PRACTICE POINTER: Filing Form I-290B When Multiple Interrelated Forms Are Denied

July 2020

When USCIS denies multiple forms that are all connected to the same primary benefit petition, attorneys must determine how to complete the notice of motion or appeal on Form I-290B. This situation often arises in the context of U nonimmigrant status petitions, where a principal petitioner typically files the Form I-918, I-192, and I-765 (c)(14) and may also file Form I-918A on behalf of one or more derivatives. In addition, derivatives may have their own Form I-192 and I-765. The denial of either the principal's I-918 or I-192 will set off a chain reaction of denials for the principal's remaining forms and all of the derivative's forms. Each of these denials is generally based exclusively on the denial of the principal's I-918 or I-192. In this practice pointer, we will address how many Form I-290Bs to file in this scenario, whether derivatives need to file their own Form I-290B, and pitfalls in completing the Form I-290B.

1. What if only the I-192 or I-918 is denied on the merits?

Oftentimes, USCIS will deny either the I-192 or I-918 on the merits and will deny the remaining forms solely based on the denial of the first form. For example, if the I-918 is denied on the merits, USCIS will deny the I-192 and I-765 based on the I-918 denial without making a separate assessment of the merits of those applications. Likewise, if the principal's I-192 is denied on the merits, USCIS will deny the I-918 and I-765 based solely on the I-192 denial.

In these scenarios, ASISTA recommends filing one Form I-290B on the form that was denied on the merits because (a) historically, USCIS has reopened the ancillary forms (those that were not denied on the merits) *sua sponte* upon granting the Form I-290B; and (b) only the appeal or motion on the merits-based denial has an independent legal basis for filing.

a) USCIS's Historical Practice

Numerous practitioners nationwide have reported that Vermont Service Center (VSC) and Nebraska Service Center (NSC) routinely reopen any ancillary forms *sua sponte* upon the grant

of a motion or appeal. As long as USCIS continues this practice, filing additional I-290Bs for ancillary denials should not be necessary. However, USCIS has not formalized this practice in any publicly available document and there is no guarantee that this practice will continue.

If you only file the I-290B on the form that was denied on the merits, we recommend stating in your cover letter for the I-290B that you are requesting the *sua sponte* reopening of all ancillary forms if the I-290B is granted. You should specify the form numbers that you wish to have reopened *sua sponte*.

For example, if you file a Motion to Reopen on an I-918 that was denied on the merits, then you should indicate in your cover letter that you request the *sua sponte* reopening of the I-192, I-765, and any I-918As should the I-918 be granted. While the principal petitioner technically cannot request reopening of the derivative's I-192, USCIS has historically reopened that as well.

b) No Independent Basis for Filing Form I-290B for Ancillary Denial

There are three bases for filing a Form I-290B:

- Appeal: Does not require showing new facts or evidence or legal error in underlying denial. AAO provides *de novo* review. AAO Practice Manual, Ch. 3.4;
- Motion to Reconsider: Requires showing that the prior decision was incorrect based on law or DHS policy under the record as it existed at the time of the denial. 8 CFR 103.5(a)(3); and
- Motion to Reopen: Requires showing new facts. 8 CFR 103.5(a)(2).

The choice of which type of I-290B to file depends on whether an appeal is even available for the underlying form and the reason for denial. *See, e.g.*, 8 CFR 212.17(b)(3) ("There is no appeal of a decision to deny a waiver."). However, in the case of a form that was only denied because of the denial of another form, USCIS cannot approve the ancillary form while the merits-based denial remains in place even if the petitioner files separate Form I-290B on each denial.

i. Appeal

In the U visa context, the denial of either the I-918 or I-918A may be appealed to the Administrative Appeals Office (AAO). 8 CFR 214.14(c)(5)(ii). While there is no need to show new facts or evidence or legal error when filing an appeal, the AAO cannot sustain an appeal of the I-918 or I-918A where the I-192 remains denied on the merits because the petitioner remains inadmissible. In cases where the petitioner does file separate I-290Bs on the merits-based denial of the I-192 and the ancillary denial of the I-918, the AAO will dismiss the appeal of the I-918 unless the I-192 has been granted. *See, e.g.*, In re: 6179147, (AAO Apr. 15, 2020).

