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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

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DATE: **JAN 11 2012** Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on April 15, 2008. On appeal, the Administrative Appeals Office (AAO) withdrew the director's decision, and because the petition was not approvable, remanded the petition to the director for further consideration on April 29, 2009. The director subsequently certified his denial to the AAO on November 9, 2009. The AAO affirmed the director's adverse decision on the petition on April 19, 2010. The matter is now before the AAO on a motion to reopen. The motion will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

8 C.F.R. § 103.5(a)(1) informs the public of the filing requirements for a motion and provides in pertinent part:

A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:

(A) In writing and signed by the affected party or the attorney or representative of record, if any;

(B) Accompanied by a nonrefundable fee as set forth in § 103.7;

(C) *Accompanied 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;*

(D) Addressed to the official having jurisdiction; and

(E) Submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

(Emphasis added.)

In this case, the petitioner failed to submit a statement indicating if the validity of the AAO's unfavorable decision has been or is subject of any judicial 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. As such, the motion must be dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4) without regard to the claims contained within the motion.

Notwithstanding this fundamental defect of the petitioner's failure to meet a regulatory requirement for the filing of motions, the AAO will review the merits of the present motion. The AAO's April 19, 2010 decision affirming the director's adverse decision on 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 criteria implicated by the evidence the petitioner submitted on certification: the lesser awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i); the published material criterion pursuant to the regulation at 8

C.F.R. § 204.5(h)(3)(iii); and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

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. at 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, “[T]he INS [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.

It is important to note that the petitioner, through counsel, failed to specifically identify the criteria under the regulation at 8 C.F.R. § 204.5(h)(3) in which he wished USCIS to consider each form of evidence. If it is the petitioner’s contention that he meets a particular criterion, it remains his responsibility to specifically identify under which criterion USCIS should consider the evidence. He failed to provide such a statement or argument in this regard during the initial filing, in response to the July 22, 2009 request for evidence (RFE), in counsel’s appellate brief dated December 9, 2009, and to a degree within the brief related to the present motion to reopen. The burden is on the petitioner to establish eligibility. It is not the USCIS’s responsibility to infer or second-guess the intended criteria.

Regarding the awards criterion, counsel argues that the previously submitted evidence establishes the petitioner’s sustained acclaim through receipt of “major national / international recognized awards. One time receipt is all that is required.” In its April 19, 2010 decision, the AAO determined that although the petitioner provided website printouts indicating he received various awards, he failed to provide sufficient evidence indicating the standards for the awards relating to whether the awards are issued for excellence in the field rather than simply for participating in or contributing to the event. The AAO also determined that the petitioner failed to demonstrate that these awards enjoy national or international recognition. Additionally, the AAO determined that the petitioner failed to meet an additional plain language requirement of this criterion due to his failure to provide evidence that he actually received the best male vocal performance award at [REDACTED]

[REDACTED], as he merely provided evidence that he was nominated for this award. Accompanying this motion, the petitioner presents one additional form of evidence; a letter from the Nepalese embassy asserting the petitioner is the recipient of five awards. The petitioner failed to submit any documentary evidence to corroborate the assertions contained within this letter. Additionally, the petitioner failed to demonstrate how this evidence was previously unavailable and could not have been submitted earlier. The petitioner has been afforded at least four different opportunities to submit this evidence: at the time of the original filing of the petition on July 19,

2007, in response to the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) on January 7, 2008, within his initial appeal on May 14, 2008, and at the time of the second RFE upon the AAO remanding the case back to the director on July 22, 2009. A review of the evidence that counsel submits on motion relating to this criterion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot be considered a proper basis for a motion to reopen. As a result, this evidence will not be considered.

Regarding the published material criterion, counsel states, "We are resubmitting some original language articles with the translations adjusted to show the citation information as required under the applicable regulation." In the AAO's April 19, 2010 decision, the AAO noted that the petitioner failed to provide translations for two articles that complied with the regulatory requirements for translated documents. Specifically, the submitted material did not contain the translator's certification that he or she is competent to translate from the foreign language into English. *See* 8 C.F.R. § 103.2(b)(3). Additionally, the petitioner failed to submit the title, date, and author of the material, which fails to comply with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). A motion to reopen is a procedural step designed to afford the petitioner an opportunity to submit new evidence that may not have been available previously; not to allow the petitioner to improve upon his previously deficient evidence that failed to meet the clearly identified regulatory requirements. The petitioner failed to demonstrate that this evidence was not available and could not have been discovered or presented in the previous proceeding, and therefore cannot be considered a proper basis for a motion to reopen. As a result, this evidence will not be considered.

