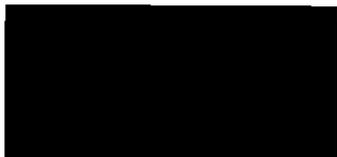


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

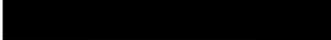


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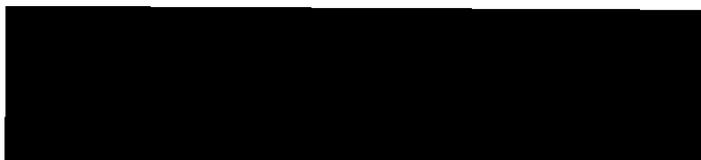
Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON BEHALF OF PETITIONER:

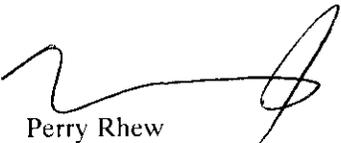


INSTRUCTIONS:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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, California Service Center, denied the nonimmigrant visa petition. The Administrative Appeal Office (AAO) dismissed the petitioner's subsequent appeal. 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.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the *Immigration and Nationality Act (the Act)*, as an alien with extraordinary ability in the arts. The petitioner states that it is engaged in artist representation, digital publications, and media consultation. It seeks to extend the beneficiary's O-1 status as an Artist (painter) for one year. The beneficiary was initially granted O-1 classification in 1999 and her status has been extended annually since that time.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary is an alien of extraordinary ability in the arts. The director determined that the petitioner failed to establish that the beneficiary meets the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), or at least three of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). The AAO dismissed the petitioner's subsequent appeal on February 3, 2011. The petitioner filed a timely motion to reconsider on March 7, 2011.

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 addressing whether the validity of the AAO's decision has been or is the subject of any judicial proceeding. Accordingly, the motion will be dismissed pursuant to 8 C.F.R. § 103.5(a)(4).

Even if the petitioner had met all regulatory requirements for filing a motion to reconsider, the AAO notes that the petitioner's assertions on motion would not result in the reversal of the AAO's previous decision. In dismissing the petitioner's original appeal, the AAO found that the petitioner failed to establish that the beneficiary met at least three of the regulatory criteria pursuant to the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B). The AAO specifically and thoroughly discussed the petitioner's evidence in its 26-page decision and determined that the petitioner failed to satisfy the plain language of any the six regulatory criteria. The AAO further concluded that the evidence in the aggregate failed to establish that the beneficiary is prominent to the extent that could be considered renowned, leading or well-known in the field of fine arts.

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 Services (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 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.

On motion, counsel contends: (1) that the AAO erroneously evaluated and discounted evidence submitted to satisfy all six of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B); and (2) that the AAO erred in dismissing the appeal when the denial of the petition "contravened the Service's regulations and the Service's memorandum of April 23, 2004, which requires the Service to give deference to the petitioner's prior approval where there is no material change in the underlying facts."

Counsel contends that the petitioner submitted evidence to meet the plain language of each and every criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), and takes issue with the AAO's determination to the contrary. Counsel acknowledges that once the petitioner satisfies the plain language of at least three of the evidentiary criteria, USCIS must still make a separate determination as to whether the evidence submitted establishes that the beneficiary's degree of skill and recognition is substantially above that ordinarily encountered, to the extent that she is recognized as renowned, leading or well-known in the field of the arts. However, counsel does not address how the AAO erred in its final determination that the beneficiary does not qualify as an alien of extraordinary ability in the arts.

The AAO notes that it would have reached the exact same conclusion regarding the beneficiary's eligibility even if it had found that the submitted evidence did satisfy the plain language of three or more of these criteria.

In its merits determination, the AAO observed that the beneficiary enjoyed a degree of national recognition as an artist early in her career, but concluded that the record did not support a finding that the beneficiary is currently recognized as a leading or well-known artist outside of her local community in California. The AAO noted that the petitioner attempted to rely on newspaper reviews from 1981 to meet at least three of the evidentiary criteria, and relied primarily on testimonial evidence to meet the remainder of the criteria. The AAO emphasized that the statute requires that the alien's achievements "have been recognized in the field through extensive documentation." See section 101(a)(15)(O)(i) of the Act. The AAO concluded that "it is not reasonable to include the beneficiary among the group of visual artists in the field as leading, renowned or well-known if the petitioner does not establish that she has received some form of independent recognition based on her reputation or achievements in the last 25 years." None of counsel's arguments on motion address these findings.

Further, the AAO does not agree with counsel that the petitioner did in fact satisfy the plain language of at least three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). For example, with respect to the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1), the petitioner is required to submit evidence that the beneficiary has performed and will perform services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts or endorsements. The AAO found that the petitioner provided evidence that the beneficiary's 1981 group exhibition at the Germany gallery "Art Gable" met the plain language of the regulatory criterion with respect to past lead or starring participation in an event or production with a distinguished reputation. However, the AAO determined that the petitioner had not submitted evidence in the form of critical reviews, advertisements, publicity releases, publications, contracts or endorsements to establish that the beneficiary *will perform* services as a lead or starring participant in productions or events which have a distinguished reputation.

