



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: SEP 05 2013

Office: TEXAS 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition on April 27, 2012. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on February 27, 2013. The matter is now before the AAO on a motion to reopen and reconsider. The motion to reopen will be dismissed. The motion to reconsider will be dismissed. Ultimately, 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." 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 failed to submit a statement regarding if the validity of the decision of the AAO 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, the AAO's February 27, 2013 decision dismissing the petitioner's original appeal concluded that the petitioner failed to establish he meets at least three of the regulatory criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). The AAO specifically and thoroughly discussed the petitioner's evidence and determined that the petitioner failed to establish eligibility for the following criteria:

- The awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i);
- The membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii);
- The published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii);
- The original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v);
- The scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi);
- The artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii);
- The leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii); and
- The commercial success criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x).

On motion, counsel contests the AAO's decision regarding the awards criterion and the original contributions of major significance criterion. Counsel does not contest the decision of the AAO regarding the membership criterion, the published material criterion, the scholarly articles criterion, the artistic display criterion, the leading or critical role criterion, or the commercial success criterion. The AAO, therefore, considers these issues to be abandoned and will not further discuss these criteria on appeal. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005).

On motion, counsel first focuses on a previously approved immigrant petition under this same extraordinary ability classification. The petitioner filed this previous petition on October 13, 2004,

and USCIS approved it on February 27, 2006. The State Department subsequently terminated the petition under the authority of section 203(g) of the Act, which states:

For purposes of carrying out the Secretary's responsibilities in the orderly administration of this section, the Secretary of State may make reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year within each of the categories under subsections (a), (b), and (c) and to rely upon such estimates in authorizing the issuance of visas. The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa within one year following notification to the alien of the availability of such visa, but the Secretary shall reinstate the registration of any such alien who establishes within 2 years following the date of notification of the availability of such visa that such failure to apply was due to circumstances beyond the alien's control.

The record does not support counsel's implication that the AAO disregarded the prior approval. Rather, the AAO noted both that an approval based on the same evidence supporting the current Form I-140 would be gross error and that a prior approval from several years past is not indicative of current eligibility as the statute requires sustained national or international acclaim as of the date of filing.

Motion to Reopen

A motion to reopen proceedings 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. 399, 403 (BIA 1991). 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 to reopen should only be granted if the new evidence presented "could not by the exercise of due diligence have been discovered earlier." *Matter of Coelho*, 20 I&N Dec. 464, 472 n. 4 (BIA 1992) (citing *Taylor v. Illinois*, 484 U.S. 400, 414 n. 18; *Guled v. Mukasey*, 515 F.3d 872, 882 (8th Cir. 2008); *Krougliak v. I.N.S.*, 289 F.3d 457, 460 (7th Cir. 2002)). New evidence is considered to be material to the present case and not previously submitted. This "new" evidence is expected to convey new value or new meaning to the case. The reviewing authority will deny a motion to reopen that is not accompanied by previously unavailable and material evidence. *Cf. Matter of Coelho*, 20 I&N Dec. at 472.

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).

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, “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.” *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.

Regarding the motion to reopen, the petitioner failed to provide new facts that are supported by affidavits or other documentary evidence and that relate to the petitioner’s eligibility as of the date of filing, May 10, 2011. Specifically, the petitioner’s self-serving curriculum vitae and the reference letters were already part of the record of proceeding and, thus, are not new. The petitioner’s introduction in the 2011-2012 issue of [REDACTED] published in 2013, postdates the filing of the petition and, thus, does not relate to his eligibility as of the date of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971). Consequently, the current submission fails to meet the requirements of a motion to reopen.

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 U.S. Citizenship and Immigration Services (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 O-S-G-*, 24 I&N Dec. 56 (BIA 2006). A motion to reconsider is based on the existing record and petitioners may not introduce new facts or new evidence relative to their arguments. 8 C.F.R. § 103.5(a)(3).

