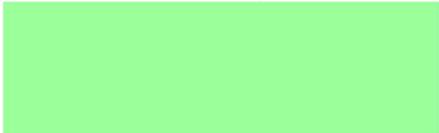




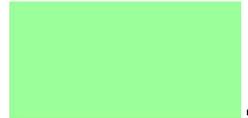
U.S. Citizenship  
and Immigration  
Services

(b)(6)

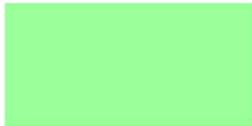


DATE: **JAN 25 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE:

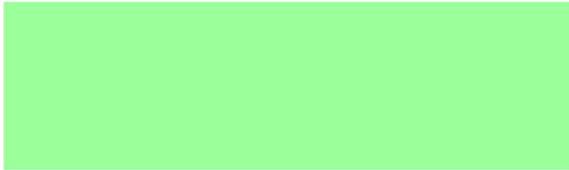


IN RE: PETITIONER:  
BENEFICIARY:



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.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on September 17, 2011. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal on August 22, 2012. The matter is now before the AAO on a motion to reopen and reconsider, filed on Friday, September 25, 2012.<sup>1</sup> The motion will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

### I. Timeliness of a Motion

In order to properly file a motion to reopen or reconsider, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the motion must be filed within 30 days of the unfavorable decision that the motion seeks to reopen or reconsider. If the decision was mailed, the motion must be filed within 33 days. See 8 C.F.R. § 103.8(b). The regulation at 8 C.F.R. § 1.2 explains that when the last day of a period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. The date of filing is not the date of submission, but the date of actual receipt with the proper signature and the required fee. See 8 C.F.R. § 103.2(a)(7)(i). The regulation at 8 C.F.R. § 103.5(a)(1)(i) further provides that if the petitioner fails to file a motion to reopen before the prescribed period expires, the AAO may, in its discretion, excuse the delay if the petitioner shows that the delay was reasonable and was beyond his or her control.

The AAO issued the unfavorable decision on August 22, 2012. The decision was served on the petitioner and counsel via first-class mail on August 22, 2012. The AAO properly provided notice to the petitioner that the specific requirements for filing a motion to reopen can be found under the regulation at 8 C.F.R. § 103.5 and that a motion must be filed within 30 days of the AAO's decision.

Counsel dated the Notice of Appeal or Motion, Form I-290B, September 19, 2012, and mailed the Form I-290B and accompanied documents to the United States Citizenship and Immigration Services (USCIS) on September 24, 2012. The USCIS received the documents on Tuesday, September 25, 2012, 34 days after the unfavorable decision was issued. In addition, neither the petitioner nor counsel has demonstrated in page 3 of the Form I-290B or the accompanying documents that the delay was either reasonable or was beyond the control of the petitioner, as required under the regulation at 8 C.F.R. § 103.5(a)(1)(i). Accordingly, the motion is dismissed as untimely filed.

### II. Requirements of a Motion

Even if the filing had been timely, the filing does not meet the requirements of a motion. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) informs the public of the filing requirements for a motion and provides in subsection (C) that a motion shall be submitted on Form I-290B and it 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."

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<sup>1</sup> On motion, counsel filed two Notices of Appeal or Motion, Forms I-290B. The United States Postal Service (USPS) online printouts indicate that USPS delivered the first Form I-290B to U.S. Citizenship and Immigration Services (USCIS) on Friday, September 21, 2012; and delivered the second Form I-290B to USCIS on Tuesday, September 25, 2012. This decision relates to the second Form I-290B, receipt number [REDACTED]

On motion, counsel has failed to submit a statement indicating if the validity of the AAO's August 22, 2012 unfavorable decision has been or is the subject of any judicial proceeding pursuant to the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion must also be dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4) without regard to the claims contained within the motion.

### III. Motion to Reopen and Reconsider

A party seeking to reopen a proceeding bears a heavy burden and "must state the new facts to be provided in the reopened proceeding 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 evidence that was not available and could not have been discovered or presented in the previous proceeding. *See Matter of Singh*, 24 I&N Dec. 331, 334 (BIA 2007). Based on its discretion, "the INS [now the USCIS] has some latitude in deciding when to reopen a case. [USCIS] should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a *prima facie* case." *INS v. Abudu*, 485 U.S. 94, 108 (1988). The result also needlessly wastes the time and efforts of the triers of fact who must attend to the filing requests. *Id.*

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the original decision, in this case the AAO's summary dismissal, 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).

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. 56, 58 (BIA 2006). 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 has provided: (1) an undated general certificate of translation from [REDACTED] that does not specifically identify which translations [REDACTED] completed; (2) a September 19, 2012 letter from [REDACTED] former [REDACTED] Vice-President and former [REDACTED] President; and (3) [REDACTED] undated curriculum vitae. Counsel has failed to demonstrate that these documents constitute "new" evidence, such that they were not available and could not have been discovered or presented in the previous proceeding. *See Matter of Singh*, 24 I&N Dec. at 334. First, neither counsel nor the undated certificate of translation indicates when the

certificate of translation was signed or when translation from Korean to English was completed. In other words, counsel has failed to show that this certificate was not available and could not have been discovered or presented in the previous proceeding. *See id.* In addition, as this undated certificate of translation fails to specify the documents that [REDACTED] translated, it fails to overcome the AAO's August 22, 2012 finding that the translations in the record do not comply with the requirements under the regulation at 8 C.F.R. § 103.2(b)(3).

Second, as the September 19, 2012 letter from [REDACTED] makes references to the petitioner's achievements from 1987 to 2005, neither counsel nor the letter has shown that this letter was not available and could not have been discovered or presented in the previous proceeding. *See Matter of Singh*, 24 I&N Dec. at 334. Similarly, [REDACTED] undated curriculum vitae fails to meet the definition of "new" evidence.

Finally, the September 25, 2012 filing fails to identify an incorrect application of law or USCIS policy in the AAO's decision summarily dismissing the appeal. Similar to the appeal, on motion, counsel does not specifically challenge any of the AAO's findings or point to specific errors in the AAO's August 22, 2012 decision. Thus, the September 25, 2012 filing does not meet the requirements of a motion to reopen or reconsider.

In conclusion, the motion to reopen and reconsider, [REDACTED] is dismissed because the petitioner has failed to file it timely, because the petitioner has failed to submit a statement regarding any judicial proceeding relating to the validity of the AAO's August 22, 2012 unfavorable decision and because the filing does not meet the requirements of a motion.

**ORDER:** The motion is dismissed, the decision of the AAO dated August 22, 2012, is affirmed, and the petition remains denied.