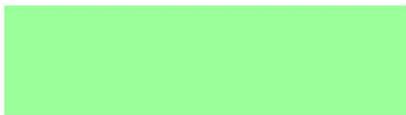




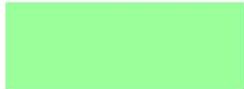
U.S. Citizenship
and Immigration
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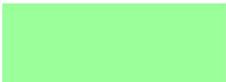
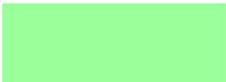
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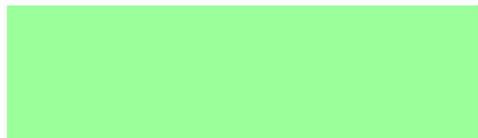
Office: TEXAS SERVICE CENTER

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,

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 December 18, 2012, and dismissed a subsequently filed motion to reopen and motion to reconsider on June 10, 2013. The matter is now before the AAO on a second 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.

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 failed to 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 counsel's January 17, 2013 motions, counsel submitted a brief primarily addressing the director's decision. Counsel failed to submit any documentary evidence in support of that motion and failed to address the AAO's dismissal of the petitioner's appeal. The AAO dismissed the motion, stating that it only considers arguments and evidence relating to the grounds underlying the AAO's most recent decision and that counsel's opportunity to contest the director's findings was the previously filed appeal.

Regarding counsel's current motions, counsel again must establish that the AAO's most recent decision, the decision dismissing the petitioner's motion to reopen and motion to reconsider on June 10, 2013, was itself in error. Counsel has not done so in this proceeding.

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)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

Counsel failed to submit affidavits or other documentary evidence as required pursuant to the regulation at 8 C.F.R. § 103.5(a)(2). Therefore, counsel's filing does not meet the applicable requirements for a motion to reopen and the motion to reopen will be dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4).

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).

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). 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. 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. 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. 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. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

On motion, counsel claims that “the Petitioner respectfully disagrees with the recent decision of the AAO and further asserts that the AAO’s June 10, 2013 dismissal was itself in error.” However, counsel failed to provide any arguments or refer to any legal authority demonstrating that the AAO’s dismissal of the prior motions was based on an incorrect application of law or USCIS policy pursuant to the regulation at 8 C.F.R. § 103.5(a)(3). Again, counsel makes no argument that explains how the AAO’s dismissal of the motions was in error. Counsel had the opportunity to contest the AAO’s dismissal of the appeal when he filed his previous motions but failed to do so.

Even if the AAO considered counsel’s current arguments in the instant motion to reconsider, counsel failed to establish that the AAO’s dismissal of the appeal was in error as a matter of law or USCIS policy. Counsel makes general assertions but does not provide an explanation regarding how the AAO erred in its decision. For example, regarding the commercial successes criterion, counsel asserts that, “[t]he AAO was clearly in error reaching the final determination on this criterion because previous evidence submitted by the petitioner sufficiently showed that [the petitioner] has been part of movies that have attained commercial success.” Although the AAO thoroughly discussed the petitioner’s evidence and explained why the petitioner failed to meet the criterion, counsel provided no explanation as to how the AAO erred.

Similarly, regarding the published material criterion, counsel states that, “[b]ased on our review, the petitioner submitted sufficient documentary evidence demonstrating that she meets this criterion.” He does not however, explain how the AAO erred in its review of the evidence. Again, although the AAO specifically discussed how the petitioner’s documentation failed to establish eligibility for the criterion, counsel cites to no precedent decision and provides no explanation to explain how the AAO’s decision was in error.

The motion to reconsider does not allege that the issues, as raised on the prior motion, 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 dismissal of the previous motion. Counsel 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 counsel has failed to 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 reopen and the motion to reconsider are dismissed, the decision of the AAO dated June 10, 2013 is affirmed, and the petition remains denied.