U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUL 0 1 2014

Office: NATIONAL BENEFITS CENTER

FILE:

IN RE: Applicant:

APPLICATION: Application for Status as a Permanent Resident Pursuant to Section 13 of the Immigration and Nationality Act of 1957, Pub. L. No. 85-316, 71 Stat. 642, as amended.

ON BEHALF OF APPLICANT: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron M. Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the director, National Benefits Center and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion will be dismissed.

The applicant is a native and citizen of El Salvador who is seeking to adjust his status to that of a lawful permanent resident under section 13 of the Act of 1957 ("Section 13"), Pub. L. No. 85-316, 71 Stat. 642, as modified, 95 Stat. 1611, 8 U.S.C. § 1255b, as an alien who performed diplomatic or semi-diplomatic duties under section 101(a)(15)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(A)(i).

The director denied the Form I-485, Application to Register Permanent Residence or Adjust Status, after determining that the applicant had failed to demonstrate that compelling reasons prevent his return to El Salvador. The director also noted that the Department of State issued its opinion on February 9, 2013, recommending that the application be denied because the applicant did not provide compelling reasons why he cannot return to his country. *Decision of the Director,* dated March 12, 2013.

The director also denied the application of the applicant's spouse (Ana Liduvina Fiallos De Machon, A203 025 946) who submitted an Application to Register Permanent Residence or Adjust Status for Status as Permanent Resident (Form I-485) under Section 13 as a derivative dependent of the applicant. The director issued a separate decision denying the application. The applicant's spouse filed a Form I-290B, Notice of Appeal or Motion seeking a review of the director's decision.

On September 13, 2013, the AAO, upon a *de novo* review of the evidence of record determined that the applicant failed to meet his burden of establishing his eligibility for adjustment of status under Section 13 of the Act.[1] Specifically, the AAO determined that the applicant failed to establish compelling reasons that prevent his and his family's return to El Salvador. The AAO dismissed the appeal accordingly. On the same date, the AAO dismissed the appeal of the applicant's dependent spouse, because, as a derivative dependent of the applicant, she failed to provide evidence of compelling reasons that prevent her return to El Salvador separate from that presented by the applicant.

On October 15, 2013, the applicant submits a Form I-290B, Notice of Appeal or Motion requesting the AAO to reopen and reconsider its decision.[2] The applicant submits statements dated October 10, 2013 and November 1, 2013, and a copy of a newspaper article – [redacted] dated October 28, 2013 on the slaying of a political party official in El Salvador, in support of the motion.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

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[1] The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[2] On the same date, the applicant's dependent spouse filed a Form I-290B, Notice of Appeal or Motion requesting the AAO to reopen and reconsider its decision. We will issue a separate decision for the applicant's dependent.

> 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.

The regulation at 8 C.F.R. § 103.5(a)(3) 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 motion, the applicant provides no new facts supported by affidavits or other documentary evidence as required for a motion to reopen. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of "new," a new fact is found to be evidence that was newly submitted, previously unavailable, and could not have been discovered or presented in the previous proceeding.[3] In this matter, the applicant has presented no new facts to be reopened; rather, the applicant reasserts the same facts previously submitted in support of his application and on appeal.

In the October 10, 2013 statement, the applicant indicated that the director and the AAO did not consider the unexplained disappearance of his father in 1968 in El Salvador as a compelling reason that precludes his return to El Salvador. The applicant stated his father's disappearance significantly impacted the family and that he is afraid to return to El Salvador for that reason as well as the current status of violence in the country. While the disappearance of the applicant's father is very unfortunate, there is no evidence in the record suggesting that the disappearance of the applicant's father in 1968 was because of the applicant's duties and responsibilities as [redacted] at the El Salvador Consulate in [redacted]

The applicant further reiterated his earlier statements that he issued travel documents to Salvadorans for deportation to El Salvador, that some of the deportees were members of the [redacted] gang, and that some of the deportees accused him of helping the United States government deport them. The applicant claims that he will be targeted by a faction of the [redacted] party because of his service under the government of [redacted] who was expelled from the [redacted] party. The applicant also states that he wants to raise his U.S. citizen child in the United States because of the high level of insecurity in El Salvador.

Pursuant to 8 C.F.R. § 245.3, eligibility for adjustment of status under Section 13 is limited to aliens who were admitted into the United States under section 101, paragraphs (a)(15)(A)(i), (a)(15)(A)(ii), (a)(15)(G)(i), or (a)(15)(G)(ii) of the Act who performed diplomatic or semi-diplomatic duties and to their immediate families, and who establish that there are compelling reasons why the applicant or the member of the applicant's immediate family is unable to return to the country represented by the government that accredited the applicant, and that adjustment of the applicant's status to that of an alien lawfully admitted to permanent residence would be in the

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[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).

national interest. Aliens, whose duties were of a custodial, clerical, or menial nature, and members of their immediate families, are not eligible for benefits under Section 13.

The applicant, on motion does not adequately address the issue of the compelling reasons that prevent his and his family's return to El Salvador. The applicant's fear of return based on the unexplained disappearance of his father, and the insecurity in the country is not sufficient evidence that establishes compelling reasons within the requirements of Section 13 of the Act. The evidence of record does not establish that the applicant's fear of return is based on his prior diplomatic service for the government of El Salvador in the United States. The applicant submitted a newspaper article that highlighted the high level of insecurity in the country, particularly, the assassination of political party activists by unknown individuals. The applicant however, does not provide any evidence that he and his family would be targeted for harm because of his duties and responsibilities at the Consulate of El Salvador in The applicant has failed to establish that he and his family are at greater risk of harm because of his past government employment, political activities or other related reason.

The applicant provides no new evidence to establish that he is unable to return to El Salvador because of any action or inaction on the part of the government of El Salvador or other political entity there. As such, the motion does not meet the requirements of 8 C.F.R. § 103.5(a)(2) and must be dismissed.

As for the motion to reconsider, the regulation requires that 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 U.S. Citizenship and Immigration (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. See *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano,* 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal argument" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. Also, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60. Furthermore, a motion to reconsider is not a process by which a party may submit documents, which were previously available and the applicant failed to submit them when requested to do so.

In the instant matter, the applicant has provided no reasons for reconsideration that are supported by pertinent precedent decisions to establish that the AAO's prior decision was based on an incorrect application of law or USCIS policy. The applicant has also failed to provide pertinent precedent decisions or evidence to establish that the AAO's decision was incorrect based on the

evidence of record at the time of the initial decision or established that the director or the AAO misinterpreted the evidence of record. The applicant made general assertions about his fear of returning to El Salvador after residing in the United States for some time, but did not submit pertinent evidence to support the assertions that he and his family will be harmed upon returning to El Salvador based on his prior employment with the government of El Salvador. The applicant does not adequately address the issue raised in the AAO's previous decision, that he had not established compelling reasons that prevent his and his family's return to El Salvador. In the September 13, 2013 decision, the AAO fully discussed the reasons why it found the applicant ineligible for adjustment of status under Section 13 of the Act. On motion, the applicant has not addressed whether the AAO's decision was incorrect as a matter of law, precedent decision or USCIS Service policy. Therefore the motion will be dismissed.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion to reopen and motion to reconsider does not meet the applicable filing requirements, it must be dismissed.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.