A significant exception arises where the I-918 was only denied due to the I-192 denial but the petitioner is contesting USCIS's finding of inadmissibility. In that case, it would be proper to file an appeal of the I-918 because the AAO has jurisdiction to determine whether the petitioner is actually inadmissible for the indicated grounds. *See, e.g.*, In re: 6340548, (AAO June 3, 2020). However, the AAO will not review the discretionary aspects of the I-192 denial if the petitioner remains inadmissible, so the petitioner may need to file simultaneously an I-290B motion to reopen or reconsider the discretionary denial of the I-192.

ii. Motion to Reconsider:

Any of the U visa forms may be the subject of a motion to reconsider. However, the petitioner must demonstrate a misapplication of law or policy. Where an ancillary form is only denied due to the merits-based denial of another form, there is no error in the denial of the ancillary form, and thus, no independent basis for a motion to reconsider.

For example, if the I-918 is denied on the merits, then USCIS must deny the I-192 because there is no underlying request for admission for which to grant the waiver of inadmissibility. The denial of the I-192, therefore, is correct.

iii. Motion to Reopen

A petitioner may satisfy the "new facts" requirement for a motion to reopen an ancillary denial by providing evidence that they have filed a motion or appeal of the primary denial. However, USCIS still cannot grant the motion to reopen the ancillary form if the merits-based denial remains in place.

For example, if the I-192 is denied on discretion and the I-918 is denied solely due to the I-192 denial, the petitioner may file separate Motions to Reopen the I-918 and I-192. However, if USCIS declines to reopen the I-192, then the I-918 will necessarily also remain denied because the petitioner remains inadmissible.

There is also an argument that filing a separate I-290B on at least the status-granting benefit (in the case of U visas, the Form I-918) would be more effective for avoiding the issuance of a Notice to Appear (NTA) under USCIS's Notice to Appear policy. While USCIS has stated that it generally will not issue an NTA unless and until the I-290B for the I-918, I-914, I-360, or I-485 has been denied, the agency has never stated publicly that it will wait to issue an NTA until after the I-290B for the I-192 has been denied. However, ASISTA has not received confirmed reports that anyone who only filed the Form I-290B on a I-192 was placed in removal proceedings pursuant to the NTA policy while the I-290B remained pending.

In short, there are multiple options for petitioners when it comes to filing I-290Bs on ancillary applications. We recommend discussing the risks and benefits of each option with your client.

2. **What if a derivative's application is denied solely based on the principal's denial?**

If a principal's I-918 is denied for any reason, any I-918As for qualifying family members will also be denied. There is no publicly available guidance from USCIS regarding whether a derivative whose benefit application was denied solely because of the principal's denial needs to file their own I-290B, and arguably, the derivative has no independent basis to file an I-290B because their eligibility for the benefit is entirely dependent on the principal's petition, which has been denied. However, several practitioners have reported receiving Notices to Appear for derivatives where no I-290B was filed on the I-918A denial, so some derivatives may benefit from filing an I-290B on their I-918A denial. Derivatives who have other status or who are already in removal proceedings would arguably not benefit significantly from filing their own I-290B and could instead ask USCIS to reopen their applications *sua sponte* if the principal's case is granted.

If filing a separate I-290B for the derivative, ASISTA recommends that the principal file the I-290B Motion to Reopen on the I-918A on behalf of the derivative. This is because:

(a) Under USCIS's NTA policy, the agency generally will not issue an NTA as long as there is a pending I-290B on the "status-impacting application," which is the I-918A, not the I-192;
(b) Only the "affected party" can file the I-290B. 8 CFR 103.3(a)(2). The affected party is defined as "the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition." Id. at (a)(1)(iii)(B). In the case of a U visa derivative, the derivative is the beneficiary of the I-918A petition, whereas the principal is the petitioner, and thus, the affected party;
(c) Evidence of the principal's I-290B filing can satisfy the "new facts" required for a motion to reopen. In addition, from anecdotal reports, the service centers may be more likely than the AAO to hold the derivative's I-290B in abeyance until they have adjudicated the principal's I-290B.

