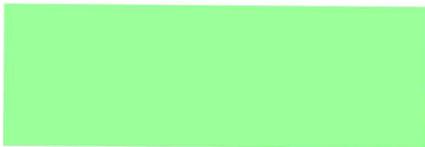


(b)(6)

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



U.S. Citizenship  
and Immigration  
Services

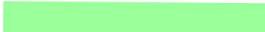


Date: **JUL 23 2013**

Office: TEXAS SERVICE CENTER

FILE: 

IN RE:

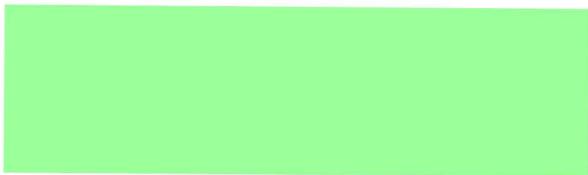
Petitioner: 

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition on August 5, 2009. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on October 4, 2010. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

In the decision of the AAO dismissing the petitioner's original appeal, 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)(i)-(x). The AAO specifically and thoroughly discussed the petitioner's evidence and determined that the petitioner met the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), but 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 published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The AAO also 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). Finally, the AAO determined that the petitioner failed to establish that she seeks to enter the United States to continue in her area of expertise.

On Form I-290B, Notice of Appeal or Motion, counsel indicated in Part 2 that he was filing a motion to reconsider the decision of the AAO. Moreover, in Part 3, counsel stated that "[t]his is an [sic] Motion to Reconsider to the [AAO]." Furthermore, in counsel's brief that was entitled, "Brief and Supplemental Evidence in Support of Motion to Reconsider," counsel stated this [t]his Motion to Reconsider is filed pursuant to 8 CFR. § 103.5(a)(1)(i)," and the petitioner "requests that the Service reconsider her I-140."

The regulation at 8 C.F.R. § 103.5(a)(3) provides:

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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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). 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. 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. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). 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. *Id.* 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.

In counsel’s motion to reconsider, counsel does not contest the findings of the AAO or offer additional arguments for the awards criterion, the membership criterion, the leading or critical role criterion, and the final merits determination. These issues are therefore considered to be abandoned. *Cf. 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) (plaintiff’s claims abandoned as he failed to raise them before the AAO).

Regarding the remaining criteria, when considering the evidence submitted by the petitioner for the published material criterion, the AAO noted the submission of the following five articles:

1. An uncertified English language translation of an unidentified title of an article, by an unidentified author, on December 24, 2000, in [REDACTED]
2. An uncertified English language translation of an article entitled, [REDACTED] by an unidentified author, on December 23 (no year indicated), in [REDACTED]
3. A certified English language translation of an article entitled, [REDACTED] by [REDACTED] on December 23 (no year indicated), in an unidentified publication;
4. An article entitled, [REDACTED] by an unidentified author, on January 19, 2001, in an unidentified publication; and
5. A certified English language translation of an article entitled, [REDACTED], on [REDACTED], on an unidentified date, in an unidentified publication.

The AAO determined that the petitioner failed to submit certified English language translations as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(3) for two of the articles (items 1 and 3), failed to include the title for one of the articles (item 1), failed to include the complete dates for three of the articles (items 2, 3, and 5), failed to include the authors for three of the articles (items 1, 2, and 4), failed to identify the publications for three of the articles (items 3, 4, and 5), failed to demonstrate that [REDACTED] are professional or major trade publications or other

major media, and failed to establish that any of the articles were published material about the petitioner relating to her work in the field.

On motion, counsel claims:

Articles about [the petitioner] have appeared in major media. On Friday January 19, 2001 in [redacted] in an Article entitled ‘ [redacted] ’ was written about [the petitioner]. Please find attached copy of the article and a letter from the News Editor of [redacted] confirming that the article was published in its paper on January 19, 2001. In this article, the author describes [the petitioner’s] expressional and gracious foot work during a Kuhipudi dance recital. . . .

In addition, the author of two reviews regarding [the petitioner] has submitted a letter attesting to articles written about [the petitioner] that have appeared in major media. One of the articles, [redacted] from [redacted] published on Friday December 29, 2000 has been included for your review.

Counsel fails to contest the findings of the AAO or submit any additional arguments or evidence regarding items 1 – 3 and 5 above. The issues are therefore considered to be abandoned. *Cf. Sepulveda v. U.S. Att’y Gen.*, 401 F.3d at 1228 n. 2; *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*9. Regarding item 4, counsel does not make any claim that the AAO’s decision was based on an incorrect application of law or policy, and does not support his brief with any pertinent precedent decisions. The basis for a motion to reconsider must depend on something new, if not necessarily new factual developments, then at least new arguments showing that some important issue of fact or law was overlooked. *See Rehman v. Gonzales*, 441 F.3d 506 (7<sup>th</sup> Cir. 2006.) Because counsel has failed to raise such allegations of error, the motion does not meet the requirements of the regulation at 8 C.F.R. § 103.5(a)(3).

