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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: JUL 17 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:



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, Texas Service Center, denied the employment-based immigrant visa petition on April 20, 2009. The Administrative Appeals Office (AAO) summarily dismissed the appeal, reopened the matter on its own motion on March 16, 2010 for the purpose of considering additional material, and ultimately dismissed the petitioner's appeal on September 16, 2010. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen will be dismissed. The motion to reconsider will be dismissed. Ultimately, 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 if the validity of the decision of the AAO has been or is subject of any judicial proceeding. As such, the motions must be dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4).

Notwithstanding the above, the AAO's decision dismissing the petitioner's appeal concluded 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 following criteria:

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

Within the motion brief, counsel also puts forth that the petitioner has commanded a high salary and meets the requirements of 8 C.F.R. § 204.5(h)(3)(ix). Counsel did not address this criterion within the appellate brief and therefore abandoned any claim to meet this criterion. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *see also Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO). Thus, the AAO's appellate decision correctly did not address this criterion. Therefore, this criterion is not an issue that the petitioner may address within the present motion to reopen and reconsider.

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, 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 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.

Motion to Reconsider

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). The Board of Immigration Appeals (BIA) generally provides that a motion to reconsider asserts that at the time of the previous decision, an error was made. It questions the decision for alleged errors in appraising the facts and the law. The very nature of a motion to reconsider is that the original decision was defective in some regard. *See Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991). A motion to reconsider is based on the existing record and petitioners may not introduce new facts or new evidence relative to their arguments.

Additionally, 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.

Regarding the motion to reconsider, the petitioner, through counsel failed to identify any incorrect application of law or USCIS policy that is also supported by any precedent decisions. The Form I-290B, Part 3, Basis for the Appeal or Motion states: “Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.” The form clearly requires the affected party to include the basis of the appeal or motion, to include any supporting citations to appropriate statutes, regulations, or precedent decisions within the box contained in Part 3 or in a separate statement or brief. *Cf. Matter of Jean*, 23 I&N 373, 379 (A.G. 2002) (citing *Soriano v. INS*, 45 F.3d 287, 287 (8th Cir. 1995) (finding the failure to follow the directions on an appellate form and instructions warrant the dismissal of the appeal)). For example, the AAO cited case law it found persuasive for the proposition that athletic achievements cannot presumptively establish that coaching is within an alien’s area of expertise. On motion, counsel simply affirms that there is a correlation between athletic skill and coaching skill but cites no legal authority

undermining the case law on which the AAO relied. As such, the petitioner has not met the requirements of a motion to reconsider under the regulation or judicial interpretation.

Motion to Reopen

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.¹ New evidence is considered to be material to the present case and not previously submitted. This “new” evidence is expected to convey new value or new meaning to the case. A motion to reopen proceedings, however, is a fundamentally different motion than a motion to reconsider. *See Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991) (citing *Sanchez v. INS*, 707 F.2d 1523, 1529 (D.C.Cir.1983); *Chudshevid v. INS*, 641 F.2d 780, 783 (9th Cir.1981)). It does not contest the correctness of (or simply request a reevaluation of) the prior decision on the previous factual record. Rather, a motion to reopen proceedings seeks to reopen proceedings so that new evidence can be presented and so that a new decision can be entered, normally after a further evidentiary hearing. *Id.* at 403.

Regarding the motion to reopen, the petitioner must demonstrate that all of the new evidence was not available and could not have been discovered or presented in the previous proceeding.

In reference to the awards criterion within the motion to reopen, counsel continues to hold the position that the petitioner’s achievements as a table tennis competitor should be considered within these proceedings. Citing *Lee v. INS*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the AAO sufficiently explained that while the petitioner’s achievements as a competitor are not irrelevant, he must demonstrate his eligibility for the classification based on his achievements as a table tennis coach. The AAO notes that the director also raised this issue in the denial, placing the petitioner on notice of the issue. Regarding the petitioner’s assertion that his accomplishments as a competitor should be considered, the petitioner provides on motion a June 15, 2009, article from ESPN’s website that accompanies counsel’s position that “there is a positive correlation between a skilled player and a skilled coach.”² The petitioner’s motion brief does not explain how this evidence was not available and could not have been discovered or presented in the previous proceeding, and this evidence is not considered new evidence. Therefore, this evidence will not be considered within the present proceeding.

Regarding the published material criterion within the motion to reopen, counsel offers the same analysis that was provided under the awards criterion. While this analysis remains unpersuasive, the

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.)

² The petitioner supplemented the appeal on June 17, 2009 (in a filing with a June 16, 2009 postmark), and the AAO afforded another opportunity to supplement the record on March 16, 2010 when it reopened the matter.

petitioner failed to offer new evidence that is supported by affidavits or other documentary evidence as required by the regulation at 8 C.F.R. § 103.5(a)(2). As such, the petitioner has not demonstrated that his motion to reopen under the published material criterion meets the regulatory requirements.

In reference to the leading or critical role criterion within the motion to reopen, the petitioner provided:

- A *New York Times* article dated December 30, 2009;
- A letter from [REDACTED] a table tennis club dated October 12, 2010;
- A *Wall Street Journal* article dated May 22, 2010;
- A second letter from [REDACTED] dated October 11, 2010;
- A letter from [REDACTED] the parent of one of the petitioner's students dated May 3, 2010;
- A letter from [REDACTED] purportedly a top-ranked table tennis player dated October 12, 2010 as comparable evidence pursuant to 8 C.F.R. § 204.5(h)(4);
- A letter from [REDACTED] dated July 7, 2010; and
- A certificate of award naming the petitioner as a national coach.

Neither the petitioner's motion brief nor any of the evidence submitted on motion explain how this evidence was not available and could not have been discovered or presented in the previous proceeding or, with respect to the evidence relating to events after the date of filing, how the evidence demonstrates the petitioner's eligibility as of that date in November 2007. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). None of the above named evidence is both new evidence and relates to the facts as they were in November 2007. Therefore, this evidence will not be considered within the present proceeding.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor. The petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

Conclusion

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), the next step would be 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" 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." 8 C.F.R. §§ 204.5(h)(2) and (3); see also *Kazarian*, 596 F.3d at 1119-20. While the AAO concludes

that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.³ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)). Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The motion to reopen is dismissed. The motion to reconsider is dismissed. The decision of the AAO dated September 16, 2010, is affirmed, and the petition remains denied.

³ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).