If you are only filing the I-290B on the I-918A, we recommend stating in your cover letter for the I-290B that you are requesting the *sua sponte* reopening of all ancillary forms if the I-290B is granted, including any I-192 and I-765.

3. **Completing the Form I-290B when multiple applications have been denied**

When completing Form I-290B, practitioners should only list one form number and receipt number as the subject of the appeal or motion at Page 2, Part 2, Items 2 and 3. Although USCIS previously accepted I-290Bs with multiple forms listed as the subject of the appeal/motion, and though there is no explicit prohibition against including more than one receipt number, several practitioners have reported rejections by VSC of I-290Bs containing more than one receipt number.

For that reason, ASISTA recommends only listing one form number and receipt number as the subject of the appeal or motion. If you are filing more than one I-290B, each I-290B should only list one form type and receipt number as its subject. The form type and receipt number listed should be the denial for which you are seeking review.

For example, if you are filing a motion or appeal on the I-918 denial, the form type is the I-918, and the receipt number is the one printed on the I-918 receipt notice:

2. USCIS Form for the Application or Petition That is the Subject of This Appeal or Motion (for example, Form I-140, I-360, I-129, I-485, I-601)

   I-918

3. Receipt Number for the Application or Petition

   EAC111111111111

If you would like to make sure USCIS understands that there are multiple I-290Bs for the same petitioner or that you are requesting the *sua sponte* reopening of ancillary forms, you can indicate that in your cover letter instead.

If USCIS has rejected your I-290B for including more than one receipt number, you should refile it and ask USCIS to deem the I-290B filed as of the date of the initial submission so that it will be timely. In addition, explain that there is no prohibition in the form itself, the form instructions, or regulations against including more than one receipt number in the Form I-290B, and therefore, the initial I-290B was properly filed. You can also argue that to the extent there was any confusion, the substance of the filing made it clear which underlying form was actually the subject of the motion or appeal. See Appendix for a sample cover letter and exhibits.

If your I-290B is now untimely due to the rejection, in addition to refiling, you should submit a case assistance request to the USCIS Ombudsman and also submit a technical assistance request to ASISTA.

For questions about this advisory, please contact ASISTA at questions@asistahelp.org.

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APPENDIX

I-290B rejection based on inclusion of multiple receipt numbers: Sample Cover Letter and Exhibits

DO NOT OPEN IN MAILROOM

FORWARD TO SUPERVISOR

SUPERVISORY REVIEW REQUESTED

REQUEST FOR SUPERVISORY REVIEW

February 3, 2020

U.S. Citizenship and Immigration Services
Vermont Service Center
75 Lower Welden Street
St. Albans, VT 05479

Via UPS Overnight Mail

RE: RESUBMISSION OF TIMELY FILED FORM I-290B, MOTION TO REOPEN AND RECONSIDER

Applicant/Petitioner:
[name and A number]

Beneficiaries:
[names and A numbers]

Dear Adjudicating Officer:

Our office represents Ms. X and her derivative beneficiaries noted above, in their immigration case. Ms. X is re-submitting her Form I-290B, Notice of Appeal or Motion, and accompanying documentation and she requests Supervisory Review due to error in incorrectly rejecting her case where she complied with the applicable regulation and instructions in the original submission of her form. The *Notice of Action* stating this rejection is included herein at Tab A.

Please note that the original submission was filed with the Nebraska Service Center (NSC), as noted herein. After Ms. X filed her Form I-290B with NSC it was forwarded to the Vermont Service Center (VSC), which rejected her Form I-290B as stated herein. Because the rejection was issued by the VSC, Ms. X is sending her request for supervisory review to the VSC, and not to the NSC, where it was originally filed.

The original I-290B submission has been included at Tab B. Please note that the first page of the cover letter to the original I-290B submission was returned to undersigned counsel in the state in which it is being resubmitted: torn and stapled to another piece of paper. In addition, the original submission contained numerically denominated and tabbed pages separating each exhibit; these tabs have been re-included for ease of reference.