Furthermore, the director's July 22, 2009 RFE put the petitioner on notice of this same deficiency. The purpose of the request for evidence is to elicit further information that clarifies whether the petitioner has established the beneficiary's eligibility for the benefit sought as of the filing date of the petition. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where the director put the petitioner on notice of a deficiency in the evidence and gave the petitioner an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the director to consider the submitted evidence, it should have submitted the documents in response to the director's request for evidence. *Id.* This provides an additional reason that the AAO need not, and does not, consider the sufficiency of the evidence submitted in the present motion to reopen.

In reference to the judging criterion, counsel's brief accompanying this motion states: "Evidence was submitted earlier in case [*sic*] and is being resubmitted to highlight this area of qualification." The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish his eligibility. On certification, the petitioner did not contest the director's findings for this criterion or offer additional evidence. The AAO, therefore, considers this issue to be abandoned. *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). Accordingly, the petitioner has not established that he meets this criterion. Of additional importance, this admittedly resubmitted evidence cannot be considered "new" under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot be considered a proper basis for a motion to reopen.

Regarding the leading or critical role criterion, in its April 19, 2010 decision, the AAO determined that the petitioner failed to document his position within the charity event relating to his role being in a leading capacity, and that he failed to document how his role within the charity event differentiated him from others who also took part in the event relating to his role being critical. Additionally, the AAO concluded that the submitted documentation failed to establish that the petitioner was responsible for the success of the relief event consistent with the meaning of performing in a leading or critical role for an organization or establishment. Accompanying the present motion, the petitioner provides a website printout from [REDACTED], a

[REDACTED] other supplemental material related to this same community support group, and a letter from the [REDACTED] dated January 18, 2008. Both the UNDP website and the relating materials fail to identify the petitioner. This new evidence relates to UNDP's reputation rather than the petitioner's role in which he performed for UNDP. It is this role that the petitioner performed for UNDP, as a whole, that the AAO originally questioned, and which he still fails to demonstrate. New evidence submitted with a motion to reopen should be both material to the present case and should convey new value or new meaning to the case. The petitioner has failed to demonstrate how the UNDP related documents contribute to his eligibility under this criterion. As such, the petitioner may not rely upon these documents to establish his performance in a leading or critical role for the charity event. Additionally, the petitioner had previously submitted the letter from the Community Support Group 2059, Pokhara. Accordingly, this evidence cannot be considered "new" under 8 C.F.R. § 103.5(a)(2). This evidence cannot be considered a proper basis for a motion to reopen.

In reference to the commercial success criterion, counsel's motion brief states: "Evidence provided earlier in case [*sic*] from the companies that own/hold his recording rights [REDACTED]. Additional anecdotal evidence is supplied through the letters of appreciation from the [REDACTED] relief concerts where [the petitioner] performed." The anecdotal evidence counsel refers to are additional appreciation letters relating to the petitioner performing at the charity event. The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish his eligibility. On certification, the petitioner did not contest the director's findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda* 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885, at \*9. Accordingly, the petitioner has not established that he meets this criterion. However, even if the AAO were to consider the "anecdotal evidence," the petitioner has failed to demonstrate that additional appreciation letters related to the charity event were not available and could not have been discovered or presented in the previous proceeding. This evidence would continue to fall short of being considered "new" under 8 C.F.R. § 103.5(a)(2). As such, this evidence cannot be considered a proper basis for a motion to reopen.

Pursuant to 8 C.F.R. § 103.5(a)(1), a motion must be accompanied by a statement indicating if the validity of the AAO's unfavorable decision has been or is the subject of any judicial proceeding. As the petitioner failed to submit such a statement accompanying his motion to reopen, the regulations at 8 C.F.R. § 103.5(a)(4) require that the motion be dismissed. Moreover, according to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. The petitioner has not filed a proper motion to reopen. His request was not accompanied by any evidence that can be considered new evidence under 8 C.F.R. § 103.5(a)(2) that was not available and could not have been discovered or presented in the previous proceeding. A request for motion must meet the regulatory requirements of a motion to reopen.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

**ORDER:** The motion to reopen is dismissed. The decision of the AAO dated April 19, 2010, is affirmed, and the petition remains denied.