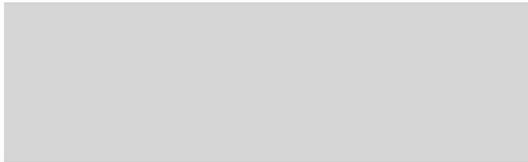




U.S. Citizenship
and Immigration
Services

(b)(6)



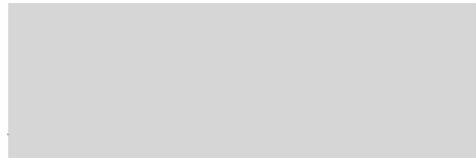
DATE: **JUN 01 2015**

PETITION RECEIPT #: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(P)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(P)(iii)

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The California Service Center Director denied the petition for a nonimmigrant visa on June 21, 2013. The Administrative Appeals Office (AAO) dismissed the appeal of that decision on May 15, 2014. On October 1, 2014, we dismissed the petitioner's motion to reopen and motion to reconsider as untimely filed. The matter is now before us on a second motion to reopen and motion to reconsider. We will dismiss the motions, our previous decision 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." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed. In this case, the petitioner has not submitted a statement regarding if the validity of our decision has been or is subject of any judicial proceeding. As such, the motions must be dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4).

Notwithstanding the above, in our decision dismissing the petitioner's appeal, we specifically and thoroughly discussed the petitioner's evidence and found that the petitioner did not submit required evidence of the beneficiary's culturally unique skills or performances pursuant to 8 C.F.R. § 214.2(p)(6)(ii). We also noted that none of the submitted documents referenced the beneficiary individually.

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. § 103.2(a)(2).

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.

In its brief in support of the motion, the petitioner asserts that we are in error in interpreting the regulation at 8 C.F.R. § 103.5a(b) [now 8 C.F.R. § 103.8; *see* 76 Fed. Reg. 53764 (Nov. 28, 2011)], as follows:

[T]he prescribed period, indicated in the May 15, denial, was 'within 33 days of the date of the decision.' In other words the prescribed period to reply ended on June 17, 2014.

However, 8 C.F.R. [§] 103.5a(b) [now 8 C.F.R. § 103.8] gives three extra days past the ‘prescribed period.’ In this case, the three extra days allowed my client to file on or before June 20, 2014.

My client filed on June 18, 2014 and the appeal was received by the Service on June 19, 2014.

We ask the Service to consider this clear regulatory language, and its application to the facts of this filing.

We ask that our response be considered timely filed so long as it is mailed by Friday, June 20, 2014.”

The regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that any motion to reopen or reconsider an action by USCIS be filed within 30 days of the decision that the motion seeks to reopen or reconsider. If the decision was mailed, the motion must be filed within 33 days, pursuant to 8 C.F.R. § 103.8(b), which states, in pertinent part, as follows:

Effect of service by mail. Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing.

Pursuant to the regulation at 8 C.F.R. § 103.5(a)(1)(i), the prescribed period for filing a motion is within 30 days of the decision. Neither the Act nor the pertinent regulations grant us authority to extend this time limit. The date of filing is not the date of mailing, but the date of actual receipt. See 8 C.F.R. § 103.2(a)(7)(i). The record indicates that we issued the decision on May 15, 2014. It is noted that we properly gave notice to the petitioner that it had 33 days to file the motion, the 30 day “prescribed period” plus three days. The petitioner dated the motion June 16, 2014. The prior motion was not received, however, until Wednesday, June 18, 2014, or 34 days after we issued our decision. Accordingly, the motion was untimely filed and we rejected it.

The motion to reconsider does not allege the application of precedent to a novel situation, or that there is new precedent or a change in law that affects our prior decision. As noted above, a motion to reconsider must include specific allegations as to how we erred as a matter of fact or law in our prior decision, and it must be supported by pertinent legal authority. Because the petitioner has not raised such allegations of error in its motion to reconsider, we will dismiss the motion to reconsider.

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). As previously stated, the regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that any motion to reopen or reconsider an action by USCIS be filed within 30 days of the decision that the motion seeks to reopen or reconsider, except that failure to file a motion to reopen before this period expires may be excused in the discretion of USCIS where it is demonstrated

that the delay was reasonable and was beyond the control of the petitioner. As previously stated, if the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.8(b).

In the instant motion, the petitioner submits a brief which generally reasserts its previous claims. On motion the petitioner, through counsel, concedes that the prior motion was filed late and further states as follows:

[W]ith regard to discretionary factors in accepting an appeal, my clients were unable to meet with me to sign a [Form] G-28 [Notice of Entry of Appearance as Attorney or Accredited Representative] until June 17, 2014 because I was in Europe for approximately the previous three weeks working on a case to be filed at the [redacted] Criminal Court in [redacted]. I believe that I returned on the seventeenth and met my clients that same day, but it was too late to file on the seventeenth.

