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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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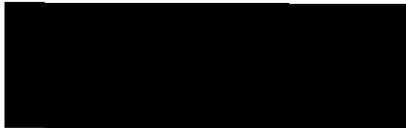


IN RE: Petitioner:
Beneficiary:



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 employment-based immigrant visa petition was denied by the Director, Texas Service Center. The petitioner filed a motion to reopen and reconsider, which the director dismissed. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(2), 103.5(a)(3), and 103.5(a)(4).

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability as a martial arts instructor. Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. See section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

At the time of filing the petition on July 27, 2007, the petitioner claimed eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). On January 2, 2008, the director issued a request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8). In response, the petitioner submitted additional documentation regarding the awards criterion, the membership criterion, and the leading or critical role criterion.

In the director's February 27, 2008 decision denying the petition, he discussed the petitioner's documentary evidence as it related to the regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(i), (ii), and (viii) and found that the petitioner failed to establish eligibility for any of the preceding criteria. On March 28, 2008, the petitioner filed a motion to reopen and reconsider pursuant to the regulation at 8 C.F.R. § 103.5(a) and again claimed the petitioner's eligibility for the awards criterion, the membership criterion, and the leading or critical role criterion. In addition, the petitioner claimed for the first time his eligibility for the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). In the director's December 17, 2009 decision dismissing the petitioner's motion, the director addressed the petitioner's documentary evidence as it related to each of the four claimed criteria and found that the petitioner failed to overcome any of the grounds originally stated in his decision and that the petitioner failed to establish eligibility for the high salary criterion.

On appeal, rather than challenging any of the director's specific findings or pointing to specific errors in the director's analyses of the documentary evidence submitted for the categories of evidence at 8 C.F.R. § 204.5(h)(3), counsel summarized the documentation previously submitted as well as the petitioner's achievements for the awards criterion, the membership criterion, and the leading or critical role criterion. Counsel also cited to a federal district court case and several

unpublished decisions of the AAO. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters even arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Regarding the unpublished decisions of the AAO, counsel failed to provide evidence to establish that the facts of the instant petition were analogous to those in the unpublished decisions. Further, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all U.S. Citizenship and Immigration (USCIS) employees in the administration of the Act, unpublished decisions are not similarly binding.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) provides that “[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.” In its May 6, 2011 decision, the AAO stated that counsel’s general references to case law and unpublished decisions were not sufficient basis for a substantive appeal, because they did not show how the director erred in his latest decision. The AAO found that the petitioner’s appellate submission failed to identify as a proper basis for the appeal an erroneous conclusion of law or a statement of fact in the director’s December 17, 2009 decision. Accordingly, the AAO summarily dismissed the petitioner’s appeal.

On motion, the petitioner submits a March 8, 2010 letter from [REDACTED] discussing the petitioner’s standing in the field.¹ Mr. [REDACTED] states:

[The petitioner] is arguably the foremost leader in the field of martial arts. His abilities are unequaled as is proved by his competition dominance. He has won titles in many different categories of competition with a variety of different rules. His abilities are unique and put him head and shoulders above all other competitors. He has dominated the tournament circuit for many years both nationally and internationally.

Mr. [REDACTED] comments on the petitioner’s abilities as a martial arts competitor, but the opinions expressed by Mr. [REDACTED] fail to demonstrate that the petitioner satisfies any of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) based on his achievements as a martial arts *instructor*. The statute and regulations require that the petitioner seeks to continue work in his area of expertise in the United States. *See* section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). On the Form I-140, Immigrant Petition for Alien Worker, in Part 6, “Basic Information About the Proposed Employment,” the petitioner lists his job title as [REDACTED]. The petitioner also submitted letters indicating that he has worked in the U.S. as a martial arts coach and trainer. Subsequent to his arrival in the United States in 2004, there is no documentary evidence showing that the petitioner has continued to successfully compete in national or international taekwondo competitions. The record is clear that the petitioner intends

¹ For clarification, the United States Tae Kwon-Do Won is a separate entity from USA Taekwondo, the official national governing body for the sport of taekwondo in the United States as recognized by the U.S. Olympic Committee. *See* <http://www2.teamusa.org/USA-Taekwondo/About-Us.aspx>, accessed on June 29, 2012, copy incorporated into the record of proceeding.

to continue to work in the area of martial arts coaching and instruction in the United States. In addition to documentation establishing the petitioner's intention to continue to work in the United States as a martial arts instructor and coach, the petitioner's initial evidence included documentation of his [REDACTED] as a taekwondo competitor from the [REDACTED]. While a taekwondo competitor and an instructor may share knowledge of the sport, the two rely on very different sets of basic skills. Thus, competitive athletics and martial arts instruction and coaching are not the same areas of expertise. This interpretation has been upheld in Federal Court. In *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

It is reasonable to interpret continuing to work in one's "area of extraordinary ability" as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field. For example, Lee's extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.

Id. at 918. The court noted a consistent history in this area. While the record demonstrates that the petitioner intends to continue working as a martial arts coach and instructor, there is no evidence showing that he intends to compete in taekwondo tournaments in the United States. Regarding Mr. [REDACTED] comments as they relate to the petitioner's eligibility for the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i), the "field of endeavor" for which classification is sought is martial arts instruction and coaching. Awards resulting from the petitioner's victories as a competitor in taekwondo tournaments cannot be considered evidence of his national or international recognition as martial arts instructor or coach. Accordingly, the titles won by the petitioner in various taekwondo competitions from the [REDACTED] do not satisfy the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(i) for purposes of establishing the petitioner's extraordinary ability as an instructor or coach. Regarding the March 8, 2010 letter from Mr. [REDACTED] USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of reference letters supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of the references' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of a martial arts instructor who has sustained national or international acclaim at the very top of his field.

With regard to the petitioner's eligibility for the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(ix), the petitioner's motion includes copies of numerous checks made payable to the petitioner dated 2010 and 2011. These payments to the petitioner post-date the petition's July 27, 2007 filing date. Eligibility must be established at the time of filing. Therefore, the AAO will not consider these payments as evidence to establish the petitioner's eligibility. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at

a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. The filing of a motion to reopen does not permit the petitioner to become eligible based on remuneration received after the filing of the original petition.

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. According to 8 C.F.R. § 103.5(a)(3), 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 USCIS policy. 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. 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. 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 may 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. 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. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

In this case, the documentation submitted on motion fails to demonstrate that the petitioner satisfies any of the categories of evidence at 8 C.F.R. § 204.5(h)(3). Further, the AAO notes that the petitioner failed to address the deficiencies in the record pertaining to the regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(ii) and (viii). The AAO, therefore, considers these issues to be abandoned. *See 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). In addition, counsel failed to support the instant motion with any precedent decisions to establish that the AAO's May 6, 2011 decision was based on an incorrect application of law or USCIS policy. The petitioner's motion does not include legal arguments or precedent decisions indicating that the AAO's decision summarily dismissing his appeal was incorrect based on the evidence of record. Moreover, the instant motion does not contain the statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding as required by the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C). For this additional reason, the motion must be dismissed.

The regulation at 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 reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen and reconsider is dismissed, the decision of the AAO dated May 6, 2011 is affirmed, and the petition remains denied.