



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: Office: NEWARK, NJ

JUL 07 2014

FILE

IN RE: Applicant:

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

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 Field Office Director (director), Newark, New Jersey, denied the application to adjust status, and certified her decision to the Administrative Appeals Office (AAO) for review. The AAO affirmed the director's decision to deny the adjustment of status application. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion will be dismissed, the previous decisions of the director and the AAO will be affirmed and the application remains denied.

The applicant is a native and citizen of Peru who filed this application for adjustment of status to that of a lawful permanent resident under section 1 of the Cuban Refugee Adjustment Act (CAA). Pub. Law No. 89-732 (Nov. 2, 1966).

The director denied the application, finding that the applicant is inadmissible to the United States under Section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year. Accordingly, the director determined that the applicant is ineligible for adjustment of status to permanent resident under section 1 of the CAA of November 2, 1966. The director certified the decision to the AAO for review. Upon a *de novo* review of the record, the AAO concurred with the determination made by the director and affirmed the director's decision.<sup>1</sup> *Decision of the AAO*, dated October 10, 2012.

The applicant now submits a Form I-290B, Notice of Appeal or Motion requesting the AAO to reopen and reconsider its decision. The applicant submits copies of her spouse's medical record in support of the motion.

The procedural history in this case is well documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that "[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.<sup>2</sup> In this matter, the applicant presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. All evidence submitted on motion was previously available and could have been presented in previous proceedings. Additionally, the applicant did not submit an affidavit as required in a motion to reopen.

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

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<sup>1</sup> The AAO reviews these proceedings *de novo*. AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

<sup>2</sup>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).

incorrect application of law or U.S. Citizenship and Immigration (USCIS) 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 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* 8 C.F.R. § 103.5(a)(2). *See also 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.

Upon review of this case, the AAO finds that the motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because the applicant has not established that the AAO made an erroneous decision through misapplication of law or policy.

On motion, the applicant submits copies of her husband’s medical records showing that he is receiving treatment from various health care professionals. The AAO has reviewed the evidence on motion and finds it insufficient to overcome the grounds of denial.

In this case, 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. In its October 10, 2012, decision the AAO fully discussed the reasons why the applicant is inadmissible to the United States. On motion, the applicant has failed to provide evidence to overcome the grounds for the AAO’s decision. The applicant on motion has failed to adequately and fully address whether the AAO’s decision was incorrect as a matter of law, precedent decision or USCIS policy. Therefore the motion shall be dismissed.

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

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 reconsider does not meet the applicable filing requirements, it must be dismissed.

The current motion will be dismissed for the reasons stated above. The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The applicant has not met that burden. Accordingly, the motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motion to reopen and to reconsider is dismissed and the decision of the AAO dated October 10, 2012 is affirmed. The application remains denied.