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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

DATE:

APR 29 2013

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,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. 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.

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), in "International Construction Economics." The AAO, in its December 18, 2012 dismissal, determined that the petitioner had previously attempted or conspired to enter into a marriage for the purpose of evading the immigration laws; therefore the petition was precluded from approval pursuant to the marriage fraud provisions of section 204(c) of the Act. Moreover, the AAO found that the petitioner failed to establish that she met at least three of the regulatory criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). Although the AAO determined that the petitioner met the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), the AAO found that the petitioner failed to meet 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 judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), and the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). It is noted that the petitioner did not claim to meet the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x).

Counsel for the petitioner filed Form I-290B, Notice of Appeal or Motion, on January 17, 2013. On motion, counsel claims that the AAO's decision was confusing because of its use of the term "petitioner," because the Freedom of Information Act (FOIA) request was "censored" and incomplete, and because it was "impossible" to respond to an allegation of a sham marriage, that occurred seven years earlier. As such, on motion, counsel requests:

[T]he government: (1) provide [the petitioner] with a complete copy of its file regarding her marriage, (2) allow an additional 30 to 60 days to locate witnesses and documentary evidence showing the bona fides of [the petitioner's] marriage, so that [the petitioner] may continue with her life.

At the outset, 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." 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, the AAO finds the petitioner has failed to establish that the filing meets the requirements of a motion to reopen or reconsider.

Regarding the AAO's terminology, counsel claims:

[The AAO's decision] continued to call [REDACTED] "the petitioner in both cases and while this was correct in the self-petitioned I-140, it was very confusing. In the AAO's decision regarding the marriage case, wherein [REDACTED] continued to be called both "petitioner" and "petitioner". [sic]

In order to have a consistent and clear decision, the AAO referenced [REDACTED] as "the petitioner" regardless of whether the decision referred to [REDACTED] as the self-petitioner on the instant employment-based petition or as the spouse who was petitioned for on the family-based petition. In fact, the AAO always referenced [REDACTED] former spouse as either [REDACTED] or [REDACTED]. A review of both the AAO's notice of intent to dismiss (NOID) the appeal issued on May 22, 2012, and the AAO's dismissal issued on December 18, 2012, reflects that both decisions contained consistent and clear terminology in reference to [REDACTED] and her former spouse. Even if the AAO were persuaded by counsel's argument, counsel has offered no specific example as to what issue she was unable to properly respond to in the AAO's notice of intent to dismiss or on motion because of the "confusion" regarding the AAO's terminology.

Regarding counsel's claim that the FOIA request was "censored" and incomplete, counsel submitted no documentation to support her claims on motion. 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). Regardless, 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). Moreover, 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). Rather than supporting the motion to reopen with affidavits or other documentary evidence or supporting the motion to reconsider with any pertinent precedent decisions, counsel requests that the AAO provide the petitioner "with a complete copy of its file regarding her marriage."

Although counsel argues that her response to the allegations of marriage fraud was hindered due to the FOIA "censorship" of several pages of officer notes, the majority of the NOID was based not on findings from the marriage question and answer interview, but rather inconsistencies in and a lack of documentation. The AAO's NOID contained a detailed description of the deficiencies in the evidence, such as inconsistencies in claimed joint residences and a lack of joint financial documentation.

After issuance of the NOID, the AAO received a letter from counsel requesting additional time to respond to the notice because of a pending FOIA request. A review of the record of proceeding reflected that FOIA completed counsel's request on September 21, 2012, however counsel failed to respond to the AAO's notice, and the appeal was dismissed on December 18, 2012. Counsel had the opportunity to raise these issues in response to the AAO's NOID but failed to do so.

Despite being on notice of these issues and failing to timely respond to them, on motion counsel again requests additional time to locate witnesses and submit additional documentary evidence. The

regulation at 8 C.F.R. § 103.3(a)(2)(vii) allows for limited circumstances in which a petitioner can supplement an already-submitted appeal. This regulation, however, applies only to appeals, and not to motions to reopen or reconsider. There is no analogous regulation which allows a petitioner to submit new evidence in furtherance of a previously-filed motion.

Similarly, the instructions to the Form I-290B provide that unlike appeals, motions may not be supplemented and specifically state that all evidence “must be submitted with the motion.” The Form I-290B itself contains six boxes, one of which the petitioner must check to indicate whether the petitioner is filing an appeal or motion. Of the three boxes that pertain to motions, all indicate that the brief and/or additional evidence is “attached” to the motion. The form contains no provision for the submission of briefs or evidence after the filing of the motion. Pursuant to the regulation at 8 C.F.R. § 103.2(a)(1), every benefit request must be executed and filed in accordance with form instructions which are incorporated into the regulation.

Again, the regulation at 8 C.F.R. § 103.5(a)(2) provides that a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence, and the regulation at 8 C.F.R. § 103.5(a)(3) provides that 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. The plain language of each regulation makes clear that submission of the supporting material and a legal basis for the motion is mandatory, not permissible. This language, combined with the form instructions and the form, explicitly require the motion to reopen and reconsider to be supported at the time of filing. There is no provision that allows for USCIS to grant an extension in order to await future correspondence that may or may not include evidence or arguments.

More importantly, counsel’s motion does not address the AAO’s finding regarding the petitioner’s failure to meet at least three of the ten regulatory categories of evidence to establish the basis eligibility requirements pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). Counsel does not contest the decision of the AAO or offer any additional arguments or evidence on motion regarding the petitioner’s eligibility as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act.

The petitioner’s motion does not meet the regulatory requirements of a motion to reopen or a motion to reconsider

ORDER: The motion to reopen and the motion to reconsider are dismissed, the decision of the AAO dated December 18, 2012, is affirmed, and the petition remains denied.