

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



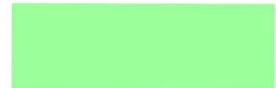
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 21 2013

OFFICE: TEXAS SERVICE CENTER FILE:



IN RE: Applicant:



APPLICATION: APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Rachel Nifonio
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the application. Prior counsel to the applicant appealed this denial to the Administrative Appeals Office (AAO), and, on February 13, 2012, the AAO rejected the appeal. Prior counsel, on the applicant's behalf, filed a motion to reopen and a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5.¹ The motions will be dismissed, and the February 13, 2012 decision of the AAO will be affirmed.

The applicant is a beneficiary of a Form I-140, Immigrant Petition for Alien Worker. The applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on October 1, 2007 listing the pending Form I-140 as her justification for filing the application. On September 12, 2008, the director denied the Form I-485 application due to the denial of the Form I-140 on the same date. On October 14, 2008 prior counsel to the applicant filed a Form I-290B, Notice of Appeal or Motion, with the Texas Service Center noting in Part 2 that he was filing an appeal to the denial of the Form I-485 application.² However, the regulations do not permit an appeal to the AAO from the denial of a Form I-485 application in these circumstances. The AAO only exercises appellate jurisdiction over matters that were specifically listed at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).³ It is noted that prior counsel did not check any of the boxes pertaining to motions in Part 2 of this particular Form I-290B. Accordingly, as there was no appeal from such a denial, the AAO had no jurisdiction to issue a decision and the appeal was rejected.

¹ The AAO sent a fax to prior counsel's office on May 16, 2013 asking for the submission of a new, properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, verifying current legal representation of the applicant on motion. The AAO received no response. The AAO then left voicemail messages with prior counsel's office on June 4, 2013 and June 6, 2013 in order to determine if it should be expecting an updated Form G-28. The AAO again received no response. In accordance with the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 292.4(a) as well as the instructions to the Form I-290B, a "new [Form G-28] must be filed with an appeal filed with the Administrative Appeals Office." This regulation applies to all appeals filed on or after March 4, 2010. *See* 75 Fed. Reg. 5225 (Feb. 2, 2010). The AAO will accordingly recognize the applicant as being self-represented in this matter.

² Although prior counsel also filed another Form I-290B appealing the denial of the Form I-140 petition on October 14, 2008, the regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically prohibits a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. There is no evidence in the record that the petitioner consented to the filing of the appeal to the denial of Form I-140 petition. As the appeal to the denial of the Form I-140 petition was not properly filed, it was rejected by AAO pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

³ In the process of reorganizing the immigration regulations, the Department of Homeland Security (DHS) deleted the list of the AAO's appellate jurisdiction that was previously found at former 8 C.F.R. § 103.1(f)(3)(iii) (2002). 68 Fed. Reg. 10922 (March 6, 2003). DHS replaced the appellate jurisdiction provision with a general delegation of authority, granting USCIS the authority to adjudicate the appeals that had been previously listed in the regulations as of February 28, 2003. *See* DHS Delegation No. 0150.1 para. (2)(U) (Mar. 1, 2003); 8 C.F.R. § 103.3(a)(iv). As a result, there is no generally accessible list of the AAO's jurisdiction that may be cited in immigration proceedings or in federal court.

On March 8, 2012, prior counsel to the applicant filed a motion to reopen and a motion to reconsider the AAO's previous rejection of the appeal to the denial of the Form I-485 application. The AAO had no jurisdiction to issue a decision regarding the initial appeal, but the AAO has jurisdiction to issue a decision on the subsequent motion to reopen and motion to reconsider.

On motion, the applicant asserts that the AAO erroneously denied the Form I-290B filed regarding her denied Form I-485. The applicant also states that her prior employer is no longer in existence, so she is unable to obtain evidence from that employer verifying her employment as a roofer. Instead, the applicant submits copies of two recommendation letters from individuals attesting to her employment skills and abilities.

The USCIS regulation at 8 C.F.R. § 103.5(a)(3) states 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 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.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 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 not available and could not have been discovered or presented in the previous proceeding.⁴ The applicant fails to explain why any of the evidence submitted with this motion could not have been discovered or presented in the previous proceeding. A review of the evidence submitted on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot be considered a proper basis for a motion to reopen.

The present motion does not allege that the issues, as raised on appeal, involved the application of precedent to a novel situation or that there is a new precedent or a change in law that affects the AAO's prior decision. Accordingly, the AAO will dismiss the motion to reopen.

In the present motion to reconsider, the AAO finds that the applicant did not cite any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or USCIS policy. The applicant has failed to demonstrate a reasonable basis for the motion to reconsider.

Motions for the reopening or reconsideration 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. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A

⁴ 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).

party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motions, the movant has not met that burden.

Therefore, the motion to reopen and the motion to reconsider must be dismissed.

ORDER: The motions are dismissed, and the February 13, 2012 decision of the AAO is affirmed.