Counsel requests that the AAO reconsider the specified regulatory criteria at 8 C.F.R. § 204.5(h)(3)(iii) based on the additional documentation; letters from individuals who claim that articles about the petitioner have appeared in major media. Even if this new information were considered under the requirements of a motion to reopen, the evidence reveals no facts that could be considered “new” under 8 C.F.R. § 103.5(a)(2).<sup>1</sup> The petitioner has been afforded two different opportunities to submit this evidence: at the time of the original filing of the petition and at the time of the filing of the appeal.

In addition to the above deficiencies, the letters are insufficient to establish the petitioner’s eligibility. The first letter is undated and is submitted by an unidentified author who claims to be the “News Editor” of [redacted]. The “News Editor” states that the article, ‘ [redacted] ’ appeared in the “ [redacted] ” on January 19, 2001. The letter fails to identify the author of the article as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii),

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<sup>1</sup> 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** 753 (2005)(emphasis in original).

and the “News Editor” failed to explain how he has knowledge that the article appeared in the publication. More importantly, the petitioner failed to submit primary evidence of the author of the purported article. The regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. In this case, the petitioner failed to submit any documentary evidence demonstrating that primary evidence and secondary evidence do not exist or cannot be obtained.

Even if the petitioner had established that primary evidence did not exist or could not be obtained, which she has not, the letter from the “News Editor” is not considered an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (9th Ed., West 2009). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746.

Moreover, as discussed in the AAO's appellate decision, the article is not about the petitioner relating to her work in the field; rather the article is about a Kuchipudi dance recital in which the petitioner is mentioned along with other individuals as performers at the recital. *See, e.g., Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at \*1, \*7 (D. Nev. Sept. 8, 2008) (finding that articles about a show are not about the actor). Finally, the petitioner failed to submit any documentary evidence establishing that [REDACTED] is a professional or major trade publication or other major media.

The remaining letter, from [REDACTED] states that he performed two reviews for [REDACTED] in December 2000 and April 2001. However, although counsel submitted an article entitled, “[REDACTED] [REDACTED], dated December 29, 2000, in [REDACTED] counsel failed to submit primary evidence of the purported article from April 2001 as required pursuant to the regulation 8 C.F.R. § 103.2(b)(2)(i). Further, the 2001 article is not considered published material about the petitioner relating to her work in the field; rather the article is about a Kuchipudi recital in which the petitioner is mentioned one time as one of many other performers at the recital. *See, e.g., Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at \*7. Finally, counsel failed to submit any documentary evidence establishing that [REDACTED] is a professional or major trade publication or other major media.

For these reasons, counsel failed to overcome the decision of the AAO on motion regarding the published material criterion.

Regarding the original contributions criterion, the AAO's appellate decision indicated that the petitioner claimed eligibility for the criterion based entirely on recommendation letters. The AAO thoroughly analyzed and discussed the recommendation letters and determined that they failed to establish that the petitioner has made original contributions of major significance in the field

consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v). On motion, counsel claims:

[The petitioner] has submitted professional recommendation letters that satisfy the requirements of 8 CFR 204.5(h)(3)(v). The Court in *Kazarian* . . ., noted that expert opinion letters cannot be vague and should specifically identify contributions and give examples of how they influenced the field. The letters submitted by [the petitioner's] experts in support of her application establish that she has created new dances, technique and exposed Kuchipudi dancing to a new generation of dancers, thereby influencing the field.

Counsel then cited to quotations from selected recommendation letters he claimed identified original contributions of major significance in the field and submitted additional recommendation letters. Regarding the additional recommendation letters, counsel failed to explain why they were not previously available and could not have been discovered or presented at the initial filing of the petition or on appeal. As such, the additional recommendation letters do not meet the requirements of a motion to reopen pursuant to the regulation at 8 C.F.R. § 103.5(a)(2).

Regarding the recommendation letters discussed in the AAO's appellate decision, counsel failed to explain how the AAO erred as a matter of fact or law under *Kazarian v. USCIS*, 596 F.3d at 1115. The AAO determined that although some of the letters indicated the petitioner's contributions, they failed to demonstrate that those contributions were original and have been of major significance to the field as a whole rather than being limited to her students. Although counsel cited to and highlighted some recommendations that he claimed demonstrated the petitioner's eligibility for this criterion, the recommendation letters refer to the petitioner's personal traits, talents, and skills without identifying how they are considered as contributions of major significance in the field. Merely having a diverse skill set is not a contribution of major significance in and of itself. Rather, the record must be supported by evidence that the petitioner has already used those unique skills to impact the field at a significant level in an original way. Furthermore, assuming the petitioner's skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment labor certification process. See *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 (Comm'r 1998).