Last, a new fee check has been included. A copy of the old check is also included to show that the appropriate fee was rendered at the time of submission. *See* Tab B. However, a new fee is included because the old check was stamped "FOR DEPOSIT ONLY USCIS VERMONT SERVICE CENTER." As such, a new check has been included in case the stamp on the old check hinders cashing by the appropriate service center.

I. REQUEST TO ACCEPT IMPROPERLY REJECTED FORM I-290B

Two reasons were given for the rejection of Ms. X's Form I-290B:

(1) "The attached Motion/Appeal must be filed with the USCIS Office where the initial application/petition was denied."

(2) "The underlying receipt number must be indicated on the Motion to Reopen/Reconsider or I-290B Notice of Appeal or Motion. If your I-290B is submitted with more than one receipt number, your I-290B will be rejected."

The Form I-290B was improperly rejected because (1) the Form I-290B was filed at the correct location, and (2) neither the regulation nor the form instructions provide for the rejection of a Form I-290B that identifies more than one receipt number.

A. The Form I-290B was filed at the correct location

On December 8, 2014, Ms. X filed an application for U nonimmigrant status, including a Form I-918 and Form I-192. On November 8, 2019, the Nebraska Service Center issued a decision denying Ms. X's Form I-192. That same day, the Nebraska Service Center issued a decision denying Ms. X's Form I-918 due to its denial of her Form I-192.

The decision by the Nebraska Service Center denying Form I-192 states the following regarding the filing location:

> "You must send your completed Form I-290B and supporting documentation with the appropriate filing fee to:
>
> U.S. Citizenship and Immigration Services
> Nebraska Service Center
> 850 S Street
> Lincoln, NE 68508"

The decision by the Nebraska Service Center denying Form I-918 also states this as the filing address.

Ms. X timely filed a Form I-290B with the Nebraska Service Center, as indicated by the envelope itself, which was returned with the rejection notice. *See* Tab C (Copy of the envelope containing the original submission, which was returned with the rejected submission). As noted on the envelope, Ms. X filed at the following address:

> "Attn: I-290B
> USCIS Nebraska Service Center
> 850 S St
> Lincoln, NE 68508-1225"

As such, Ms. X filed her Form I-290B at the correct location and the rejection was improper.

B. <u>The Form I-290B complied with the regulations and form instructions</u>

As noted above, the second reason for rejecting Ms. X's I-290B was:

> "The underlying receipt number must be indicated on the Motion to Reopen/Reconsider or I-290B Notice of Appeal or Motion. **If your I-290B is submitted with more than one receipt number, your I-290B will be rejected.**" (Emphasis added)

The bolded sentence is not included in the form instructions for Form I-290B, nor in the relevant regulation, 8 C.F.R. § 103.5, from which the Form I-290B derives its authority.

The Form I-290B instructions regarding receipt number inclusion require that the motioning individual "Provide the receipt number for the application or petition that is the subject of your appeal or motion." It does ***<u>not</u>*** state that more than one receipt number cannot be included, such as when the "subject" of the motion is an application or petition that necessarily involves more than one form.

Counsel included the receipt number for both Form I-192 and Form I-918, because the Form I-918 was denied solely due to the denial of the Form I-192. Both forms were therefore necessarily part of the application or petition which is the subject of the appeal. The USCIS website also notes that the Form I-192 is "Required Initial Evidence" for Form I-918, indicating it is part of the application for a U nonimmigrant visa and must be included for inadmissible applicants.[1] Due to the inherently interrelated nature of the denial of these forms in the present application for U nonimmigrant status, Counsel included both form numbers because they are ultimately both the "subject" of the motion. Counsel also included proof of a newly submitted Form I-192 to be considered in the re-opened proceeding regarding Form I-918.

Further, the regulation 8 C.F.R. § 103.5(a)(1)(iii) states the "[f]iling requirements" for a motion to reopen and reconsider. This regulation requires that a motion must be:

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[1] https://www.uscis.gov/i-918 (see Checklist of Required Initial Evidence).

