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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



File: [Redacted] Office: MIAMI, FL

Date: JAN 31 2003

IN RE: Applicant: [Redacted]

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

IN BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, 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. A second motion to reopen was dismissed. The matter is now before the Associate Commissioner on a third motion to reopen. The motion will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or willful misrepresentation. The applicant is married to a United States citizen and seeks the above waiver in order to remain in the United States and reside with her spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the application accordingly. The Associate Commissioner affirmed that decision on appeal and on a first motion to reopen. A second motion to reopen was dismissed.

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 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"

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).

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 initial appeal, the applicant's spouse submitted a letter stating that he did not understand what the problem was and requested that his wife's application for adjustment of status be processed. On first motion, the applicant's spouse apologized for the lack of understanding on his and his wife's part and stated that the reason for the motion was that his wife's misrepresentation was not willful in that she did not intend to misrepresent a material fact when procuring admission into the United States. The spouse asked if it would be possible to start the process over as husband and wife and stated that he would seek assistance in the process.

On second motion, counsel (re)asserted that the applicant's misrepresentation was neither willful nor material. Counsel stated that the ". . . [r]espondent inadvertently listed her marriage date as February 9, 1999 instead of February 5, 1999. Logic dictates that if Respondent's intention were to fraudulently enter the United States, a Respondent would have pre-dated her application rather than post-date it. . . ." It is unclear what specific "application" counsel was referring to. In addition, the "logic" of counsel's claim was not explained. On second motion, counsel also stated that the applicant and her spouse entered into their marriage in good faith and have been married for almost three years. Counsel claimed that the applicant's removal would be an emotional and financial hardship to herself and to her U.S. citizen spouse. The Associate Commissioner noted that counsel's assertion of hardship did not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). A review of counsel's statements submitted on second motion revealed no fact that could be considered "new" under 8 CFR 103.5(a)(2). The statements were, therefore, not considered a proper basis for a motion to reopen. The second motion was dismissed.

On third motion, counsel asserts that an application for relief from deportation is an ongoing application; the applicant is statutorily eligible for adjustment of status; the applicant's removal would be an extreme emotional and financial hardship to herself and her spouse; the applicant has no criminal history and is not a danger to the community or a flight risk; the number and severity of the applicant's violations are singular and, if at all existent, insignificant; and the applicant's misrepresentation was neither willful nor material. It is noted that in the instant matter, the applicant is neither filing for relief from deportation nor adjustment of status to lawful permanent residence. The instant matter involves only the applicant's request for a waiver of inadmissibility under section 212(i) of the Act. In addition, the assertions made by counsel on third motion, were previously made and considered in the initial appeal and subsequent motions.

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.

On third motion, counsel does not establish that the decision was incorrect based on the evidence of record at the time of the initial decision. Counsel cites Matter of A-A, 20 I&N 492 (BIA 1992), as holding that an application for relief from deportation is an ongoing application. The instant matter, however, concerns a waiver of grounds of inadmissibility, not relief from deportation. In addition, counsel cites several Board of Immigration Appeals (BIA) decisions as holding that "an application for admission to the United States is continuous, and admissibility is determined at the time an application is finally considered." However, counsel merely cites the cases and does not discuss in any way their applicability to the case at hand. Assuming, *arguendo*, that counsel intended to file a motion to reconsider, that motion will also 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.