



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: Office: NATIONAL BENEFITS CENTER

APR 11 2014

IN RE:

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:

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. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The AAO dismissed a subsequent motion to reopen and reconsider and affirmed its previous decision. The matter is now before the AAO on a second motion to reopen and a motion to reconsider. The motion will be dismissed. The application will remain denied.

The applicant is a native and citizen of Ecuador 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 amended, 95 Stat. 1611, 8 U.S.C. § 1255b, as an alien who performed diplomatic or semi-diplomatic duties under section 101(a)(15)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(A)(ii).

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 he performed diplomatic or semi-diplomatic duties and that compelling reasons precluded his return to Ecuador. The director also noted that the U.S. Department of State issued its opinion on January 17, 2013, recommending that the applicant's adjustment of status application be denied because the applicant had no qualifying status and had no compelling circumstances that preclude his return to Ecuador. *Decision of the Director*, dated February 4, 2013.

On September 10, 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 that he performed duties for the government of Ecuador that are diplomatic or semi-diplomatic in nature, and that he failed to establish that he was an accredited diplomat that represented the government of Ecuador. As the applicant had failed to establish eligibility for adjustment of status under Section 13 of the Act, the AAO did not discuss the issue of whether the applicant established compelling reasons that preclude his return to Ecuador as specified under Section 13 of the Act. The AAO affirmed the director's decision and dismissed the appeal accordingly.

On October 15, 2013, counsel for the applicant submitted a Form I-290B, Notice of Appeal or Motion, and indicated at part 2F of the form that he was filing a motion to reopen and reconsider a Form I-485 decision. Counsel provided the receipt number related to the Form I-485 application, the date of denial as September 10, 2013 and the USCIS office where the decision was issued as USCIS-Lee's Summit, MO. It was noted that the decision date provided on the Form I-290B is the date of the AAO's dismissal of the appeal. Therefore the last decision subject to the motion is the AAO's dismissal of the appeal. Although counsel incorrectly listed the office that rendered the latest decision, the AAO will accept the Form I-290B as a motion to reopen and to reconsider the AAO's decision of September 10, 2013.

In its January 17, 2014 decision, the AAO dismissed the applicant's motion to reopen and to reconsider on the grounds that the applicant failed to meet the requirement for filing a motion to

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).

reopen and reconsider. The AAO determined that the applicant did not provide new facts to be reopened and failed to adequately address the basis for the AAO's dismissal of the appeal, to wit, the applicant failed to establish that he performed diplomatic or semi-diplomatic duties and that the applicant failed to establish that compelling reasons preclude his return to Ecuador. The AAO dismissed the motion accordingly.

On current motion, counsel asserts that the applicant was issued an A-1 "diplomatic visa" which he used to enter the United States and that the issuance of such visa qualifies the applicant for benefits as a diplomat. Counsel states that while the applicant did not perform diplomatic or semi-diplomatic duties after he entered the United States, and asserts that while the applicant's duties as a sailor were not per se diplomatic duties, "the INA Section 13 was written to protect political dissidents, which [the applicant] is." Counsel submits a brief in support of the current 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:

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, counsel and the applicant have provided 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 not available and could not have been discovered or presented in the previous proceeding.² On current motion, the applicant has presented no new facts to be reopened; rather, counsel reasserts the same argument and evidence that are already in the record and a copy of the applicant's previously submitted affidavit.

On motion, counsel reasserts that the applicant was a member of the personal security staff of the former president of Ecuador, [REDACTED] was deposed in a coup d'état, which brought much chaos and political unrest to Ecuador; and that [REDACTED] arranged for some political and personal security personnel close to him, such as the applicant, to seek shelter elsewhere, lest they will be prosecuted by the new emerging power players. Counsel claims that

² 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) .

the applicant received an A-2 “diplomatic visa” reserved for diplomats and other government officials for travel to the United States and that the applicant traveled to the United States as a government official from Ecuador. Counsel continues to insist that the fact that the applicant was issued an A-2 visa by the U.S. Consulate in Ecuador is “in and of itself proof . . . that the applicant was indeed entitled to the ‘A’ classification.” Counsel does not address the AAO’s detailed analysis and determination that the applicant did not perform diplomatic or semi-diplomatic duties for the government of Ecuador in the United States as required under Section 13 of the Act. Counsel does not provide any document containing a detailed description of the applicant’s duties and responsibilities on behalf of the government of Ecuador in the United States that demonstrates convincingly that the applicant performed duties that are diplomatic or semi-diplomatic in nature. Also, counsel does not provide any evidence to establish that the applicant was an accredited representative of the government of Ecuador in the United States, who performed diplomatic or semi-diplomatic duties that entitles him to consideration for a benefit under Section 13 of the Act.

