

Administrative Appeals Office
U.S. Citizenship and Immigration Services
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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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

[Redacted]

DATE: OFFICE: TEXAS SERVICE CENTER
JUN 08 2012

[Redacted]

IN RE: [Redacted]

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:

[Redacted]

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 with the field office or service center that originally decided your case by filing a 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 November 12, 2009. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on November 9, 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.

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, counsel failed to submit a statement regarding if the validity of the decision of the AAO has been or is subject of any judicial proceeding.

Notwithstanding the above, in the decision of the AAO 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 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), the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), and the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v). Moreover, the AAO found that the petitioner minimally met the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi) and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). Finally, the AAO conducted a final merits determination pursuant to *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) and determined that the petitioner failed to demonstrate (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." 8 C.F.R. § 204.5(h)(3).

On part 3 of Form I-290, Notice of Appeal or Motion, counsel claims:

The new evidence demonstrates the national role of the Universities in Romania, and Professor Mateas' adjudications within that system during the relevant period of time preceding the initial application for this case. We submit the accompanying documents to satisfy the plain language requirements of 8 C.F.R. [§] 204.5(h)(3)(iv), requiring "...[e]vidence of alien's participation on a panel as a judge of the work of others in the same... field of specialization for which classification is sought," and/or 8 C.F.R. [§] 204.5(h)(3)(v), which, requires "[e]vidence of alien's original scientific, scholarly, [or] ...athletic contributions of major significance in the field. . . ."

In addition, counsel submitted the following documentation:

1. A book entitled, *Facultatea de Educație Fizică și Sport din Oradea*;
2. Letters from [REDACTED] and [REDACTED] from the University of Oradea;
3. Documentation regarding the National University Research Council; and
4. Documentation regarding the University of Oradea Publishing House.

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

Regarding the judging criterion, in the director’s original decision, he addressed the insufficient letter from [REDACTED] regarding the petitioner’s purported “selection to the judging panels.” On appeal, counsel claimed that the petitioner judged faculty candidates without submitting any supporting documentation. In the AAO’s decision, the AAO affirmed the director’s conclusion regarding [REDACTED] letter and addressed the unsupported assertions of counsel. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). The AAO also indicated in the decision that the petitioner did submit a certificate from the Faculty of Physical Education and Sports Oradea reflecting that the petitioner was part of the entrance committee. However, the certificate failed to reflect that the petitioner participated as a judge of the work of others consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

On motion, counsel failed to explain why the evidence was previously unavailable and could not have been submitted earlier. The petitioner has been afforded three different opportunities to submit this evidence: at the time of the original filing of the petition on August 20, 2009, in response to the director’s request for additional evidence on October 6, 2009, and at the time of the filing of the appeal on December 11, 2009. A review of the evidence that the petitioner

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).

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. Further, while counsel indicated that the documentary evidence submitted on motion also satisfied the original contributions criterion, counsel failed to explain how the evidence constitutes or even relates to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) that requires original contributions of major significance in the field. Again, counsel failed to explain why the evidence was previously unavailable and could not have been submitted earlier.

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 AAO notes that counsel failed to address the AAO’s decision regarding the awards criterion, the membership criterion, and the published material criterion. 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). Similarly, counsel failed to address the AAO’s final merits determination. Therefore, even if the petitioner were to demonstrate that he meets at least three of the regulatory categories of evidence, which the AAO does not imply, counsel failed to establish the petitioner’s achievements at the time of filing the petition were commensurate with sustained national or international acclaim, or that he was among that small percentage at the very top of the field of endeavor.

Moreover, upon a review of the AAO’s decision, the AAO determined that the petitioner met the leading or critical role criterion based on his role with Weymouth Club. However, section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires the petitioner’s leading or critical role in more than one organization or establishment with a distinguished reputation. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of “letter(s).” Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS’ ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for “a” bachelor’s degree or “a” foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials). In the case here, the petitioner

demonstrated his leading or critical role with only one establishment. As such, the AAO must withdraw its prior determination regarding the leading or critical role criterion.

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 November 9, 2010, is affirmed, and the petition remains denied.