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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] Office: NEW ORLEANS FIELD OFFICE Date: **JAN 21 2010**

IN RE: Applicant: [Redacted]

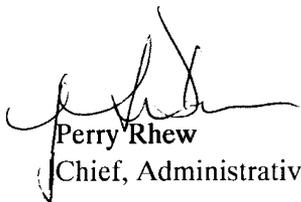
APPLICATION: Application for Permanent Residence Pursuant to Section 1 of the Cuban Adjustment Act of November 2, 1966 (P.L. 89-732)

ON BEHALF OF APPLICANT:

[Redacted]

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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, New Orleans, Louisiana, who certified his decision to the Administrative Appeals Office (AAO) for review. The AAO affirmed the field office director's decision. The matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed. The application will be denied.

The AAO issued its decision affirming the field office director's decision on August 3, 2009. Counsel for the applicant submitted a Form I-290B, Notice of Appeal or Motion, that was received September 1, 2009. Counsel checked Box D of Part 2 of the Form I-290B, indicating that a motion to reopen the decision was being submitted. Counsel lined out the words "is attached" when referring to his brief and/or additional evidence and inserted the words "will be submitted within 30 days."

An affected party has 30 days from the date of an adverse decision to file a motion to reopen or reconsider a proceeding before United States Citizenship and Immigration Services (USCIS). 8 C.F.R. § 103.5(a)(1)(i). If the adverse decision was served by mail, an additional three-day period is added to the 30-day period. 8 C.F.R. 103.5a(b). Any motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In this matter, counsel for the applicant timely submitted the Form I-290B. Counsel indicated on the Form I-290B that the applicant had new evidence which could overcome the reasons for denial and asked for 30 days in which to provide a brief and additional evidence. The AAO observes that counsel submitted a two-page brief, received on September 30, 2009 disagreeing with the AAO's decision and asserting that the AAO's decision was an abuse of discretion. Counsel resubmits the same documents already reviewed by the AAO and does not present any new evidence.

Counsel's brief does not satisfy either the requirements of a motion to reopen or a motion to reconsider. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) 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 USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

On motion, counsel submits evidence previously submitted. As previously stated, a motion to reopen must state the new facts that will be proven if the matter is reopened, and must be supported by affidavits or other documentary evidence. Generally, the new facts must be material and unavailable previously, and could not have been discovered earlier in the proceeding. See 8 C.F.R. § 103.23(b)(3). Here, no evidence in the motion contains new facts that were previously unavailable. The documents submitted on motion are the same documents that the petitioner submitted on appeal. Accordingly, the AAO does not consider this evidence is now "new" for the purpose of a motion to reopen.

The evidence also fails to satisfy the requirements of a motion to reconsider. Although counsel asserts that the decision denying the application is an abuse of discretion, he does not support his assertion by any pertinent precedent decisions, or otherwise establish that the director or the AAO misinterpreted the evidence of record.

Moreover, the AAO notes that although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider. The additional evidence must comprise the motion. *See* 8 C.F.R §§ 103.5(a)(2) and (3).

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). 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. The petitioner has not met that burden.

ORDER: The motion is dismissed. The previous decision of the AAO, dated August 3, 2009, is affirmed. The application is denied.