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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: JUL 22 2013

Office: NEBRASKA 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".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on October 2, 2008. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on October 21, 2009. The AAO dismissed the petitioner's first three motions to reopen and reconsider on April 12, 2011, on July 11, 2012 and on December 17, 2012. The matter is again before the AAO on a motion to reopen and reconsider. The motion to reopen will be dismissed. The motion to reconsider will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

Counsel's brief accompanying the present motions is generally the same as counsel's brief which accompanied the petitioner's first motion, and reiterates previous claims regarding the petitioner's eligibility for the exclusive classification. The petitioner makes no attempt in his current motion to address the AAO's most recent decision, which concluded that the filing did not meet the regulatory requirements for a motion to reopen or a motion to reconsider.

Motion to Reconsider

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 USCIS policy. 8 C.F.R. § 103.5(a)(3). The Board of Immigration Appeals (BIA) generally provides that a motion to reconsider asserts that at the time of the previous decision, an error was made. It questions the decision for alleged errors in appraising the facts and the law. The very nature of a motion to reconsider is that the original decision was defective in some regard. *See Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991).

The only case law counsel cites is *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), which predates the petitioner's second motion. 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.

The AAO concluded in its most recent decision that the petitioner's filing did not meet the requirements of a motion to reopen or reconsider. The petitioner has not provided any pertinent precedent decision or other legal authority to support a finding that the AAO's determination was in error. Consequently, he has failed to meet the regulatory requirements for a motion to reconsider.

Motion to Reopen

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, 108 (1988)). “There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.” *INS v. Abudu*, 485 at 107. Based on its discretion, “[T]he [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.” *Id.* at 108. The result also needlessly wastes the time and efforts of the triers of fact who must attend to the filing requests. *Id.* A party seeking to reopen a proceeding bears a “heavy burden.” *Id.* at 110. With the current motion, the petitioner has not met that burden.

A motion to reopen is a fundamentally different motion than a motion to reconsider. *Id.* at 402 (citing *Sanchez v. INS*, 707 F.2d 1523, 1529 (D.C.Cir.1983); *Chudshevid v. INS*, 641 F.2d 780, 783 (9th Cir.1981)). It does not contest the correctness of (or simply request a reevaluation of) the prior decision on the previous factual record. Rather, a motion to reopen proceedings seeks to reopen proceedings so that new evidence can be presented and so that a new decision can be entered, normally after a further evidentiary hearing. *Matter of Cerna*, 20 I&N Dec. at 403. “A motion to reopen must state the *new* facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.” (Emphasis added) 8 C.F.R. § 103.5(a)(2). The petitioner presents the same facts within this motion that he presented in a previous proceeding and has submitted no new evidence. Furthermore, the present motion may only address the elements contained in the most recent AAO decision, finding that the petitioner’s August 9, 2012 filing did not meet the requirements of a motion. Therefore, he has failed to meet the regulatory requirements for filing a motion to reopen.

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.

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 II New Riverside University Dictionary 792 (1984) (Emphasis in original.)

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ORDER: The motion to reopen is dismissed. The motion to reconsider is dismissed. The decision of the AAO dated December 17, 2012, is affirmed, and the petition remains denied.