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

(b)(6)

[redacted]

DATE: OCT 0 7 2013 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition on May 3, 2012. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on January 30, 2013. 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.

The petitioner seeks classification as an employment creation alien pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The record indicates that the petition is based on an investment in The limited partnership is located within the United States Citizenship and Immigration Services (USCIS) designated the State of Vermont Agency of Commerce and Community (ACCD) Regional Center, pursuant to section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000); section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002); section 4 of Pub. L. No. 108-156, 117 Stat. 1944 (2003); and section 1 of Pub. L. No. 112-176, 126 Stat. 1325 (2012). The petitioner indicated in part 2 of the petition that the limited partnership is located in a targeted employment area, for which the required amount of capital is $500,000.

The AAO dismissed the appeal for the following reasons: (1) the petitioner did not submit properly executed certified translations pursuant to the regulation at 8 C.F.R. § 103.2(b)(3); (2) the petitioner did not sufficiently document the lawful source of his funds pursuant to the regulation at 8 C.F.R. § 204.6(j)(3); and (3) the petitioner did not establish that he placed the required amount of capital at risk for the purpose of generating a return of capital pursuant to the regulation at 8 C.F.R. § 204.6(j)(2).

I. Motion Requirements

The regulation at 8 C.F.R. § 103.5 sets forth the requirements for filing a motion to reopen and a motion to reconsider. In general, motions must be filed within 30 days of the decision. 8 C.F.R. § 103.5(a). The official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction. 8 C.F.R. § 103.5(a)(i). Moreover, motions must meet the following filing requirements pursuant to the regulation at 8 C.F.R. § 103.5(a)(iii):

(A) In writing and signed by the affected party or the attorney or representative of record, if any;

(B) Accompanied by a nonrefundable fee as set forth in § 103.7;

(C) Accompanied 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;

(D) Addressed to the official having jurisdiction; and

(E) Submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

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] Thus, the petitioner must explain why the evidence was previously unavailable and could not have been submitted earlier.

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 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. *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. *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. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). 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. *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.

Finally, a motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Counsel did not submit a statement regarding if the validity of the AAO's prior decision is the subject of any judicial proceeding. 8 C.F.R. § 103.5(a)(iii)(C). Therefore, the motions did not meet the minimum filing requirements.

[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).

II. Motion to Reopen

In counsel's brief in support of the motion, counsel contends that there were numerous translation errors and "all documents that were submitted have been re-translated." However, counsel does not explain why proper, certified translations were not previously available or could not have been submitted earlier in the proceeding. Furthermore, the regulation at 8 C.F.R. § 103.2(b) provides:

> (3) Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Moreover, the instructions at the time that the petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, as well as the current Form I-526 instructions, stated:

> **Translations.** Any document containing a foreign language submitted to USCIS must be accompanied by a full English language translation that the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.[2]

(Emphasis in original.)

Further, in the director's request for evidence on February 15, 2012, pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the director specifically indicated:

> *Any document submitted to the USCIS containing a foreign language, must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English.*

(Emphasis in original.)

Finally, the instructions at the time that counsel filed Form I-290B, Notice of Appeal or Motion, as well as the current instructions, stated:

> **Translations**
>
> Any document containing a foreign language submitted to USCIS must be accompanied by a full English language translation that the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.[3]

[2] Copy of the November 23, 2010 edition to the Form I-526 instructions incorporated into the record of proceeding.
[3] Copy of the December 2, 2011 edition to the Form I-290B instructions incorporated into the record of proceeding.

(Emphasis in original.)

In addition to the regulation at 8 C.F.R. § 103.2(b)(3), the petitioner was notified by USCIS instructions and notices of the requirements regarding the translations of foreign language documents. Nevertheless, at the initial filing of the petition, in response to the director's request for additional evidence, and on appeal, the petitioner did not comply with the regulation at 8 C.F.R. § 103.2(b)(3). As counsel has not provided an explanation on motion as to why properly executed translations could not have been submitted earlier, the submission of new translations of previously submitted documents do not meet the requirements of a motion to reopen pursuant to the regulation at 8 C.F.R. § 103.5(a)(2). A motion to reopen permits the submission of new facts that were not previously available and could not have been discovered or presented. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO is precluded from considering evidence offered for the first time on motion. *C.f., Matter of Soriano*, 19 I&N Dec. 764, 766-67 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

For the reasons stated above, the translations of previously submitted documentation are not a proper basis for a motion to reopen.

Furthermore, besides submitting updated translations, counsel re-submitted documentation, such as bank statements and wire transfers, and submitted additional documentation regarding the sales of real estate properties, copies of bank statements for several accounts, and a letter from regarding the receipt of the petitioner's funds into the regional center. However, counsel has not offered any explanation as to why the documentary evidence was previously unavailable or could not have been submitted earlier. The director advised the petitioner in the request for evidence that he must trace the source of the invested funds through evidence such as wire transfers and the director concluded in the final decision that the petitioner had not sufficiently documented the path of the invested funds.

Finally, counsel submits most of the evidence in a supplemental filing that postdates the filing of the motion. While the regulation at 8 C.F.R. § 103.3(a)(2)(vii) allows a petitioner to supplement an appeal, counsel cites to no legal authority that allows a petitioner to supplement a motion. The instructions for the Form I-290B provide:

> **Motions**
>
> Although a petitioner may be permitted additional time to submit a brief and/or evidence to support an appeal, no such provision applies to motions. Any additional evidence must be submitted with the motion.

(Emphasis in original.)

Accordingly, the evidence that counsel submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot be considered a proper basis for a motion to reopen. As such, the motion to reopen will be dismissed.

III. Motion to Reconsider

On motion, counsel does not make any claim that the AAO's decision was based on an incorrect application of law or policy, and does not support her brief with any pertinent precedent decisions. The basis for a motion to reconsider must depend on something new, if not necessarily new factual developments, then at least new arguments showing that some important issue of fact or law was overlooked. *See Rehman v. Gonzales,* 441 F.3d 506 (7th Cir. 2006). Because counsel has failed to raise such allegations of error, the motion does not meet the requirements of the regulation at 8 C.F.R. § 103.5(a)(3).

Counsel does not allege any factual or legal error in the AAO's prior decision nor does she refer to new legal authority that materially affects the petitioner's case. 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 not raised such allegations of error in the motion to reconsider, the AAO will dismiss the motion to reconsider.

IV. SUMMARY

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 and the motion to reconsider is dismissed, the decision of the AAO dated January 30, 2013, is affirmed, and the petition remains denied.