(A) In writing and signed by the affected party or the attorney or representative of record, if any;

(B) Accompanied by a nonrefundable fee as set forth in § 103.7;

(C) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;

(D) Addressed to the official having jurisdiction; and

(E) Submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

Notably, this regulation does ***not*** restrict the number of receipt numbers that can be included on a Form I-290B.

As such, a rejection that is done because an "I-290B is submitted with more than one receipt number" is *ultra vires* to the regulations and form instructions, lacks authority under law, and should not be used as a reason to reject a Form I-290B.

C. AAO decisions indicate that rejection is not proper when considering the appeal/motion of petitions/applications that consist of intrinsically interrelated forms

Additionally, Administrative Appeals Office (AAO) opinions have addressed the issue of the inclusion of forms and receipt numbers on a Form I-290B, when considering motions to reopen or consider whose subject is an application or petition which consist of more than one form, whose approval is intrinsically interrelated.

- In a decision issued August 23, 2010, the AAO found that "the appeal is properly filed" for Form I-140 when "the Form I-290B Notice of Appeal erroneously lists the receipt number of the beneficiary's Form I-485 Application to Register Permanent Residence or Adjust Status… which was denied on the same date as the current petition. Counsel's brief indicates that the appeal relates to the Form I-140 Immigrant Petition for Alien Worker*." In re Petitioner [redacted]*, 2010 WL 6526477, *1, Footnote 1 (August 23, 2010) (Copy of decision attached at Tab D).

- In a decision issued March 7, 2013, the AAO granted a motion to reconsider when the AAO had initially "rejected the applicant's appeal without reaching the merits because the office lacked jurisdiction over the Form I-130, Petition for Alien Relative, which the applicant indicated was the basis of appeal on his Form I-290B." The AAO reversed this rejection after looking at the appeal as a whole, because "[a]lthough counsel's statement contained in the Form I-290B contests the bases for the denial of the 'immigrant visa application,' the substance of counsel's statement and attached appeal brief sufficiently

demonstrate that the applicant was in fact appealing the denial of his waiver application. We therefore grant the applicant's motion to reconsider his appeal." *In re: Applicant [redacted]*, 2013 WL 5176227, *1, 2 (March 7, 2013) (Copy of decision attached at Tab E).

- In a decision issued April 8, 2013, the AAO accepted an appeal when the appeal stated it was of Form I-485, but listed a receipt number for a related Form I-601 waiver and included a brief relating to the Form I-601 waiver denial. The AAO cited the requirements for a motion to reconsider in 8 C.F.R. § 103.5(a)(3) and noted that "the applicant's submission meets the requirements of a motion to reconsider." *In re Applicant [redacted]*, 2013 WL 5537946, *1 (April 8, 2013) (Copy of decision attached at Tab F).

- In a decision issued May 6, 2010, the AAO issued an opinion indicating that receipt numbers are included as an administrative convenience and not as a regulatory or instruction-based requirement. In that case, "the applicant indicated that he was filing a motion to reopen the Form I-765 dated November 4, 2009. The applicant, however, inadvertently listed the receipt number for the TPS application instead of the receipt number for the Form I-765. Far from treating the receipt numbers as controlling, the AAO noted that "The director erroneously annotated the Form I-290B as a motion to reopen for the Form I-821 and forwarded the matter to the AAO. Therefore, the case will be remanded and the director shall consider the applicant's response as a motion to reopen." *In re: Applicant [redacted]*, File Nos. [EAC 09 112 73035-I-765], [EAC 10 046 50775-motion], *1 (May 6, 2010) (Copy of decision attached at Tab G).

As such, the AAO recognizes the need to consider the nature of the motion when the subject of that motion is a petition or application consisting of intrinsically interrelated forms, such as a necessary waiver. The AAO further recognizes the importance of considering the nature of the appeal instead of mechanically processing receipt numbers. Here, Ms. X is motioning to reopen and reconsider the denial of her Form I-192 waiver, which denial serves as the sole reason for the denial of her Form I-918, and both of which were part of the same application for U nonimmigrant status submitted on December 8, 2014.

