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U.S. Department of Justice

Immigration and Naturalization Service

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

02 JUL 2002

FILE: [Redacted]
LIN 00 012 52064

Office: Nebraska Service Center

Date:

IN RE: Applicant: [Redacted]

APPLICATION: Application for Adjustment of Status Pursuant to Section 902 of the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA), Public Law 105-277.

IN BEHALF OF APPLICANT: Self-represented

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting Director, Nebraska Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be dismissed.

The applicant is a native and citizen of Haiti who is seeking adjustment of status to that of a lawful permanent resident pursuant to section 902 of Public Law 105-277, Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA).

The acting director denied the application after determining that the applicant was ineligible for adjustment of status under the HRIFA Act because his application for asylum, Form I-589, was not considered properly filed prior to December 31, 1995, as required.

Upon review of the record of proceeding, the Associate Commissioner determined that the asylum application was not properly filed with the Service pursuant to 8 C.F.R. 208.3(c)(3). He, therefore, concurred with the acting director's conclusion and affirmed his decision on March 8, 2001.

On motion, the applicant states that he did not know that a new asylum application form was required until the form was returned to him. He further states that at the present time, there is a lack of communication or a misinterpretation of the Haitian Refugee Immigrant Fairness Act.

Pursuant to 8 C.F.R. 103.5(a)(2), a motion to reopen must state the new facts to be proved at the reopened proceedings and be supported by affidavits or other documentary evidence. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. 103.5(a)(4).

Based on the plain meaning of "new," a new fact is held to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

When used in the context of a motion to reopen in analogous legal disciplines, the terminology "new facts" or "new evidence" has been determined to be evidence that was previously unavailable during the prior proceedings. In removal hearings and other proceedings before the Board of Immigration Appeals, "[a] motion to reopen

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).



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...." 8 C.F.R. 3.2 (1999). 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). 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. 464, 472 n.4 (BIA 1992) (quoting Taylor v. Illinois, 484 U.S. 400, 414 n.18 (1988)).

On motion, the applicant submits copies of the rejected asylum application and a letter from [REDACTED] Technical Education Center dated July 19, 1999. This evidence, however, does not overcome the director's finding that the asylum application was not properly filed, nor does this evidence, submitted on motion, reveal facts that could be considered "new" under 8 C.F.R. 103.5(a)(2). Furthermore, the applicant has failed to establish or explain how the Service misinterpreted the HRIFA Act as claimed. For these reasons, the motion may not be granted.

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, supra, 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, supra, at 110.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The motion is dismissed.