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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: **MAY 08 2014**

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:

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 black ink, appearing to read "Ron Rosenberg", with a horizontal line extending to the right.

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) initially summarily dismissed the petitioner's appeal of that decision, subsequently reopened the matter on its own motion, and ultimately dismissed the appeal on the merits on October 19, 2013. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

As stated in the final decision of the AAO dismissing the petitioner's appeal on the merits, the beneficiary met one of the criteria under the regulation at 8 C.F.R. § 204.5(h)(3), of which at least three are required. Specifically, the beneficiary met the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), but did not meet the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(ii), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). On appeal, the petitioner abandoned the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), and the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix).

In Part 3 of Form I-290B, Notice of Appeal or Motion, the petitioner claims:

USCIS failed to properly estimate the total population of "clinicians employed as high level executives in managed care." Second, determining the "population" also means that you need to judge what is the actual field of endeavor. If the foreign worker claims to have extraordinary ability in a field of endeavor that is obscure or limited, although awards would be helpful, many times awards for these types of fields do not exist. However, the nonexistence of awards does not negate beneficiary's qualification as being among the "small percentage who have risen to the very top of the field of endeavor." Beneficiary has created 5 (five) Accountable Care Organizations that have each and cumulatively reduced unnecessary testing and allowed the savings to be put back into Medicare fund. Beneficiary was also acknowledged for obtaining FDA approvals for 5 (five) drugs. Finally, by virtue of being on H-1B status, Beneficiary is restricted from receiving a "high salary or other significantly high remuneration." USCIS's narrow approach in failing to expand its scope beyond the obvious criteria falls to embody legislative intent.

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." The petitioner 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, 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 Services (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. *Compare* 8 C.F.R. § 103.5(a)(3) with 8 C.F.R. § 103.5(a)(2) (describing the requirements for a motion to reopen).

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 may not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 57-58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same arguments and seek reconsideration by generally alleging error in the prior decision. *Id.* 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.

Here, the motion to reconsider does not allege that the issues raised on motion involve the application of precedent to a novel situation, or that there was new precedent or a change in law that affected the AAO’s decision. Instead, the petitioner claims that USCIS did not properly estimate the total population of the beneficiary’s field without referencing any particular language in the AAO decision or citing any pertinent legal authority. The regulation at 8 C.F.R. § 204.5(h)(2) provides that the petitioner must establish that the beneficiary “is one of that small percentage who have risen to the very top of the field of endeavor.” On the Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated that the beneficiary is employed as an executive director of clinical research, and the petitioner’s business is a healthcare provider. Although the beneficiary’s occupational title is an executive director of clinical research, the beneficiary’s field will not be narrowed to a single position title within the field of healthcare. To hold otherwise would render meaningless the requirement that the alien be among the small percentage of the very top of his field by allowing a petitioner to narrow the beneficiary’s field until the beneficiary ranks among the top of a small group in that “field.” *See Buletini v. INS*, 860 F.Supp. 1222, 1229 (E.D. Mich. 1994) (finding that the alien’s field was medical science rather than nephrology).

Regardless, the petitioner must first meet the antecedent procedural requirement of submitting qualifying evidence that meets the plain language requirements of three criteria at 8 C.F.R. § 204.5(h)(3) before USCIS will consider whether the beneficiary is within the small percentage at the very top of the field. *Kazarian v. USCIS*, 596 F.3d 1115, 1119-22 (9th Cir. 2010). While the AAO concluded that the petitioner had not established that the beneficiary was within the small percentage at the very top of his field, the AAO did not elaborate on this conclusion because the petitioner had not submitted the requisite initial evidence. The petitioner must first overcome the determination that it had not met the initial evidence requirements before reaching the issue of whether the evidence in the aggregate demonstrates that the beneficiary is within the small percentage at the very top of his field.

The AAO's prior decision discussed the petitioner's documentary evidence, including the claims regarding the savings to Medicare funding and FDA approvals, as it related to the claimed regulatory categories of evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(3) and determined that the petitioner had established that the beneficiary only met one criterion. Furthermore, the petitioner never claimed to have received qualifying awards and did not, on appeal, contest the findings of the director regarding the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix).. See *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). The petitioner does not cite any legal authority on motion to support a conclusion that the claimed unavailability of qualifying awards in the field or the claimed salary restrictions as a nonimmigrant demonstrates the beneficiary's eligibility for the classification sought, which requires evidence that meets only three of the ten criteria. Notably, the October 9, 2013 decision did not suggest that the petitioner's failure to submit qualifying evidence under the awards and salary criteria at 8 C.F.R. § 204.5(h)(3)(i) and (ix) precluded eligibility. Rather, the decision explained that the petitioner had not submitted qualifying evidence under at least three of the ten criteria at 8 C.F.R. § 204.5(h)(3).

The motion to reconsider does not allege that the issues raised in the prior decision 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 denial. The petitioner has also not asserted any new facts or provided new evidence for consideration on motion. 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 the petitioner did not 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).

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 reconsider is dismissed, the decision of the AAO dated October 9, 2013 is affirmed, and the petition remains denied.