II. A FAILURE TO ACCEPT MS. X'S INITIAL FORM I-290B OR HER NEWLY RENDERED FORM I-290B WOULD BE ARBITRARY AND CAPRICOUS AND A DENIAL OF DUE PROCESS

A. Arbitrary and capricious

An action is arbitrary and capricious if the agency "failed to examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42-43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Here, two explanations were articulated for the rejection:

(1) "The attached Motion/Appeal must be filed with the USCIS Office where the initial application/petition was denied."

(2) "The underlying receipt number must be indicated on the Motion to Reopen/Reconsider or I-290B Notice of Appeal or Motion. If your I-290B is submitted with more than one receipt number, your I-290B will be rejected."

The first explanation, as noted above, references a condition that was actually satisfied. The second explanation, as described above, imposes a condition that is not stated in the relevant regulation or form instructions. As such, the initial rejection was arbitrary and capricious, and any further refusal to remedy this rejection would also be arbitrary and capricious.

B. <u>Violation of Due Process</u>

By imposing a new standard that is not explicitly stated in the regulation or instructions, the agency has violated due process. The Ninth Circuit has stated that:

> "When administrative bodies promulgate rules or regulations to serve as guidelines, these guidelines should be followed. Failure to follow such guidelines tends to cause unjust discrimination and deny adequate notice contrary to fundamental concepts of fair play and due process."

NLRB V. Welcome-American Fertilizer Co. 443 F.3d 19, 20 (9th Cir. 1971). It is fundamentally unfair to be informed about a rule only in the course of being informed that one has violated it. Here, Ms. X was without notice that including more than one receipt number was a basis for automatic rejection, given that such a requirement is not imposed by the relevant regulations or instructions.

In addition, the motion to reopen and reconsider contained key evidence that was to rebut the accusation that Ms. X has gang affiliation just because she has had a social relationship with an individual who had been in a gang, in the form of an evaluation by gang expert concluding that Ms. X is not affiliated with a gang. If Ms. X is prevented by a technical rejection from rebutting this allegation, her due process right to meaningfully rebut a serious and consequential accusation will be violated. *Cf. Bowman Transport v. Arkansas Best Freight Systems,* 419 U.S. 281, 288 n. 4 (1974) ("A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.")

As such, Ms. X asks that her Form I-290B be adjudicated on the merits in order to preserve her fundamental due process rights.

CONCLUSION

Ms. X respectfully asks that you accept and adjudicate her previously submitted I-290B, included in its entirety at Tab H, as properly and timely filed as of the original receipt date.

Best,

Grant Reichert
Staff Attorney
Northwest Immigrant Rights Project

TABLE OF CONTENTS

2010 WL 6526477 (DHS)

U.S. Department of Homeland Security

U.S. Citizenship and Immigration Services

Administrative Appeals Office

Nebraska Service Center

IN RE: Petitioner: [IDENTIFYING INFORMATION REDACTED BY AGENCY]
Beneficiary: [IDENTIFYING INFORMATION REDACTED BY AGENCY]
Petition: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)
On Behalf of Petitioner: [IDENTIFYING INFORMATION REDACTED BY AGENCY]

File No. [IDENTIFYING INFORMATION REDACTED BY AGENCY]
August 23, 2010

*1 **DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tile installation company. It intends to employ the beneficiary permanently in the United States as a tile setter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director found that the petitioner filed the preference visa petition for an unskilled worker but the Form ETA 750 accompanying the petition was for a skilled worker (requiring at least four years of specialized experience as a tile setter). The director denied the petition, accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact.[1] The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, the single issue in this case is whether or not the petitioner has established that the petition is for an unskilled worker (requiring less than two years of training or experience).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Here, the Form ETA 750 was accepted for processing by the DOL on April 30, 2001. The position as stated on the approved Form ETA 750 required the beneficiary to have at least four years of work experience in the job offered or as a tile setter before April 30, 2001. When filing the petition, the petitioner, however, marked box 2.g on the Form I-140, indicating that it was filing the petition for any other worker (requiring less than two years of training or experience).