Additionally, 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. at 58. 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 asserts the AAO incorrectly determined that the petitioner had abandoned the claims to the [REDACTED] and his receipt of government funding. The AAO decision acknowledged that the petitioner initially made these claims of eligibility, but noted that he failed to contest the director's decision or to raise these as issues on appeal. Consequently, the petitioner abandoned these claims within the appellate proceedings. The AAO supported this determination by citing to *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005) and *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, 9 (E.D.N.Y. Sept. 30, 2011). Counsel asserts that cases the AAO references are not applicable as the cited cases were relevant more broadly, to forms of relief rather than being applicable to individual eligibility claims under the regulatory criteria. *Hristov*, however, did not involve forms of relief. Rather, it found that the petitioner in that case waived specific criteria under 8 C.F.R. § 205.5(h)(3) by failing to raise them on appeal. The court stated: "The law does not require the plaintiff to affirmatively waive claims; instead, he waives claims if he fails to assert them on appeal." *Id.* at *9. In light of *Hristov's* direct relevance, counsel has not shown that the AAO committed an error in its application of the case law, only one of which was *Sepulveda*.

Counsel also references the [REDACTED], claiming the AAO erred in determining that the record lacked independent documentation showing this fellowship was a nationally or internationally recognized prize or award for excellence in the petitioner's field. Counsel does not identify the evidence that he asserts the director considered but the AAO did not. As noted by counsel, the director did conclude that the grant and fellowship were local; however, the director did not reference any independent evidence in support of that conclusion. National and international recognition results, not from the individual or entity that signed the prize or the award, but through the awareness of the accolade in the eyes of the field nationally or internationally. This can occur through specific means; for example, through media coverage. A national or international level competition may issue lesser awards that merely receive local or regional recognition, which do not meet the plain language requirements of this criterion. Additionally, unsupported conclusory letters are not sufficient evidence that a particular prize or award is nationally or internationally recognized. As such, the petitioner's claim that this fellowship constitutes a national award because the federal government of Australia issued the fellowship is not sufficient. The regulation requires the award to be nationally recognized rather than simply being issued by a national government authority.

The portion of the motion relating to the original contributions of major significance criterion does not contain any discussion of new facts that are supported with affidavits or other documentary evidence and asserts error on the AAO's part. The AAO will therefore treat this portion of the motion as a motion to reconsider. However, the petitioner fails to support the motion to reconsider with any precedent decisions that demonstrate the AAO misapplied the law or USCIS policy.

Rather, counsel asserts that the AAO was “without basis” in citing *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff’d in part* 596 F.3d 1115 (9th Cir. 2010) for the proposition that vague, solicited letters are insufficient by themselves to establish that any contributions are of major significance. Counsel asserts that, unlike the petitioner in *Kazarian*, the petitioner in this matter has submitted letters from internationally recognized experts. Counsel cites the *Adjudicator’s Field Manual* for the proposition that expert letters add value. The AAO’s decision, however, did not summarily reject the letters, but carefully considered the content of those letters, determining that they were conclusory and unsupported by other evidence in the record. Although counsel’s motion brief asserts that the AAO disregarded the petitioner’s accomplishments listed in the expert letters, he failed to provide any examples of such overlooked accomplishments. Moreover, counsel states that these accomplishments, “by any objective criterion, would be regarded as being of ‘major significance.’” While counsel uses the word “objective,” he is actually asking USCIS to make a subjective determination that an accomplishment is of major significance based on a description of the accomplishment. Counsel provides no legal authority to support the implication in his motion to reconsider that USCIS should subjectively regard accomplishments as being of major significance absent objective evidence of the impact of these accomplishments in the field. Thus, the filing fails to meet the requirements for a motion to reconsider.

The motions will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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 is dismissed. The motion to reconsider is dismissed. The decision of the AAO dated February 27, 2013, is affirmed, and the petition remains denied.