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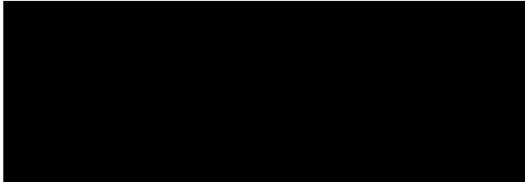
U.S. Department of Homeland Security
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Washington, DC 20536

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**U.S. Citizenship
and Immigration
Services**



File: LIN 03 039 51858

Office: NEBRASKA SERVICE CENTER

Date: **FEB 26 2004**

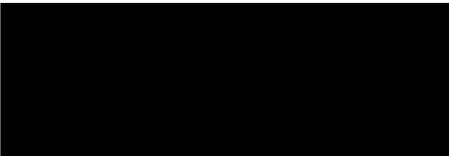
IN RE: Petitioner:

Beneficiary:



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:



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

RP
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The director's decision to deny the petition was affirmed by the Administrative Appeals Office (AAO) on appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a dance studio and an artist management group, seeking O-1 classification of the beneficiary as an alien with extraordinary ability in the arts under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i) in order to employ her for one year as a ballroom dance performer and instructor at an annual salary of \$35,000 plus an undetermined percentage for each staged performance.

The director denied the petition, finding that the petitioner had failed to establish that the beneficiary satisfies the standards for classification as an alien with extraordinary ability in the arts.

Both the director and the AAO determined that the petitioner failed to establish that the beneficiary qualifies as an alien with extraordinary ability in the arts under 8 C.F.R. § 214.2(o)(3)(ii) and (iv). As the AAO noted in its decision, it would be more appropriate to apply the more stringent requirements required to prove extraordinary ability in athletics under 8 C.F.R. § 214.2(o)(3)(iii) given that ballroom dance (or dancesport) has been recognized as an official Olympic event.¹ Notwithstanding this observation, the AAO found that the evidence failed to establish the qualifications of the beneficiary under the lesser standard for an alien of extraordinary ability in the arts.

On motion, counsel submits evidence that was previously submitted. Counsel also submitted a two-page brief in support of the motion.

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.²

On motion, counsel for the petitioner asserts that a new fact is that the beneficiary has won fourth place in the 2003 United States National 10-Dance Professional Championship. According to the evidence on the record, the beneficiary won that competition in March 2003, well before the Director and the AAO rendered their decisions on the instant petition.

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). All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. Evidence of this award was presented and considered in the previous proceeding. 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.

¹ See evidence on the record, the letter of [REDACTED] dated November 5, 2002.

² 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).

Furthermore, 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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.

Counsel asserts the following as the basis for a motion to reconsider:

The beneficiary's 4th place award in the 2003 U.S. National 10-Dance Professional Championship is evidence of distinction.

The decision violates 5 U.S.C. § 706(s)(A) which allows judicial reversal of visa determinations if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The decision violates the fourteenth amendment.

The decision was incorrect based upon the evidence of record at time of initial decision.

CIS abused its discretion and failed to act upon its own burden of proof.

Counsel does not submit any document that would meet the requirements of a motion to reconsider. Counsel does not cite any precedent decisions in support of a motion to reconsider. Counsel's arguments are not persuasive. It is the petitioner, not Citizenship and Immigration Services (CIS) that bears the burden of proof for establishing eligibility. *See* Section 291 of the Act, 8 U.S.C. § 1361. Counsel failed to explain the foundation for her assertions that the decision violates federal statutory law and the constitution. Further, counsel is emphasizing an award that the beneficiary received four months *after* the date of the filing of the instant petition. A petitioner cannot establish eligibility based on an award received after the filing date. *See* 8 C.F.R. § 103.2(b)(12). *See also Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

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.