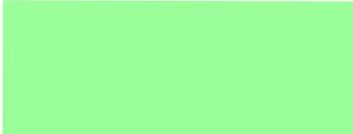




**U.S. Citizenship
and Immigration
Services**

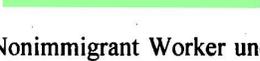
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Date: **MAR 21 2013**

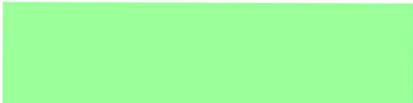
Office: VERMONT SERVICE CENTER

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 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, Vermont Service Center, denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is now before the AAO on a combined motion to reopen and reconsider. The motion will be dismissed.

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 athletics. The petitioner states that it is a provider of professional tennis services and instruction. It seeks to employ the beneficiary as a professional tennis coach/instructor for a period of three years.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary is an alien with extraordinary ability in athletics as a tennis coach/instructor. The director found that the evidence submitted failed to satisfy the criterion set forth at 8 C.F.R. § 214.2(o)(3)(iii)(A) or three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).

Upon review of the director's decision, the AAO found the majority of the evidence in the record pertains to the beneficiary's achievements as a competitive tennis player, not as a tennis coach or instructor. The AAO noted it conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO noted the statute requires that the beneficiary seek entry into the United States "to continue work in the area of extraordinary ability." Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i). The AAO further noted the beneficiary intends to work in the area of tennis coaching/instruction; however, the petitioner has devoted exactly one brief paragraph to describing the beneficiary's professional coaching experience.¹ The AAO found the minimal evidence in the record does not establish that the beneficiary has coached students who compete successfully at the national or international level of the sport, or at any professional level. In fact, the AAO noted the petitioner had not identified any tennis players who have been coached by the beneficiary. Therefore, the AAO concluded that that the petitioner failed to establish the beneficiary is one of the small percentage of individuals who are recognized as having risen to the very top of the tennis coaching field.

The matter is now before the AAO on a combined motion to reopen and reconsider. On motion, counsel for the petitioner addresses specific evidentiary deficiencies that were raised in the AAO's by submitting two reference letters.

A motion to reopen must state the new facts to be proven in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent

¹The AAO noted that the petitioner's claims regarding the beneficiary's coaching career consist of the following:

[The beneficiary] has professional experience as well, having served as Tennis Coach from 2001 through 2003 with the [redacted] in Lithuania; Assistant Coach at [redacted] in South Carolina during summer of 2004 and 2006; and Professional Tennis Coach since 2007 with the [redacted]

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. 8 C.F.R. § 103.5(a)(3).

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 regarding if the validity of the decision of the AAO has been or is subject of any judicial proceeding. As such, the motion must be dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4).

Even if the petitioner had filed a motion that meets the regulatory requirements at 8 C.F.R. § 103.5(a)(4), the AAO would dismiss the combined motion to reopen and reconsider on the merits.

Regarding the motion to reconsider, although the petitioner indicated that it was seeking to file a motion to reconsider, the petitioner offers new evidence for the AAO's consideration and does not claim that the AAO's adverse decision was incorrect based on the evidence of record at the time of the initial decision. The motion does not meet the requirements of a motion to reconsider pursuant to 8 C.F.R. § 103.5(a)(4). Accordingly, the motion to reconsider will be dismissed.

Regarding the motion to reopen, on the Form I-290B, Notice of Appeal or Motion, counsel states, "Please see attached motion and supporting documentation." Counsel submits a short brief in which she summarizes the newly submitted evidence. She asserts:

In the instant case, although the Beneficiary gained her reputation as a tennis player and not as a coach, her qualifications as a coach are based upon the knowledge and experience she gained as an athlete.

The petitioner submits, as evidence in support of the motion to reopen, newly-obtained reference letters from [REDACTED] tennis director at [REDACTED] in Boca Raton, Florida and [REDACTED] a certified professional tennis coach, both attesting to the beneficiary's coaching qualifications and achievements.

In a letter dated June 6, 2010, [REDACTED] states he has known the beneficiary for five years and the beneficiary is a top tennis player and coach of extraordinary ability. This evidence fails to establish that the beneficiary is an alien with extraordinary ability in athletics as a tennis coach/instructor.

In a letter dated June 10, 2010, [REDACTED] states that the beneficiary has been coaching his brother, a 16 yr. old junior player, for three years "when he trains in South Florida." He states that his brother "is the number one junior player in Barbados." However, additional documentary evidence is needed

to establish that the beneficiary's student has won nationally or internationally recognized prizes or awards for excellence in the field. While the petitioner has provided the name of the beneficiary's claimed award-winning student, the petitioner has not provided documentary evidence of their award. The record contains no primary evidence of the beneficiary's experience as a coach. The petitioner has not adequately explained why documentary evidence of such award is not available. The third-party statements of witnesses regarding such awards are insufficient to meet this criterion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Further, the evidence indicates that the beneficiary has only been coaching tennis players competing at the junior level. Even if the petitioner had submitted a copy of the award, a national award received by a student competing at the junior level would not carry the same evidentiary weight as an international award received by a competitor at the adult, professional level, without some additional explanation as to how the sport is governed at the junior level. Therefore, the evidence on motion does not establish that the beneficiary has coached students who compete successfully at the national or international level of the sport, and, therefore, fails to establish that the beneficiary is an alien with extraordinary ability in athletics as a tennis coach/instructor.

In addition, as stated above, 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.² A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2); the petitioner 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 evidence in support of the petition: at the time of the original filing of the petition on December 18, 2008, in response to the director's request for additional evidence issued on December 23, 2008, and at the time of the filing of the appeal on February 27, 2009. As the evidence submitted on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2), the petitioner has not established a proper basis for a motion to reopen. For this additional reason, the motion will be dismissed pursuant to 8 C.F.R. § 103.5(a)(4).

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.

Accordingly, the motion to reopen will be dismissed.

ORDER: The motions to reopen and reconsider are dismissed, the AAO's previous decision will not be disturbed, and the petition remains denied.

² 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 College Dictionary* 736 (2001)(emphasis in original).