On current motion, counsel claims that the U.S. Department of State issued the applicant an A-1 diplomatic visa because they determined that the applicant was coming to the United States on behalf of the government of Ecuador. Counsel states that although the applicant did not perform diplomatic or semi-diplomatic duties after he entered the United States, the applicant is still eligible for benefits under Section 13 of the Act because “he was an Ecuadorian political defector and risked his life and well-being during his service under [REDACTED]” Counsel contends that Section 13 was meant to protect political defectors like the applicant.

Contrary to the assertions of counsel, the regulations at 8 C.F.R. § 245.3, stipulates that 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 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 has failed to demonstrate that he performed diplomatic or semi-diplomatic duties. Counsel’s argument regarding the scope of protection under Section 13 is not only far-reaching but is also contrary to the law and regulation.

Additionally, Section 13 requires that an applicant for adjustment of status under this provision have “compelling reasons demonstrating that the alien is *unable* to return to the country represented by the government which accredited the” applicant. (Emphasis added). The term “compelling” must be read in conjunction with the term “unable” to correctly interpret the meaning of the words in context. Thus, reasons that are compelling are those that render the applicant unable to return, rather than those that merely make return undesirable or not preferred from the applicant’s perspective. The “compelling reasons” standard is not a merely subjective standard. Aliens seeking adjustment of status under Section 13 generally assert the subjective belief that their reasons for remaining in the United States are compelling, or that it is keenly interesting or attractive to them to remain in the United States rather than return to their respective countries. What Section 13 requires, however, is that the reasons provided by an applicant demonstrate compellingly that the

applicant is unable to return to the country represented by the government which accredited the applicant.

The legislative history for Section 13 reveals that the provision was intended to provide adjustment of status for a "limited class of . . . worthy persons . . . left homeless and stateless" as a consequence of "Communist and other uprisings, aggression, or invasion" that have "in some cases . . . wiped out" their governments. Statement of Senator John F. Kennedy, *Analysis of Bill to Amend the Immigration and Nationality Act*, 85th Cong., 103 Cong. Rec. 14660 (August 14, 1957). The phrase "compelling reasons" was added to Section 13 in 1981 after Congress "considered 74 such cases and rejected all but 4 of them for failure to satisfy the criteria clearly established by the legislative history of the 1957 law." H. R. Rep. 97-264 at 33 (October 2, 1981).

The legislative history of Section 13, including the 1981 amendment adding the term "compelling reasons," shows that Congress intended that "compelling reasons" relate to political changes that render diplomats and foreign representatives "stateless or homeless" or at risk of harm following political upheavals in the country represented by the government which accredited them. Section 13 requires that an applicant for adjustment of status under this provision have "compelling reasons demonstrating that the alien is *unable* to return to the country represented by the government which accredited the" applicant. (Emphasis added). The term "compelling" must be read in conjunction with the term "unable" to correctly interpret the meaning of the words in context. Thus, reasons that are compelling are those that render the applicant unable to return, rather than those that merely make return undesirable or not preferred from the applicant's perspective.

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* 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 counsel has not established that the AAO made an erroneous decision through misapplication of law or policy.

On current motion, 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. Counsel in essence repeats the same arguments proffered on appeal and on prior motion, which were thoroughly evaluated by the AAO and dismissed as insufficient. Counsel does not discuss the issue of the applicant's duties on behalf of the government of Ecuador. Counsel does not address the issues raised in the AAO's previous decisions, that the applicant had no qualifying status upon which to apply for benefit under Section 13 of the Act. In its September 10, 2013 and January 17, 2014 decisions, the AAO fully discussed the reasoning behind its findings that the applicant had no qualifying status and had not established compelling reasons why he cannot return to Ecuador. Counsel has not fully addressed these issues on current motion. Counsel has not overcome the grounds for the AAO's previous decisions. Accordingly, the motion shall be dismissed.

The motion shall also be dismissed for failing to meet another applicable requirement for a motion. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the submission constituting the motion does not contain a statement as to whether or not the unfavorable decision has been or is the subject of any judicial proceeding as required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Thus, the applicant and counsel failed to comply with the requirements as set by the regulations for properly filing a motion. Accordingly, the motion must be dismissed for this reason also.

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 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 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.