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)

DATE: MAY 0 8 2015 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 a subsequent appeal. The matter is now before us on motions to reopen and to reconsider. We will dismiss the motions.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences, the arts, or business, and as a member of the professions holding an advanced degree. The petitioner, a petroleum engineer, asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. In our appellate decision dated December 5, 2014, we upheld the director's determination. The petitioner filed the Form I-290B, Notice of Appeal or Motion (Form I-290B), on January 7, 2015. In part 3 of the Form I-290B, the petitioner selected the box indicating that he was "filing a motion to reopen and a motion to reconsider a decision."

When he filed the motion on January 7, 2015, the petitioner submitted a letter from counsel entitled "FORM I-290B MOTION TO RECONSIDER" and a copy of our December 5, 2014 decision.[1] Counsel asserted that our decision was not received by his office until December 15, 2014, that his law office was "preparing for the holidays," and that his spouse, who works as a paralegal for his law firm, was expected "to undergo major surgery on or about January 7, 2015." Counsel requested "a time period of 30 days to prepare a brief and additional evidence which will be sent to the AAO."

The regulation at 8 C.F.R. § 103.5(a)(1)(iii) provides that a motion "may be accompanied by a brief." However, unlike the regulation at 8 C.F.R. § 103.3(a)(2)(vii) governing appeals, which allows a petitioner, under limited circumstances, to supplement an appeal once it has been filed, no similar provision applies to the filing of a motion under 8 C.F.R. § 103.5(a)(1)(iii).

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 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.

In the letter accompanying the motion, the petitioner, through counsel, quotes four statements from the appellate decision and asserts that USCIS either "incorrectly appl[ied] its own standards" or "incorrectly appl[ied] the legal standards," and that our findings are "incorrect." Without any further discussion, the petitioner states that those issues "will be more formally and legally addressed with the Brief that will follow within 30 days." As the petitioner's motion does not state the new

[1] As our appellate decision was mailed, the petitioner was afforded an additional three days for filing the motion pursuant to the regulation at 8 C.F.R. § 103.8(b).

facts to be provided and is not supported by any affidavits or other documentary evidence, the motion to reopen is dismissed.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions or legal citation to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 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.

As mentioned previously, the petitioner asserts that our appellate findings are "incorrect" and that USCIS incorrectly applied our own standards and legal standards. For example, the petitioner contends that "USCIS is incorrectly applying the legal standards when it states that the [petitioner's] past record of prior achievements must have some degree of influence on the field as a whole." *In re New York State Dept of Transportation*, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), is the precedent decision that setforth the factors to be considered when evaluating a request for a national interest waiver. Pursuant to NYSDOT, a petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. The petitioner's assertion, therefore, that USCIS applied incorrect legal standards by requiring the petitioner to demonstrate a past record of prior achievement with some degree of influence on the field as a whole is without merit.

The petitioner's motion includes no substantive discussion of any alleged errors or incorrect standards that would provide sufficient bases to overcome our appellate findings. Again, the petitioner states that the issues "will be more formally and legally addressed with the Brief that will follow within 30 days." The motion, however, is not supported by any pertinent precedent decisions or legal citation to establish that our December 5, 2014, decision was based on an incorrect application of law or USCIS policy. In addition, the motion does not establish that our appellate decision was incorrect based on the evidence of record at the time of the decision. Accordingly, the motion to reconsider is dismissed.

On February 5, 2015, two months after our appellate decision was issued, we received the petitioner's untimely brief in support of the motion. A cover letter accompanying the February 2015 submission states: "Enclosed please find the Brief for Appeal in the above matter." The instructions to the Form I-290B, specifically state: "No additional time will be permitted to submit supplementary arguments or evidence in support of a motion to reopen or reconsider after the Form I-290B has been filed." Pursuant to the regulation at 8 C.F.R. § 103.2(a)(1), every benefit request must be executed and filed in accordance with form instructions which are incorporated into the regulation. The Form I-290B itself contains six boxes in Part 3, one of which the petitioner must check to indicate whether he is filing an appeal or a motion. Of the three boxes that pertain to motions, all indicate that the brief and/or additional evidence is "attached" to the motion. The Form I-290B contains no provision for the submission of briefs or evidence after the filing of the motion.

Again, the regulation at 8 C.F.R. § 103.5(a)(2) provides that a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence, and the regulation at 8 C.F.R. § 103.5(a)(3) provides that 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 Service policy. The regulatory language, the Form I-290B instructions, and the information on the form itself explicitly require the motions to reopen and reconsider to be supported by a brief and/or evidence at the time of filing.

In this matter, the petitioner's motion did not meet the regulatory requirements of a motion to reopen or a motion to reconsider at the time of filing. In addition, the regulations do not allow the petitioner to submit a brief or evidence to supplement a motion once it has been filed. *See* 8 C.F.R. § 103.5(a)(1)(iii). Lastly, the petitioner did not submit a statement regarding any judicial proceeding relating to the validity of our December 5, 2014, unfavorable decision, as required under the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C).

The regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motions are dismissed, and our previous decision and the decision of the director remain undisturbed.

ORDER: The motions to reopen and reconsider are dismissed, and the petition remains denied.