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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

DATE:

OCT 29 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 (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,

A handwritten signature in cursive script, appearing to read "Ron Rosenberg".

Ron Rosenberg
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 October 19, 2012, and dismissed a subsequently filed motion to reopen and motion to reconsider on April 18, 2013. The matter is now before the AAO on a second motion to reopen. The motion 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 did not 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 part 3 of Form I-290B, Notice of Appeal or Motion, counsel states:

Additional evidence & brief will be submitt [sic] within 30 days due to previous counsel's response to the incorrect [illegible]. Previous counsel responded to denial from December 7, 2011, as opposed to the denial from appeal on October 19, 2012. We respectfully request additional 30 days to submit evidence in support of the instant motion to reopen.

Counsel dated the motion on May 15, 2013. United States Citizenship and Immigration Services (USCIS) received counsel's additional evidence on July 19, 2013. As indicated in the AAO's prior decision on motion, although 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 applies only to appeals, and not to motions to reopen or reconsider. There is no analogous regulation which allows a petitioner to submit evidence after a motion has already been filed. A motion must meet the regulatory requirements of a motion to reopen or reconsider *at the time it is filed*; no provision exists for USCIS to grant an extension for supplemental documents on motion.

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)).

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 New College Dictionary, (3d Ed 2008). (Emphasis in original).

In its previous decision on motion, the AAO found that the petitioner focused primarily on the director's decision and failed to address the specific findings of the AAO's dismissal of the petitioner's appeal. The AAO stated that it only considers arguments and evidence relating to the grounds underlying the AAO's most recent decision and that prior counsel's opportunity to contest the director's findings was the previously filed appeal. Additionally, the AAO found that the petitioner's motion failed to meet the requirements of a motion to reopen or motion to reconsider.

In support of the current motion, counsel submits copies of prior counsel's previously submitted briefs and documentation; despite his statement in Part 3 of Form I-290B, counsel did not submit a brief addressing the current motion. In addition, counsel submitted several photographs, an affidavit executed by [REDACTED] regarding the petitioner's artwork, and a letter from [REDACTED] President of the [REDACTED]

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). Counsel does not explain why the evidence was previously unavailable and could not have been submitted earlier. The petitioner was afforded at least three different opportunities to submit this evidence: at the time of the original filing of the petition on October 12, 2010, in response to the director's request for additional evidence on July 27, 2011, and at the time of the filing of the appeal on January 6, 2012.

Moreover, the accompanying captions to the photographs reflect 2013 dates. Similarly, [REDACTED] letter appears to reflect that the petitioner became a member of the society after the filing of the petition, and the petitioner never previously claimed membership with the society. A motion to reopen is not a forum to raise arguments that could have previously been raised. Further, while a motion to reopen must be supported by affidavits or other documentary evidence, the documentation must be about events occurring before or at the time of the filing of the petition. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

The petitioner failed to submit any evidence on motion that reveals a fact that could be considered under 8 C.F.R. § 103.5(a)(2).

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 prior decisions of the AAO are affirmed, and the petition remains denied.