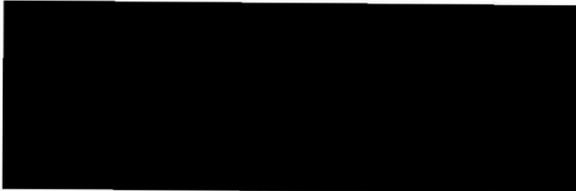




U.S. Citizenship
and Immigration
Services

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H2

File: [REDACTED] Office: ATHENS

Date: OCT 10 2006

IN RE: [REDACTED]

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

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge (OIC), Athens, Greece. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the OIC's decision to deny the application. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The applicant is a native and citizen of Ethiopia who was found to be inadmissible to the United States by a consular officer under section 212(a)(1)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(1)(A)(i), as an alien who is determined to have a communicable disease of public health significance. In addition, the applicant was also found to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having an imposter appear for a medical examination on two separate occasions during 2002 in order that the applicant would appear to test negative for the human immunodeficiency virus (HIV) in connection with his visa application. The applicant is the beneficiary of an approved preference visa petition based on his marriage to a United States citizen in March 1996 in Greece. The applicant seek waivers of the bars to admission provided under sections 212(g) and (i) of the Act, 8 U.S.C. § 1182(g), in order to join his spouse and child in the United States.

The OIC denied the application after determining that the applicant failed to establish his eligibility for a waiver because he had not demonstrated that his exclusion would result in extreme hardship to his U.S. citizen spouse or child.¹ On November 1, 2004, the AAO affirmed the OIC's denial.

On December 14, 2004, the applicant filed the present Motion to Reopen and Reconsider² the AAO's decision. On motion, the applicant, through his brother, asserts that he has established that he is eligible for a waiver under section 212(g) of the Act, as he has shown that he has sufficient health coverage and he has taken appropriate measures to maintain his health in light of the fact that he is HIV positive. *Brief from Applicant's Brother*, received February 7, 2005. The applicant's brother contends that the AAO's decision was based on an incomplete review of the evidence provided by the applicant. *Id.* The applicant's brother further asserts that the applicant's wife and child will experience extreme hardship if the present waiver application is denied, and thus the applicant is eligible for a waiver under section 212(i) of the Act. *Id.*

The regulation at 8 C.F.R. § 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

¹ As noted in the AAO's prior decision, the record reflects that although the applicant was seeking waivers both under 212(g) and 212(i), the OIC's decision appears to only address the applicant's eligibility for the 212(i) waiver. It is possible that the OIC determined that because the applicant had not satisfied the requirements for the 212(i) waiver that no purpose would have been served in addressing his eligibility for the 212(g) waiver. The AAO reviewed the applicant's eligibility for both waivers pursuant to its *de novo* authority. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

² The applicant indicated that he is "reappeal[ing]" the AAO's denial. The applicant is not permitted to appeal the AAO's prior dismissal, yet the AAO will treat the applicant's Form 290B filing as a Motion to Reopen and Reconsider the AAO's prior decision.

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.

Upon review, the applicant has not asserted that the AAO's prior decision "was based on an incorrect application of law or Service policy." 8 C.F.R. § 103.5(a)(2). The applicant's brother discusses facts, but he does not address the legal or policy basis for the AAO's dismissal. Thus, the applicant has not established that the AAO applied an erroneous interpretation of law or policy, as required by the regulation at 8 C.F.R. § 103.5(a)(2). Accordingly, the applicant's motion to reconsider will be denied.

The regulation at 8 C.F.R. § 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.³

On motion, the applicant's brother addresses facts that were previously presented to CIS. The applicant's brother asserts that the applicant has shown that he has sufficient health coverage and he has taken appropriate measures to maintain his health in light of the fact that he is HIV positive. The applicant's brother explains that the applicant's wife will experience extreme hardship if the applicant's waiver application is denied, as she would have difficulty residing in either Greece or Ethiopia as one of Eritrean descent and a member of the Evangelical Church. The applicant's brother attests that the applicant's child is suffering from delayed development due to the applicant's absence. The applicant's brother asserts that the AAO ignored the hardships to the applicant's family members, and failed to review the evidence of record or the briefs from the applicant's former counsel.

The applicant's brother asserts that the AAO's dismissal was erroneous in that it did not question why the U.S. Embassy in Athens concealed from the applicant his eligibility to apply for a waiver. The applicant's brother contends that the AAO erred in failing to question why the Athens Embassy disclosed the applicant's HIV status to the applicant's insurance company, or why the Athens Embassy compelled the applicant to secure additional health coverage rather than assessing whether his existing coverage was adequate to meet his potential needs.

Upon review, the applicant has not stated a sufficient basis to support a motion to reopen. The applicant's brother largely bases his arguments on alleged misconduct by the U.S. Embassy in Athens, and he contends that the AAO erred in not making inquiries into such misconduct. However, the AAO is not a disciplinary body and it lacks authority or a mandate to oversee the internal actions of the staff of other CIS offices or other governmental agencies such as the U.S. Department of State. The right of appeal before the AAO affords an applicant an additional opportunity to determine if he has established eligibility for the benefit sought. Accordingly, AAO review is conducted on a *de novo* basis. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The decision of an OIC will only be reversed when an applicant has established eligibility under the Act. In the absence of clear evidence of such eligibility, erroneous actions by staff of the U.S. government are not a basis for sustaining an appeal before the AAO.

³ 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).

The applicant's brother describes previous actions of the Athens Embassy. He discusses conditions in Ethiopia, Greece, and Eritrea and the hardship they would create for the applicant's wife. He further describes the applicant's son's difficulty in school. The applicant's brother asserts that the applicant's wife is enduring severe depression. However, the applicant's brother has failed to identify any facts that can be considered "new" as contemplated by the regulation at 8 C.F.R. § 103.5(a)(2). Each of the matters addressed by the applicant's brother either occurred prior to the filing of the applicant's appeal, or they were already ongoing at that time. The applicant has not provided any new evidence that is dated after August 13, 2003, the date he filed his original appeal before the AAO.

It is noted that the applicant's brother asserts that the AAO failed to review the evidence in the record or the brief's provided by the applicant's former counsel. However, the AAO's prior decision reflects that the applicant's evidence was referenced and considered, including the applicant's medical exam, a statement from the applicant, notes from the applicant's interview in Athens, Greece, the brief from applicant's former counsel, documents regarding coverage of the applicant's medical expenses, and a statement from the applicant's wife. The AAO further highlighted deficiencies in the record, including an absence of an assessment of the applicant's current health by a qualified medical professional and evidence of the name of the applicant's child that may clarify submitted insurance documentation. The applicant's brother has not identified any documentation that was submitted, yet not addressed by the AAO. Nor has the applicant provided supplementary evidence to meet the AAO's concerns. Thus, the applicant has not shown that he presented facts to the AAO that were not considered.

Additionally, the applicant's brother makes assertions that are not supported by evidence. He indicates that the applicant's son is experiencing difficulty in school, yet the applicant has failed to provide supporting evidence. The applicant's brother states that the applicant's wife is experiencing severe depression, yet the record contains no documentation of this fact such as a report from a qualified mental health professional. 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. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as 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. The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. With the current motion, the applicant has not met that burden.

Based on the foregoing, the applicant's motion to reopen and reconsider will be dismissed and the prior decision of the AAO will not be disturbed.

ORDER: The motion is dismissed.