



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: Office: NATIONAL BENEFITS CENTER

MAR 25 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: 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,

A handwritten signature in black ink, appearing to read "Ron M. Rosenberg".

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 granted. The previous decision of the AAO will be affirmed and the application will remain denied.

The applicant, a native and citizen of Colombia, who was accredited by the United Nations as a contractor for the [REDACTED] in New York, 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)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(G).

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 was admitted into the United States in a diplomatic status or that he subsequently held a diplomatic position. *Decision of the Director*, dated January 13, 2013.

On July 16, 2013, the AAO, upon a *de novo* review of the evidence of record determined that the applicant failed to meet his burden of proof to establish eligibility for adjustment of status under Section 13 of the Act.¹ Specifically, the AAO determined that the applicant failed to establish that he had a qualifying position, in that he failed to establish that he was an accredited diplomat and that he performed diplomatic or semi-diplomatic duties. The AAO dismissed the appeal accordingly.

On August 5, 2013, the applicant submits a Form I-290B, Notice of Appeal or Motion requesting the AAO to reopen and reconsider its decision of July 16, 2013. The applicant asserts that the AAO relied in part on extraneous documents that were not part of the record in arriving at its July 16, 2013 decision. The applicant requests that the AAO reconsider its decision without the extraneous documents.

The AAO acknowledges that it made reference to "supportive statements from friends and a copy of Calendar Project of Activities," which were not part of the documents submitted by the applicant. However, we find the error to be harmless. In addition, the AAO will review all relevant documents in the record to make a decision in the current matter.

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:

¹ The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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, the applicant refers to May 1, 2007 and July 13, 2007 statements that were previously submitted in the record in support of the motion. The applicant does not provide new facts to be reopened that are 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 newly submitted, previously unavailable, and could not have been discovered or presented in the previous proceeding.² In addition, new facts must be relevant and have probative value. In this matter, the applicant has presented no new facts to be reopened; rather, the applicant reiterates his earlier assertions as to why he cannot return to Colombia. The applicant does not present new facts or evidence demonstrating that he had a qualifying status and that he performed diplomatic or semi-diplomatic duties as required under Section 13. The applicant does not submit affidavits or other documentary evidence in support of the motion. As such, the applicant has failed to meet this key requirement of a motion to reopen.

Section 13 of the Act of September 11, 1957, as amended on December 29, 1981, by Pub. L. 97-116, 95 Stat. 1161, provides, in pertinent part:

(a) Any alien admitted to the United States as a nonimmigrant under the provisions of either section 101(a)(15)(A)(i) or (ii) or 101(a)(15)(G)(i) or (ii) of the Act, who has failed to maintain a status under any of those provisions, may apply to the Attorney General for adjustment of his status to that of an alien lawfully admitted for permanent residence.

(b) If, after consultation with the Secretary of State, it shall appear to the satisfaction of the Attorney General that the alien has shown compelling reasons demonstrating both that the alien is unable to return to the country represented by the government which accredited the alien or the member of the alien's immediate family and that adjustment of the alien's status to that of an alien lawfully admitted for permanent residence would be in the national interest, that the alien is a person of good moral character, that he is admissible for permanent residence under the Immigration and Nationality Act, and that such action would not be contrary to the national welfare, safety, or security, the Attorney General, in his discretion, may record the alien's lawful admission for permanent residence as of the date [on which] the order of the Attorney General approving the application for adjustment of status is made.

8 U.S.C. § 1255(b).

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) .

