



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JAN 17 2014** Office: NATIONAL BENEFITS CENTER FILE: [REDACTED]

IN RE: [REDACTED]

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:
[REDACTED]

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 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 he had failed to establish compelling reasons why he cannot 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. 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 then 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 is 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.

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.

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).

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 In this matter, the applicant has presented no new facts to be reopened; rather, the applicant resubmits the same facts previously submitted on appeal. Specifically, the affidavit submitted by the applicant on motion is essentially the same affidavit previously submitted in support of the appeal, which was reviewed and found insufficient evidence by the AAO.

On motion, counsel reasserts the same facts as previously asserted on appeal, to wit; that the applicant was a member of the personal security staff of the former president of Ecuador, [REDACTED]; [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 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 mere 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”, which in counsel’s view is only reserved for diplomats and other government officials for travel to the United States. Counsel does not adequately 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. Furthermore, 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 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.

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

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) .

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 assertion on motion that the issuance of an A2 visa in and of itself qualifies the applicant for a benefit under Section 13 of the Act is without merit.

We note that counsel has provided no documentary evidence in support of his allegations on motion, and also notes that the allegations are internally inconsistent and inconsistent with the other documents in the file, such as the applicant's prior sworn statement at his adjustment of status interview on January 9, 2012, and the notation on the applicant's visa to the United States. Counsel states at the beginning of his statement of facts on appeal that [REDACTED] sought a visa for the applicant to leave Ecuador as one of his political and personal security personnel close to him "lest they should be prosecuted by the new emerging power players." Further down, counsel states that the applicant sought a diplomatic visa and was granted such visa to travel to the United States "in his capacity as a government official from Ecuador." However, at his adjustment of status interview on January 9, 2012, the applicant stated under oath that the purpose of his trip to the United States was for "a simple visit." His A2 visa to the United States, which was issued in [REDACTED] Ecuador on September 12, 2005, has the following notation "[REDACTED]" This notation clearly shows that the applicant was admitted to the United States on a temporary tour of duty and limited to his work on the ship, [REDACTED]. Also, at the time the applicant issued the visa, [REDACTED] was no longer the president and was residing in Brazil, where he was granted political asylum. [REDACTED] dated August 25, 2011.

The inconsistencies noted above call into question the veracity of the factual allegations by the applicant and counsel, upon which the application and the current motion are based. The record does not contain competent and credible evidence to reconcile or clarify the inconsistencies. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice without competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of other evidence in the record. *See id.* 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. Counsel in essence repeats the same arguments he proffered on appeal, 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 decision, that the applicant had no qualifying status upon which to apply for benefit under Section 13 of the Act. In its September 10, 2013 decision, the AAO fully discussed the facts that the applicant was not an accredited representative of the government of Ecuador in the United States, that the government of Ecuador filed no request for the applicant to be registered with the United States Department of State in Washington, D.C. as a diplomatic member of the country's diplomatic corps, and that the applicant did not perform diplomatic or semi-diplomatic duties. Counsel has not addressed these issues on motion. Therefore the motion shall be dismissed.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. 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 petitioner. 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.