



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

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF A-B-

DATE: NOV. 19, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a performing artist, seeks classification as an individual of extraordinary ability in the arts. This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the Petitioner's Form I-140, Immigrant Petitioner Alien Worker. We dismissed the Petitioner's appeal¹ and rejected a subsequent appeal. We then denied a motion to reopen² and an additional motion to reopen and motion to reconsider.³

The matter is now before us on a motion to reopen. Upon review, we will deny the motion.

I. LAW

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth two options for satisfying this classification's initial evidence requirements. First, a petitioner can demonstrate a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide documentation that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles). Where a petitioner submits qualifying evidence under at least three criteria, we will then determine whether the totality of the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor.⁴

¹ See *Matter of A-B-*, ID# 407091 (AAO July 12, 2017).

² See *Matter of A-B-*, ID# 1051883 (AAO Nov. 30, 2017)

³ See *Matter of A-B-*, ID# 1258853 (AAO Apr. 12, 2018).

⁴ See *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); see also *Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity

A motion to reopen is based on documentary evidence of *new facts*. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. PROCEDURAL HISTORY

The Director denied the petition, finding that the Petitioner did not satisfy the initial evidentiary criteria applicable to individuals of extraordinary ability, either a major, internationally recognized award or at least three of ten possible forms of documentation. Specifically, the Director determined that the Petitioner met only one of the criteria, leading or critical role criterion under 8 C.F.R. § 204.5(h)(3)(viii). We then dismissed the Petitioner's appeal, withdrawing the Director's decision relating to the leading or critical role criterion but concluding that she only fulfilled the criterion for artistic display at 8 C.F.R. § 204.5(h)(3)(vii).

Subsequently, the Petitioner filed an appeal on our decision. We rejected the appeal because we do not exercise appellate jurisdiction over our own decisions.⁵ In addition, we informed the Petitioner that we could not treat her appeal as a motion because it did not satisfy the requirements of either a motion to reopen or a motion to reconsider. *See* 8 C.F.R. § 103.5(a)(2) and (3).⁶

The Petitioner then filed a motion to reopen. However, we denied the motion as untimely filed. Specifically, we dismissed the Petitioner's appeal on July 12, 2017, and she filed her motion to reopen on September 27, 2017. A motion must be filed within 33 calendar days of the date that the unfavorable decision was served by mail. *See* 8 C.F.R. §§ 103.5(a)(1)(i), 103.8(b). Because we did not receive the motion within 33 days after the decision dismissing her appeal, the Petitioner filed an untimely motion to reopen.

In addition, the Petitioner filed a motion to reopen and a motion to reconsider, claiming that she made a typographical error on the earlier Form I-290B, Notice of Appeal or Motion, and we should have treated the second appeal as a motion. Furthermore, the Petitioner argued that the timeliness of her motion to reopen should have been calculated based on the date of the rejected appeal rather than to our decision dismissing her appeal. We found, however, that the Petitioner did not demonstrate that we erred in rejecting her appeal as improperly filed. Moreover, as discussed above, we explained why we did not treat her appeal as a motion. In addition, we indicated that when our office rejects an appeal, the appeal does not retain a filing date. *See* 8 C.F.R. § 103.2(a)(7)(ii)-(iii). Accordingly, we denied her motion to reopen and motion to reconsider.

of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

⁵ We have appellate jurisdiction over only the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1 (effective March 1, 2003).

⁶ The Petitioner's filing did not include a statement of new facts to be provided for a reopening of the proceeding or a statement of reasons for reconsideration.

In the current motion to reopen, the Petitioner references the Director's decision denying her petition and our decision dismissing her appeal. The Petitioner argues that she meets two additional criteria and presents previously submitted documentation.

III. ANALYSIS

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' (the Board) definition of "new" at 8 C.F.R. § 1003.23(b)(3) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

The Petitioner's brief on motion does not mention or address our most recent decision denying her motion to reopen and motion to reconsider. Instead, the Petitioner references the Director's decision and our original decision dismissing her appeal. Furthermore, the Petitioner's motion to reopen consists of documentation that was previously submitted in an earlier proceeding, and she did not establish that her evidence overcomes our prior decision. Because the Petitioner does not offer "new facts" supported by documentary evidence, the instant filing does not meet the requirements of a motion to reopen.

IV. CONCLUSION

The Petitioner has not established that our previous decision was incorrect based on the record before us, nor does her evidence on motion demonstrate her eligibility for the benefit sought.

ORDER: The motion to reopen is denied.

Cite as *Matter of A-B-*, ID# 1728227 (AAO Nov. 19, 2018)