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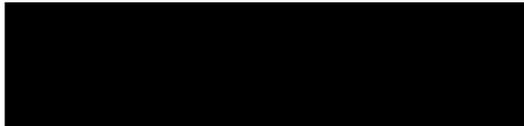
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

B2



DATE: **JAN 24 2012** Office: TEXAS 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:

SELF-REPRESENTED

INSTRUCTIONS:

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, Texas Service Center, denied the employment-based immigrant visa petition on March 6, 2008. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on June 29, 2009. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be dismissed, 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 whether the validity of the AAO's decision has been, or is, subject of any judicial proceeding.¹ The regulation mandates that this shortcoming alone, requires USCIS to dismiss the motions. See 8 C.F.R. § 103.5(a)(4).

Notwithstanding the fatal defect noted above, in the AAO's decision dismissing the petitioner's original appeal, the AAO found that the petitioner failed to establish that 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 awards criterion at 8 C.F.R. § 204.5(h)(3)(i), the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii), the published material criterion at 8 C.F.R. § 204.5(h)(3)(iii), the judging criterion at 8 C.F.R. § 204.5(h)(3)(iv), the original contributions criterion at 8 C.F.R. § 204.5(h)(3)(v), the display criterion at 8 C.F.R. § 204.5(h)(3)(vii), the high salary criterion at 8 C.F.R. § 204.5(h)(3)(ix), and the commercial success criterion at 8 C.F.R. § 204.5(h)(3)(x). In fact, the AAO found that the petitioner failed to establish eligibility for any of the criteria under the regulation at 8 C.F.R. § 204.5(h)(3), in which the petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

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.² Counsel fails to explain why any of the evidence submitted with this motion could not have been discovered or presented in the previous proceeding. The petitioner has been afforded at least three opportunities to submit this evidence: at the time of the original petition

¹ It is noted that the attorney who represents the petitioner is currently on the Executive Office for Immigration Review list of currently disciplined practitioners. The attorney is also suspended by the District of Columbia and has no record with the Client Protection Fund Listing of Maryland. Therefore, the AAO does not recognize counsel in this proceeding.

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).

filing on July 31, 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 December 31, 2007, and at the time he filed the appeal on April 8, 2008. A review of the evidence that counsel submits on motion 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.

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 petitioner has not met that burden. The motion to reopen will be dismissed.

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 (USCIS) policy. 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. 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. 56, 58 (BIA 2006). 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.

The present motion to reconsider does not allege that the issues, as raised on appeal, involved the application of precedent to a novel situation, or that there is a new precedent or a change in law that affects the AAO's prior decision. Instead, the petitioner generally reiterates prior arguments that are based on the same factual record. As noted above, a motion to reconsider must include specific allegations as to how the AAO erred as a matter of fact or law in its prior decision, and it must be supported by pertinent legal authority. 8 C.F.R. § 103.5(a)(3); *see Matter of Medrano*, 20 I&N at 219; *Matter of O-S-G-*, 24 I&N Dec. at 58-60.

After issuance of the AAO's decision, in 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary

criterion.³ With respect to the criteria at 8 C.F.R. §§ 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent “final merits determination.” *Id.*

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that “the proper procedure is to count the types of evidence provided (which the AAO did),” and if the petitioner failed to submit sufficient evidence, “the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded).” *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the “final merits determination” as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor,” 8 C.F.R. § 204.5(h)(2), and “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered “sustained national or international acclaim” are eligible for an “extraordinary ability” visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at 1119.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In reviewing the AAO's appeal decisions, the AAO will apply the test set forth in *Kazarian* and will conduct a new analysis if the prior decision was based on a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court.

It is noted that in the original appeal decision, the AAO determined that the petitioner failed to meet the awards criterion. Specifically, the AAO found that the petitioner failed to demonstrate that the [REDACTED] best character actor award from 1988 or the [REDACTED] “first position in a nationwide competitive [REDACTED] in 1992 were nationally or internationally recognized prizes or awards for excellence in the field pursuant to 8 C.F.R. § 204.5(h)(3)(i). Within the prizes and awards criterion, the AAO also discussed the fact that more than 15 years had passed between the receipt of the two awards and the petition filing. Pursuant to *Kazarian*, although contemplation of this time lapse was not relevant to the awards criterion and should have been discussed within a final merits section, the ultimate determination on this issue remains the same. As the petitioner failed to establish any new facts or error on the part of the AAO, he failed to overcome the AAO's decision for this criterion.

³ Specifically, the court stated that the AAO had unilaterally imposed novel, substantive, or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

The AAO also found that the petitioner failed to meet the requirements of the membership criterion pursuant to 8 C.F.R. § 204.5(h)(3)(ii). Specifically, the AAO states the petitioner failed to demonstrate that the Film Artistes Association of Nepal requires outstanding achievement of its members. The membership criterion requires evidence of membership in more than one association in the petitioner's field which requires outstanding achievements of its members. However, the petitioner only submits evidence of membership with one association. As the petitioner failed to establish any new facts or error on the part of the AAO, he failed to overcome the AAO's decision for this criterion.

