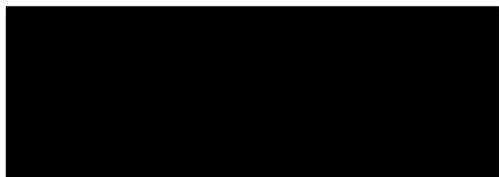


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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: **JUL 02 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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 August 27, 2008. The Administrative Appeals Office (AAO) upheld the director's decision, and dismissed the appeal on November 9, 2009. The petitioner filed a motion to reopen the AAO appellate dismissal, which was dismissed on February 10, 2011. The matter is now before the AAO on a second motion to reopen. The motion will be dismissed.

The regulation at 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 analysis within this motion is limited to the issues contained in the most recent decision on the motion to reopen dated February 10, 2011. The issue within the previous motion to reopen that the petitioner may address within this decision is related to the AAO's determination that, when the petitioner filed the previous motion, he failed to provide evidence that could be considered new. A motion to reopen is designed to afford the petitioner an opportunity to submit new evidence that may not have been available previously. It is not intended to allow the petitioner to improve upon the previously deficient evidence that failed to meet the clearly identified regulatory requirements. In addition, on motion a petitioner must still 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)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Moreover, the AAO cannot "consider facts that come into being only subsequent to the filing of a petition." *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998) (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981)). Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008). The petitioner failed to demonstrate that the newly submitted evidence on motion was both (1) not available and could not have been discovered or presented in the previous proceeding and (2) relates to eligibility as of the date of filing.

The evidence the petitioner submits with the present motion is an informational guide to an Indian Festival dating back to 2011 featuring the petitioner, a compact disc with the petitioner's performances, and an undated statement from [REDACTED] with a notary seal dated February 28, 2011. Additionally, within counsel's brief accompanying the present motion, he claims that two forms of evidence submitted with the previous motion to reopen did, in fact, qualify as new evidence as they were not available to the petitioner prior to filing the previous motion. The evidence counsel claims was previously unavailable is an uncertified translation of a poster titled, [REDACTED] magazine published on April 11, 2010. The petitioner asserts in his statement accompanying the present motion to reopen that both the uncertified translation of the poster and the magazine were unavailable to him and that he only happened across this evidence upon meeting with another dancer, [REDACTED], from the [REDACTED]. The petitioner also asserts that he was unaware of the existence of this evidence, but failed to provide a sworn affidavit from [REDACTED] or other evidence to corroborate these claims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Additionally, in reference to the *South Asian Music Society* magazine published on April 11, 2010, this evidence cannot be considered as it was not in existence until after the petitioner filed the previous motion to reopen on December 10, 2009. Moreover, it does not relate to the petitioner's eligibility as of the date of filing on February 22, 2007. Consequently, neither form of evidence will be considered as new evidence that might serve as a basis to grant the present motion to reopen. As a result, the AAO acted appropriately when it did not consider the evidence and dismissed the previous motion to reopen.

Counsel further asserts that the AAO erred in failing to consider new evidence responding to the AAO's 2009 decision concluding that the record lacked evidence that the published material appeared in major media. The director, however, reached the same conclusion in the August 27, 2008 decision, placing the petitioner on notice of this deficiency. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record on appeal. The petitioner failed to submit the requested evidence and instead submitted it on motion. The AAO did not err in failing to consider this evidence. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

Counsel further asserts that the director erred in failing to consider evidence of awards. Counsel does not explain why the AAO should have reopened the matter to consider awards it already noted lacked supporting evidence of their significance. Similarly, counsel fails to explain why the AAO erred in reopening the matter to consider letters that were already part of the record.

Counsel's brief accompanying the present motion puts forth his interpretation of section 203(b)(1)(A)(iii), which states:

Aliens with extraordinary ability. - An alien is described in this subparagraph if -

- (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
- (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
- (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

Counsel focused on the word "prospectively" in subparagraph (iii) and stated: "According to this statutory language evidence of continuing extraordinary ability may be submitted not to demonstrate such extraordinary ability at the time of filing but that his abilities have benefited prospectively the United States." Counsel's reading of the law ignores the regulatory requirement that a petitioner demonstrate eligibility for the classification sought at the time of the petition filing. 8 C.F.R. §§ 103.2(b)(1), (12). A petition may not be approved if the petitioner was not qualified at the priority date, but expects to become eligible at a subsequent time. *See Matter of Katigbak*, 14 I&N Dec. at 49. Counsel provided no legal analysis to support his interpretation that the aforementioned section of the Act allows an alien to apply for an immigrant classification prior to actually being eligible. As USCIS may adjudicate a petition on the same date it is properly filed, so must the petitioner be able to demonstrate eligibility on this same date. Additionally, the use of the word "prospectively" in the Act contemplates that the alien must, at some point in the future, be beneficial to the United States; not that the alien may garner achievements and recognition after filing to overcome a lack of acclaim as of that date. Even assuming the evidence did demonstrate that the petitioner prospectively benefitted the United States after filing the petition pursuant to section 203(b)(1)(A)(iii) of the Act, such evidence cannot overcome the AAO's conclusion that the petitioner did not demonstrate sustained national or international acclaim as of the date of filing pursuant to section 203(b)(1)(A)(i) of the Act.

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 [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 . . . 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 expends 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.

The petitioner has been afforded at least four distinct opportunities to submit evidence: at the time of the petition’s original filing on February 22, 2007; in response to the director’s request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) dated July 7, 2008; within his appeal filed on September 24, 2008; and at the time of the first motion to reopen on December 10, 2009. A review of the evidence that counsel submits on motion, relating to the previous motion reveals no fact that could be considered “new” under 8 C.F.R. § 103.5(a)(2) for the reasons described above. Therefore, the petitioner has not provided evidence that can be considered a proper basis for a motion to reopen. As a result, this evidence will not be considered.

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 the 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. The request was not accompanied by any evidence that can be considered new evidence under 8 C.F.R. § 103.5(a)(2) that was (1) not available and could not have been discovered or presented in the previous proceeding (2) relates to the petitioner’s eligibility as of the date of filing. A request for motion must meet the regulatory requirements of a motion to reopen at the time of filing.

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 February 10, 2011, is affirmed, and the petition remains denied.