This regulatory criterion not only requires the petitioner to make original contributions, it also requires that those contributions be of major significance. The letters contain bare assertions of the petitioner's status in the field without providing specific examples of how those contributions rise to a level consistent with major significance in the field. Vague, solicited letters that simply repeat the regulatory language are not sufficient without an explanation as to how the petitioner's contributions have already influenced the field. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d at 1122. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

USCIS may, in its discretion, use as advisory opinion 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 letters of support from the petitioner's personal contacts 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; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008). Thus, the content of the writers' 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 of original contributions of major significance.

For these reasons, counsel failed to overcome the decision of the AAO on motion regarding the original contributions criterion.

Regarding the artistic display criterion, the AAO determined that the petitioner's occupation as a dancer and choreographer did not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) and therefore evaluated the petitioner's evidence under the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). On motion, counsel states:

[T]he section simply states "evidence of the display of the alien's work in the field at artistic exhibitions or showcases." While this section excludes fields of endeavors other than arts, there is nothing in the regulation to suggest that it is limited to specific artistic endeavors. As a result, confirmation that the alien's work has been presented to an audience of viewers, which would suggest the public's interest in the alien's work should be considered.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires "[e]vidence of the display of the alien's work in the field at *artistic* exhibitions or showcases." The petitioner is a dancer and choreographer. When she is performing before an audience, she is not displaying her dances in the same sense that a painter or sculptor displays his or her work in a gallery or museum. The petitioner is performing her work, she is not displaying her work. In addition, to the extent that the petitioner is a performing artist, it is inherent to her occupation to perform. Not every performance is an artistic exhibition designed to showcase the performer's art. To accept that a performance artist like the petitioner meets this criterion would render the regulatory requirement that the petitioner meet at least three criteria meaningless as this criterion would effectively be collapsed into the criterion at the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation.

The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by at least one federal district court. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at \*7 (performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii).

Although the AAO considered the petitioner's performances under the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), a criterion which the petitioner also failed to meet, counsel did not contest the decision regarding the leading or critical role criterion. The issue of the petitioner's eligibility under the leading or critical role criterion is, therefore, considered to be abandoned. *Cf. Sepulveda v. U.S. Att'y Gen.*, 401 F.3d at 1228 n. 2; *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*9.

For these reasons, counsel failed to overcome the decision of the AAO on motion regarding the artistic display criterion.

On motion, counsel further argues:

In the alternative, if the [AAO] will not consider [the petitioner's] work in this category, her dance performances should be considered to satisfy 8 CFR § 204.5(h)(4); other comparable evidence. [The petitioner's] performance can be considered as other comparable evidence of extraordinary ability.

Counsel has not previously made any comparable evidence claim pursuant to the regulation at 8 C.F.R. § 204.5(h)(4); he does so for the first time on motion. Claims that were previously available but not previously asserted cannot be proffered as a basis for a motion to reconsider. *Martinez-Lopez v. Holder*, 704 F.3d 169 (1<sup>st</sup> Cir. 2013).

Notwithstanding the above, the regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. The regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the [petitioner's] occupation, the petitioner may submit comparable evidence to establish the [petitioner's] eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to his occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation as a dancer and choreographer cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, counsel has claimed the petitioner's eligibility for six of the ten criteria at the regulation at 8 C.F.R. § 204.5(h)(3), and the petitioner demonstrated that she met the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner's occupation. Moreover, although the petitioner failed to claim these additional criteria, a dancer or choreographer could command a high salary pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix) and could have commercial successes pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x). Counsel provided no

documentation as to why these provisions of the regulation would not be appropriate to the profession of a dancer or choreographer. Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

For these reasons, counsel failed to meet the requirements of a motion to reopen and to demonstrate that the petitioner meets the provisions of the regulation at 8 C.F.R. § 204.5(h)(4).

The petitioner does not allege any factual or legal error in the AAO's prior decision nor does she refer to new legal authority that materially affects her case. As noted above, a motion to reconsider must include specific allegations as to how the AAO erred as a matter of fact or law in its prior decision, and it must be supported by pertinent legal authority. Because counsel has failed to raise such allegations of error in the motion to reconsider, the AAO will dismiss the motion to reconsider.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The motion to reconsider is dismissed, the decision of the AAO dated October 4, 2010, is affirmed, and the petition remains denied.