Similarly, the AAO found that the petitioner failed to meet the published material criterion as the articles the petitioner submitted were not accompanied by certified translations, or the articles did not comply with the requirements of 8 C.F.R. § 204.5(h)(3)(iii) due to the articles missing required information such as the author, date, and title. On appeal, the petitioner rectifies some of these shortcomings, however, he failed to explain why this evidence could not have been discovered or presented in the previous proceeding. The petitioner was on notice of the requirement to submit such evidence from the regulations at 8 C.F.R. § 103.2(b)(3) and 8 C.F.R. § 204.5(h)(3)(iii). See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). As a result, this evidence fails to qualify as "new" evidence acceptable with a motion to reopen. Accompanying the appeal, the petitioner also submitted information about himself taken from the online encyclopedia, *Wikipedia* and his own web site. With regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.⁴ See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008). Again, the petitioner failed to explain why this evidence could not have been discovered or presented in the previous proceeding. As the petitioner failed to establish any new facts or error on the part of the AAO, he failed to overcome the AAO's decision for this criterion.

It is further noted that the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires "[e]vidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is." The petitioner submitted evidence of an *invitation* to act in the role of a judge for the Internal Children theater program and a photograph that the petitioner asserts documents his presence at the program as a judge. However, he failed to provide a translation of the invitation that complies with the regulatory

⁴ Online content from *Wikipedia* is subject to the following general disclaimer, "WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . *Wikipedia* cannot guarantee the validity of the information found here. The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields." See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on November 8, 2011, a copy of which is incorporated into the record of proceeding.

requirements related to translations, which the AAO noted. The petitioner provides no primary evidence to establish he actually performed as a judge of the work of others in his field, rather than receiving an invitation to judge others. The AAO previously held that an invitation to perform as a judge and evaluating students was insufficient to meet the regulatory requirements. While the AAO's previous analysis relating to the significance of judging student work is more appropriately discussed in the final merits determination pursuant to the *Kazarian* decision, the ultimate determination that the petitioner failed to meet the requirements of criterion was correct. As the petitioner failed to establish any new facts or error on the part of the AAO, he failed to overcome the AAO's decision for this criterion.

Regarding the petitioner's contributions of major significance, the AAO determined that although he provided reference letters attesting that the petitioner is a "nationally acclaimed actor," the letters failed to specify exactly what original contributions of major significance the petitioner made in his field. The AAO further found that the petitioner failed to provide evidence of any influence the petitioner has had on other actors. As the petitioner failed to establish any new facts or error on the part of the AAO, he failed to overcome the AAO's decision for this criterion.

This motion fails to address a shortcoming that the AAO's decision points out; the display criterion only applies to the visual arts, while the petitioner's field is in the performing arts. The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *See Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). As the petitioner failed to establish any new facts or error on the part of the AAO, he failed to overcome the AAO's decision for this criterion.

Regarding the petitioner's high remuneration claims, the AAO found that the petitioner had not provided documentation of the salaries or compensation of others within his field to serve as a guide to compare to his compensation level. This criterion plainly requires that the petitioner "has commanded a high salary or other significantly high remuneration for services, *in relation to others in the field*" (emphasis added). *See* 8 C.F.R. § 204.5(h)(3)(ix). The petitioner provides insufficient evidence for the AAO to compare his remuneration with the most experienced and renowned actors in Nepal. As the petitioner failed to establish any new facts or error on the part of the AAO, he failed to overcome the AAO's decision for this criterion.

Finally, in reference to the petitioner's commercial successes, the AAO notes that on motion counsel claims that the Nepalese theater system does not have a corollary box office receipt system similar to the one used in the United States. On motion, the petitioner submits a letter from [REDACTED] proprietor of [REDACTED] to establish the existence of an alternative system in Nepal. Most importantly, counsel fails to specify why the petitioner was unable to provide this evidence in a previous proceeding. Additionally, the petitioner failed to provide any

evidence to corroborate the claims of [REDACTED] which should be readily available if this alternative system is commonly used to measure success in Nepal. The petitioner failed to submit any documentary evidence reflecting his commercial successes in the form of box office receipts or record, cassette, compact disk, or video sales. As the petitioner failed to establish any new facts or error on the part of the AAO, he failed to overcome the AAO's decision for this criterion.

In accordance with the *Kazarian* opinion, the AAO must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2); and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." See section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). See also *Kazarian*, 596 F.3d at 1115. The petitioner failed to establish eligibility for even one of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3).

In evaluating the AAO's final merits determination, the AAO must look at the totality of the evidence to conclude the petitioner's eligibility pursuant to section 203(b)(1)(A) of the Act and 8 U.S.C. § 1153(b)(1)(A)(i). In this case, the petitioner provides a single award which he failed to establish was awarded for excellence in his field. The appeal acknowledged the lengthy passage of time between the petitioner receiving the awards and the petition's filing. This 15 year lapse is not representative of sustained acclaim. The petitioner also provides membership in a single association which the petitioner failed to establish requires outstanding achievements of its members, and that he was merely invited to act as a judge in a children's theater program. He also provides remuneration he has commanded but failed to provide evidence to compare his compensation to others in the field, and he provides insufficient evidence for the AAO to evaluate his commercial successes. The petitioner's personal accomplishments fall far short of establishing that he "is one of that small percentage who have risen to the very top of the field of endeavor" and that he "has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." See 8 C.F.R. § 204.5(h)(2), section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3).

Review of the record does not establish that the petitioner has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim and who is within the small percentage at the very top of his field. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level.

The petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 reconsider and the motion to reopen are dismissed, the decision of the AAO dated July 29, 2009, is affirmed, and the petition remains denied.