed.

Further, unlike the regulation at 8 C.F.R. § 103.3(a)(2)(vii), which allows the affected party additional time to submit the accompanying brief and/or evidence, the governing motion regulation

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<sup>1</sup> 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 New College Dictionary, (3d Ed 2008). (Emphasis in original).

at 8 C.F.R. § 103.5(a) contains no such provision. As such, if the affected party wishes to submit evidence for consideration, the evidence must accompany the Form I-290B at the time she files the motion. Regardless, in a letter dated July 12, 2013, counsel concedes that the petitioner is unable to obtain additional evidence to support the motion and requests that the AAO take into account the current political situation in Egypt, without identifying a specific error of fact or law in any of the AAO's previous decisions.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The motion to reopen is dismissed. The motion to reconsider is dismissed. The decision of the AAO dated January 22, 2013, is affirmed, and the petition remains denied.