Counsel objects to this finding insofar as the AAO declined to consider a planned exhibition of the beneficiary's work at the [REDACTED] in Prague, Czechoslovakia scheduled for October 2009. The AAO noted that the event would take place outside of the requested one-year validity period for the extended petition and noted that the regulatory language "will perform services" is presumed to refer to future events that will occur during the validity of the petition."

On motion, counsel asserts that "nothing in the regulation states that the event in which an alien will perform should be within the one-year validity period for the extended petition." However, the AAO's decision notes two other reasons for exclusion of evidence related to the October 2009 event. First, the AAO's decision indicates that the October 2009 event was not included in the beneficiary's initial itinerary submitted at the time of filing. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Further, the AAO noted that the October 2009 event at MIRO Gallerie was documented only by a letter from the owner of the gallery. The AAO specifically observed on page 7 of its decision that letters from the gallery owner regarding the beneficiary's past or future participation in productions or events at the [REDACTED] do not meet the evidentiary requirements described in the plain language of the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1).

With respect to the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3), counsel asserts that "the AAO erred in discounting the testimonial from the owner of Miro Gallerie, an establishment with a distinguished reputation, that the beneficiary has played and continues to play a lead or critical role in [REDACTED] and . . . improperly imposed requirements beyond those required in the regulations" by requiring more than testimonial evidence to meet this criterion. The AAO acknowledged that the petitioner submitted three letters from [REDACTED] attesting to the beneficiary's long-standing relationship with the gallery, but noted that the letters themselves failed to clarify the exact nature and extent of the beneficiary's relationship with the [REDACTED]. Even if the petitioner had found that [REDACTED] vague letters had met the plain language of this regulatory criterion, the probative value of such evidence would have been greatly reduced due to the lack of any corroborating evidence related to the beneficiary's previous, current or ongoing relationship with the gallery. The AAO noted that the beneficiary's list of major exhibitions mentions a single [REDACTED] exhibition in Berlin in 1992. Further the AAO observed that if testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

Counsel objects to the AAO's finding that two newspaper reviews of the beneficiary's exhibitions published 28 years prior to the filing of the petition are insufficient to establish a "record of major commercial or critically-acclaimed successes," pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(B)(4). Specifically, counsel asserts that the AAO imposed requirements beyond those stated in the regulations by requiring "recent reports in major newspapers." However, counsel does not acknowledge much less object to the AAO's finding at page 14 of its decision that a newspaper review of a gallery exhibition does not rise to the level of a report of an "occupational achievement" in the beneficiary's field.

In addition, counsel contends that the petitioner did in fact establish that the beneficiary has commanded a high salary in relation to others in the field in the past and therefore satisfies the plain language of the regulatory criterion at 8 C.F.R. 214.2(o)(3)(iv)(B), which requires the petitioner to submit "contracts or other reliable

evidence" in support of its claims. The AAO declined to accept testimonial letters vaguely attesting to the beneficiary's "high salary" as "reliable evidence" of the beneficiary's salary in comparison to others. While counsel asserts that the AAO was required to establish why such evidence was "unreliable" the AAO notes that the director specifically advised the petitioner in a request for evidence of the types of evidence required to satisfy the regulatory language, and the petitioner failed to provide such evidence.

Therefore, although the motion will be dismissed pursuant to 8 C.F.R. § 103.5(a)(4), the AAO confirms that review of the record does not establish that the petitioner submitted evidence to satisfy the plain language of at least three of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), nor does the evidence as a whole establish that the beneficiary has achieved the level of distinction as an alien of extraordinary ability in the arts.

Finally, the AAO acknowledges that counsel once again relies on a 2004 USCIS memorandum to support her assertion that prior approvals of petitions involving the same parties should be given deference. See Memorandum of William R. Yates, Associate Director for Operations, USCIS: *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility of Petition Validity* (April 23, 2004) ("Yates Memorandum"). The memorandum provides that exceptions to this policy should be made where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. *Id.* Once again, the AAO observes that the Yates Memorandum is addressed to service center and regional directors and not to the chief of the AAO.

The AAO notes that prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm'r. 1988).

Each nonimmigrant petition filing is a separate proceeding with a separate record of proceeding and a separate burden of proof. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, in the present matter, the director reviewed the record of proceeding and concluded that the petitioner was ineligible for an extension of the nonimmigrant visa petition's validity based on the petitioner's failure to submit evidence that satisfies the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv). In both the request for evidence and the final denial, the director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act.

Much of the evidence in the current record consists of letters dated in 1999 and newspaper clippings from the 1980s, which we presume were submitted in support of the beneficiary's initial petition filed in 1999. If the

prior petitions were approved based on the same evidence, such approvals would constitute material and gross error on the part of the director. Neither the director nor the AAO is required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988).

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the motion to reconsider will be dismissed, the AAO's decision dated February 3, 2011 will not be disturbed, and the petition will remain denied.

**ORDER:** The motion is dismissed.