U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

H4

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

File: [redacted] Office: MIAMI, FLORIDA Date: DEC 08 2002

IN RE: Applicant: [redacted]

Application: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. 1182(h)

IN BEHALF OF APPLICANT:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary L. Rosenberg

for Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The Associate Commissioner affirmed that decision on a motion to reopen. The matter is now before the Associate Commissioner on a second motion to reopen. The motion will be dismissed.

The applicant is a native and citizen of Nicaragua who is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is married to a lawful permanent resident, is the father of a United States citizen child, and is the son of a lawful permanent resident father. He is applying for adjustment of status under the Nicaraguan Adjustment and Central American Relief Act, Public Law 105-100 (NACARA) and seeks a waiver of this permanent bar to admission as provided under section 212(h) of the Act, 8 U.S.C. 1182(h), to remain in the United States and reside with his family members.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and that the severity of the applicant's crimes did not warrant a favorable exercise of discretion. The district director then denied the application and the Associate Commissioner affirmed that decision on appeal and on a subsequent motion to reopen.

On second motion, the applicant states that he regrets having committed a crime and asks for another chance. He reasserts that he has no close family relatives in Nicaragua and that his wife and child will suffer if he is removed from the United States.

8 CFR 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

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.[1]

For comparison purposes, when used in the context of other legal disciplines, the phrase "new facts" or "new evidence" has been determined to be evidence that was previously unavailable and could not have been discovered during the prior proceedings. In removal hearings and other proceedings before the Board of Immigration

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[1] 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 792 (1984)(emphasis in original).

Appeals, the regulations at 8 CFR 3.2 state:

> A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. . . . A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . ."

In examining the authority of the Attorney General to deny a motion to reopen in deportation proceedings, the Supreme Court has found that the appropriate analogy in criminal procedure would be a motion for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323 (1992); INS v. Abudu, 485 U.S. 94, 100 (1988); see also Matter of Coelho, 20 I&N Dec. 464, 472 n.4 (BIA 1992). Accordingly, in federal criminal proceedings, a motion for a new trial based on newly discovered evidence "'may not be granted unless . . . the facts discovered are of such nature that they will probably change the result if a new trial is granted, . . . they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier, and . . . they are not merely cumulative or impeaching.'" Matter of Coelho, 20 I&N Dec. at 472 n.4 (quoting Taylor v. Illinois, 484 U.S. 400, 414 n.18 (1988)).

On second motion, the applicant resubmits documentation previously submitted including a brief, an affidavit from his spouse, and evidence that his mother suffers from diabetes. A review of the evidence submitted on second motion reveals no fact that could be considered "new" under 8 CFR 103.5(a)(2). All evidence submitted was presented in the previous proceeding. The evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

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. at 323 (citing INS v. Abudu, 485 U.S. at 107-108). A party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion to reopen will be dismissed.

Furthermore, 8 CFR 103.5(a)(2) states, in pertinent part:

> 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.

Although the applicant has resubmitted a brief entitled "Motion Requesting Service Officer to Reopen and Reconsider Denial Pursuant to 8 C.F.R. 103.5," the applicant does not establish that the decision was incorrect based on the evidence of record at the time of the initial decision. Other than the title of the motion, the applicant does not assert that a motion to reconsider should be considered as an alternative to the motion to reopen. Assuming, *arguendo*, that the applicant intended to file a motion to reconsider, his motion will be dismissed.

Finally, it should be noted for the record that, unless the Service directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 CFR 103.5(a)(1)(iv).

The burden of proof in this proceeding rests solely with the applicant. Section 291 of the Act, 8 U.S.C. 1361. The applicant has not sustained that burden. 8 CFR 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the Associate Commissioner will not be disturbed.

ORDER: The motion is dismissed.