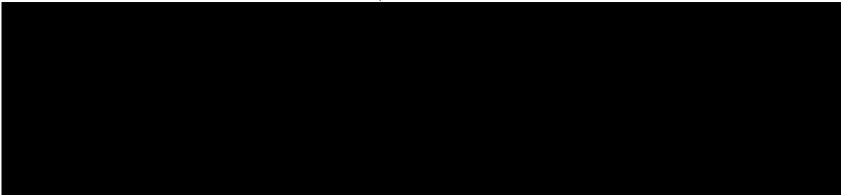


D8



U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



FILE: LIN 02 186 53702 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

FEB 11 2004

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

ON BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO) on appeal. A motion to reopen and reconsider was timely filed. The matter is now before the AAO. The motion will be dismissed.

A form I-129 was filed on May 15, 2002, in the name of Fred Astaire Dance Studio, dba G&K Dance, Inc., seeking O-1 classification of the beneficiary, under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien with extraordinary ability in ballroom dance instruction, in order to employ him in the United States for a period of three years at an annual salary of \$25,000.

The director denied the petition because the petitioner failed to establish that the beneficiary is at the very top of his field of endeavor. The petitioner appealed the director's decision and the AAO dismissed the appeal. A new Form G-28 was filed with the motion to reopen and reconsider now before the AAO.

On motion, counsel for the petitioner submits a statement asserting that the beneficiary qualifies for O-1 classification and submits additional evidence.

8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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."

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

On motion, the petitioner has submitted a letter from counsel, phone and fax records, and new business documents including sales contracts and bills of lading. As argument, the petitioner states: "[w]e submit that Mr. Li's duties continue to be those of an executive as defined by the Act. . . . As demonstrated in previous appeals and in the original extension application, Mr. Li's position duties and responsibilities and overall function in the organization qualify him in this category."

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). The petitioner has provided a letter of recommendation for the beneficiary written by the president of the American Ballroom Company. A letter written by Vlatcheslav Sarukhanyan, president of the All Armenian Professional Ball and Sport Dance Association and translations of articles, among other items. Such evidence submitted was previously available and could have been discovered or presented in the previous proceeding.

On review, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

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. With the current motion, the movant has not met that burden. The motion to reopen will be dismissed.

Furthermore, 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

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).

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. 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.

Although the petitioner has submitted a motion requesting CIS to reopen or reconsider the decision, the petitioner does not submit any document that would meet the requirements of a motion to reconsider. The reason provided for reconsideration, i.e., that the beneficiary satisfies three of the criteria listed at 8 C.F.R. § 214.2(o)(3)(iii)(B) — - is not an adequate reason for reconsideration. The petitioner failed to cite any precedent decisions in support of a motion to reconsider. The petitioner does not argue that the previous decisions were based on an incorrect application of law or CIS policy. The petitioner's motion will be dismissed.

Finally, it should be noted for the record that, unless CIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.