A review of the record reveals that the Form G-28 was signed by both the petitioner and counsel on June 16, 2014. The petitioner has not submitted any additional evidence with the instant motion.

The petitioner filed the prior motion on Wednesday, June 18, 2014, or 34 days subsequent to our decision dismissing the petitioner's appeal. We dismissed the petitioner's motion as untimely filed. We found that, although the petitioner asserted that the delay in filing was due to "travel schedules," the petitioner did not establish the delay was either reasonable or beyond the control of the petitioner pursuant to 8 C.F.R. § 103.5(a)(1)(i). Specifically, the petitioner did not explain how "travel schedules" resulted in a delay in filing the motion, and why such a delay should be considered reasonable or beyond the petitioner's control such that it would exempt it from adhering to the 33-day timeframe for the filing of a motion established by regulations. We also noted that while the filing was postmarked June 17, 2014, the petitioner's supporting brief was dated June 16, 2014, and the petitioner did not explain why it could not have mailed the motion on that date.

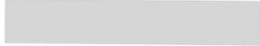
The petitioner has not sufficiently explained why his failure to timely file the Form I-290B, Notice of Appeal or Motion, was reasonable or beyond his control such that USCIS can exercise discretion to accept the late motion. 8 C.F.R. § 103.5(a)(1)(i). Further, the facts asserted by counsel are not supported by the required affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Therefore, counsel's assertions cannot be considered new evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as 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. With the current motion, the petitioner has not met that burden. We will dismiss the motion to reopen.

Finally, even if the petitioner's prior motion were considered timely filed, it does not overcome the stated reasons for our decision dismissing the petitioner's appeal. As previously stated, in our appeal decision we found that the petitioner did not submit required evidence of the beneficiary's culturally unique skills or performances pursuant to 8 C.F.R. § 214.2(p)(6)(ii). Although the petitioner asserted on appeal that it "provided an expert opinion regarding the cultural significance of the art form for which it seeks P-3 status for [the beneficiary]," we noted that the petitioner provided no further explanation in support of this assertion, nor submitted any evidence to establish that the director's conclusion was erroneous. We discussed the submitted evidence and concluded that the petitioner did not explain how the submitted evidence, consisting of documentation generally describing the Korean traditional Hanbok and letters expressing appreciation for the petitioner's presentations about Korean traditional costumes, constituted testimonials from experts or published material about the beneficiary's performance, as required under the plain language of 8 C.F.R. § 214.2(p)(6)(ii). We noted that none of the submitted documents referenced the beneficiary individually. Accordingly, we found that those documents did not constitute testimonials from experts or published material about the beneficiary's performance, as required under the plain language of 8 C.F.R. § 214.2(p)(6)(ii).

In its prior motion, the petitioner submitted additional, almost identical letters from three churches and [redacted] Chamber of Commerce. The petitioner also submitted a new letter from the [redacted] Washington which was almost identical to the letter submitted on appeal from the [redacted] Washington. Unlike the letters submitted in support of the appeal, the letters submitted with the prior motion were addressed to the beneficiary instead of the petitioner and contained new performance dates consistent with the passage of time. Although the letters "referenced the beneficiary individually," the letters did not contain any information about the beneficiary's culturally unique skills or performances. In addition, they are from churches and a Korean chamber of commerce and the authors do not explain their expertise in Korean culture. Therefore, those documents do not constitute testimonials from experts or published material about the beneficiary's performance, as required under the plain language of 8 C.F.R. § 214.2(p)(6)(ii).

Additionally, our appeal decision addressed the director's finding that all of the beneficiary's performances or presentations will not be culturally unique considering the petitioner's apparent involvement in alterations and repairs. We concluded that the petitioner had abandoned the issue by not contesting or addressing that particular finding on appeal, *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). In its prior motion, the petitioner asserted that the submitted evidence overcomes the director's finding that all of the beneficiary's performances or presentations will not be culturally unique. However, as discussed above, the petitioner has not submitted evidence sufficient to establish that the beneficiary's performance or presentation is culturally unique as required by 8 C.F.R. § 214.2(p)(6)(ii)(A) or (B). Absent evidence that the beneficiary's performance or presentation is culturally unique to Korea, the petitioner cannot establish that the beneficiary's presentations or performances will be "culturally unique" events. Based on the foregoing, the evidence in support of the petitioner's prior motion does not overcome the reasons for our decision dismissing the petitioner's appeal.



The petition will remain denied and the motion dismissed for the previously stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 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 October 1, 2014, is affirmed, and the petition remains denied.