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 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 terms diplomatic and semi-diplomatic are not defined in Section 13 or pertinent regulations. Although the term "diplomatic" is used in the Act to describe aliens admitted to the United States under section 101(a)(15)(A) of the Act, the language and intent of 8 C.F.R. § 245.3 is to exclude from consideration for adjustment of status under section 13 certain aliens admitted in "diplomatic" status and entitled to the rights and immunities afforded diplomats under international law. Both section 101(a)(15)(A) of the Act and the Vienna Convention recognize that certain accredited employees or officials admitted to serve within embassies or other diplomatic missions are not "diplomatic" staff. The Vienna Convention refers to such personnel as administrative and technical staff, service staff, or personal servants. *The Vienna Convention on Diplomatic Relations*, Art. 1 (April 18, 1961), 500 U.N.T.S. 95. Whereas ambassadors, public ministers, and career diplomatic or consular officers are admitted under section 101(a)(15)(A)(i) of the Act, those admitted under section 101(a)(15)(A)(ii) such as the applicant are described as "other officials and employees" accepted on the basis of reciprocity. These non-diplomatic employees are nevertheless afforded the rights and immunities of diplomatic staff. *See Vienna Convention, supra*, Art. 37.

In this case, the applicant was admitted into the United States in a G-4 status as an officer or employee of the United Nations Development Program. The applicant was employed at the agency as a contractor, first as a Statistics Analyst and later as a Web Consultant. The applicant was not accredited to represent any foreign government and or recognized by the United States Department of State as a diplomat representing any foreign government. Additionally, the applicant's visa category (G4) does not qualify him to apply for adjustment of status under Section 13 of the Act. The regulation stipulates very specifically that only individuals who have been admitted into the United States under section 101(a)(15)(A)(i) or (ii) and their families or admitted under section 101(a)(15)(G)(i) or G(ii) of the Act and who performed diplomatic or semi-diplomatic duties are eligible to apply for adjustment of status under Section 13. The applicant does not fall under any of the categories listed above.

Although the applicant indicated at his adjustment of status interview on October 25, 2007, that he considers his duties at the United Nations to be semi-diplomatic in nature, the AAO does not concur. The essential role of a diplomat is the representation of a country in its relations with other countries. *See American Heritage Dictionary of the English Language, 4th Edition, 2000* (Diplomat: One, such as an ambassador, who has been appointed to represent a government in its relations with other governments); *Black's Law Dictionary* (Diplomacy: The art and practice of conducting negotiations between national governments). The record in this case shows that the applicant was employed by the [REDACTED] as a contractor who worked on various projects for the

United Nations. While the applicant was issued a G-4 visa in order to assist him to enter or re-enter the United States to assume the functions for which he was being recruited, he was not accredited by a foreign government or accepted by the United States Department of State as a diplomat representing the government of a foreign country. The applicant did not represent the United Nations in negotiations between nations.³ By his own testimony, the applicant admitted that he was a staff member of the United Nations Headquarters in New York and that he was not involved in negotiations between nations.⁴ It is also noted that the United States Department of State issued its opinion on December 15, 2012, recommending that the adjustment of status application of the applicant be denied because an individual with a G-4 visa is not eligible for adjustment of status under Section 13 of the Act.⁵

On motion the applicant provides no new facts or evidence to establish that he had a qualifying status and that he performed diplomatic or semi-diplomatic duties. The applicant has not established that he is eligible to apply for adjustment of status under Section 13 of the Act. 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 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 failed to provide pertinent

³ See Letter from N [redacted], Recruitment and Placement Officer, General Service Staffing Section, Office of Human Resources Management, United Nations, New York, dated September 18, 1991.

⁴ See Record of Sworn Statement by [redacted], dated October 5, 2007.

⁵ See Interagency Record of Request (Form I-566).

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. The applicant in essence relied on the same arguments he made on appeal, which have been found to be insufficient evidence. The applicant does not successfully address the issue raised in the AAO's previous decision, that he had had no qualifying status and that he did not perform diplomatic or semi-diplomatic duties. In its June 13, 2013 decision, the AAO fully discussed these issues and on motion, the applicant has not addressed whether the AAO's decision was incorrect as a matter of law, precedent decision or USCIS Service policy. Therefore the motion to reconsider 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 failed to comply with this requirement 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 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. The previous decision to the AAO is affirmed. The application remains denied.