

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

F₁

[Redacted]

FILE: [Redacted]
AAO 09 223 50031

Office: GUATEMALA CITY, GUATEMALA

Date:

OCT 19 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition to Classify Orphan as an Immediate Relative Pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F)

ON BEHALF OF PETITIONER:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The field office director denied the Form I-600, Petition to Classify Orphan as an Immediate Relative. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and, in response to a subsequent motion to reopen or reconsider, affirmed its decision to deny the petition. The matter is again before the AAO on motion to reopen or reconsider.¹ The motion will be dismissed, and the previous decisions of the field office director and the AAO will be affirmed. The petition will be denied.

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F). The field office director denied the petition on July 22, 2008. The AAO dismissed the petitioner's appeal on February 5, 2009. The AAO affirmed that decision, in response to a subsequent motion to reopen or reconsider, on May 11, 2009. As the facts and procedural history of this case were adequately documented in its February 5, 2009 decision, the AAO will only repeat certain facts as necessary here.

In its February 5, 2009 decision, the AAO dismissed the petitioner's appeal on the basis of its determination that (1) because the identity of the beneficiary had not been established, the record lacked conclusive evidence to establish that the beneficiary meets the definition of an orphan; and (2) the record lacked sufficient evidence regarding the parentage of the beneficiary to establish that the biological mother was a "sole parent" or that the beneficiary was an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents.

In its May 11, 2009 decision, the AAO found that the petitioner had again failed to resolve these issues. In its conclusion, the AAO found that the record still contained multiple, and unresolved, contradictions and inconsistencies. The AAO noted that the petitioner had not submitted a valid birth certificate or any other credible documentation to resolve the contradictory evidence in the record regarding the circumstances of the beneficiary's birth. Moreover, the contradictory statements by the beneficiary's birth mother regarding whether she consents to the emigration and adoption of her child had not been explained. The AAO noted further that the record lacked evidence that the beneficiary's biological father had severed his parental ties or irrevocably released the beneficiary for emigration and adoption. In the alternative, the record also lacked any documentary evidence that the beneficiary's mother, if she were to be considered a "sole parent," was incapable of providing for the beneficiary's basic needs in a manner consistent with local standards in Guatemala. The AAO found that in light of such unresolved inconsistencies and lack of evidence, there were questions as to whether either or both parents have abandoned the beneficiary or irrevocably released him for emigration and adoption. Accordingly, the AAO found that the petitioner had failed to establish that the beneficiary qualifies for classification as an orphan, as that term is set forth at section 101(b)(1)(F) of the Act, and affirmed its February 5, 2009 decision.

¹ Counsel refers to her submission as an "appeal." However, as the regulations do not provide for an appeal of an AAO decision, counsel's submission will be treated as a motion to reopen or reconsider the matter in accordance with 8 C.F.R. § 103.5

On motion to reopen or reconsider, newly-retained counsel submits a brief, evidence that the Form I-290B was filed timely, and three unpublished AAO decisions.² Counsel requests that adjudication of the motion be delayed until after a hearing scheduled for June 2009, so that the AAO will have “ample time to consider the evidence from the June hearings in Guatemala.” Counsel however, has submitted no documentation from that hearing, which occurred four months ago, nor has she explained her failure to do so. Counsel also refers to another hearing, which will take place in October 2009, and requests that adjudication of the motion be postponed until after the conclusion of that hearing, as well.

The AAO will not delay its adjudication of this motion, as requested by counsel. Given counsel’s failure to submit the results of the June 2009 hearing, which would have occurred four months ago, the AAO is not persuaded that she would submit the results of an October hearing in a timely manner. More importantly, however, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). For this same reason, the AAO is not persuaded by counsel’s assertion that the petitioner was “prejudiced” by “the premature adjudication of this case.” Had the petitioner not wanted the Form I-600 adjudicated, he should not have filed it.

Having rejected counsel’s request to delay adjudication of this case, the AAO turns to the issues raised by counsel. Upon review of counsel’s submission, the AAO finds that it meets the requirements of neither a motion to reopen, nor a motion to reconsider.

The regulation at 8 C.F.R. 103.5(a)(2) states, in pertinent part, the following:

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 upon the plain meaning of the word “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.³ As counsel has submitted no evidence in support of her motion,⁴ there is therefore no evidence that could be considered *new* under 8 C.F.R. 103.5(a)(2).

² While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all U.S. Citizenship and Immigration Services (USCIS) employees in the administration of the Act, unpublished decisions are not similarly binding.

³ 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 College Dictionary* 736 (Houghton Mifflin 2001)(emphasis in original).

⁴ The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *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 this motion, the petitioner has not met that burden. Accordingly, counsel’s submission does not qualify as a motion to reopen.

Nor does counsel’s submission qualify as a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part the following:

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.

Counsel’s submission does not qualify as a motion to reconsider. Again, in order for a submission to qualify as a motion to reconsider, that submission must, at the time it is filed, establish that the decision it seeks to have reconsidered was incorrect at the time it was issued. 8 C.F.R. § 103.5(a)(2). The tracking information submitted by counsel indicates that she filed the motion on May 28, 2009. In that submission she referred USCIS to a June 2009 hearing, and in a later submission also referred USCIS to an October 2009 hearing. As counsel’s submission is dependent upon evidence not yet in existence at the time she filed her motion, it did not, at the time it was filed on May 28, 2009, establish that the AAO’s decision was incorrect. Nor does it establish that the AAO’s decision was incorrect based upon the record before it at the time it issued its decision, either. Accordingly, counsel’s submission does not qualify as a motion to reconsider.⁵

In accordance with this discussion, the AAO finds that counsel’s submission satisfies the requirement of neither a motion to reopen nor a motion to reconsider. The regulation at

⁵ Although counsel’s submission does not qualify as a motion to reconsider, the AAO will nonetheless address her citation to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff’d*, 857 F.2d 10 (1st Cir. 1988). Counsel claims that the petitioner was previously represented by “a Guatemalan attorney who is not licensed in the United States and is not authorized to appear before USCIS or this appellate board.” However, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel’s ethical or legal responsibilities, and if not, why not. *Id.* Counsel submits no evidence to establish that the petitioner has complied with any of these three requirements. Furthermore, the record contains a Form G-28 that was signed by the petitioner and a U.S.-based attorney who claimed to be the co-counsel of the petitioner’s Guatemalan attorney.

8 C.F.R. § 103.5(a)(4) states that “[a] motion that does not meet applicable requirements shall be dismissed.” Accordingly, counsel’s submission will be dismissed, the proceedings will not be reopened or reconsidered, and the decisions of the field office director and the AAO will not be disturbed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: Counsel’s submission is dismissed. The decisions of the field office director and the AAO are affirmed.