*2 The AAO conducts appellate review on a *de novo* basis, *see Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. [2]

The regulation at 8 C.F.R. § 204.5(1)(4), in pertinent part, provides:
Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the petitioner requested the unskilled worker classification (less than two years of experience) on the Form I-140 petition. However, the Form ETA 750 labor certification indicates that the beneficiary must have at least four years experience in the job offered as of April 30, 2001. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

On appeal, counsel for the petitioner claims that neither he nor the petitioner has received the director's decision denying the preference visa petition. Counsel states that the petitioner and the beneficiary only became aware of the director's preference visa denial when counsel received a notice of denial for the beneficiary's application to register permanent residence or adjust status. The director, according to counsel, must send all notices regarding the beneficiary's immigration matters to all of his attorneys of record.

The record shows that [IDENTIFYING INFORMATION REDACTED BY AGENCY] represented the petitioner in filing the Form I-140 preference visa petition. The beneficiary, on February 28, 2008 consented to have the law offices of [IDENTIFYING INFORMATION REDACTED BY AGENCY] represent him in his Form I-485 adjustment of status. [3] On September 30, 2008 the director issued his decisions denying both the Form I-140 and the Form I-485. The director sent the preference visa decision to [IDENTIFYING INFORMATION REDACTED BY AGENCY] and the adjustment of status denial to [IDENTIFYING INFORMATION REDACTED BY AGENCY]

Upon *de novo* review, the AAO finds that the director properly sent the preference visa decision to Mr. Rose, the petitioner's attorney of record. The beneficiary was not and is not a recognized party to the proceedings. 8 C.F.R. § 103.2(a)(2). The record contains no notice of change of counsel until October 24, 2008, when named counsel above entered an appearance on behalf of both the petitioner and the beneficiary. Since current counsel was not the petitioner's attorney of record on or before September 30, 2008 the director properly notified previous counsel of the decision.

*3 The AAO finds that the director erred, however, in not sending the petitioner a separate copy of the decision. Nevertheless, the AAO will not remand for the reissuance of the director's decision. As noted in this decision, the petitioner filed a Form I-140 under the wrong classification, the remedy for which is to file a new petition under the correct classification, with the proper fee. Considering the narrow remedy available to the petitioner, it would serve no useful purpose to give the petitioner the opportunity to respond to the director's decision through the appellate process. [5] Upon receipt of this decision, the petitioner may file a motion to reopen or reconsider under 8 C.F.R. § 103.5.

On appeal, counsel also argues that the petitioner had ineffective assistance of counsel. A due process violation against the petitioner, according to counsel, has occurred since Mr. [IDENTIFYING INFORMATION REDACTED BY AGENCY] retired, closed his office, and moved to New York without informing the petitioner of the status of his case.

Although counsel claims that Mr. [IDENTIFYING INFORMATION REDACTED BY AGENCY] was incompetent, in this matter, counsel did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec.

637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. In addition, counsel does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, counsel did not adequately articulate a proper claim based upon ineffective assistance of counsel.

The petitioner has not established that the petition is for an unskilled worker, especially when the evidence submitted (the approved Form ETA 750) shows that the petitioner required the beneficiary to have at least four years experience in the job offered as of April 30, 2001.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Perry Rhew
Chief
Administrative Appeals Office

Footnotes

1 The Form I-290B Notice of Appeal erroneously lists the receipt number of the beneficiary's Form I-485 Application to Register Permanent Residence or Adjust Status, LIN 08 112 51720, which was denied on the same day as the current petition. Counsel's brief indicates that the appeal relates to the Form I-140 Immigrant Petition for Alien Worker (LIN 08 020 50136). The AAO will accept the appeal of the Form I-140.

2 The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

3 On February 27, 2009, [IDENTIFYING INFORMATION REDACTED BY AGENCY] was suspended from practicing before USCIS for one year and has not been reinstated.

5 The AAO attaches a copy of the director's September 3, 2008 decision, by mail to the petitioner.

2010 WL 6526477 (DHS)

End of Document

2013 WL 5176227 (INS)

U.S. Department of Homeland Security

U.S. Citizenship and Immigration Services

Administrative Appeals Office (AAO)

Kingston, Jamaica

IN RE: Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY]
APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)
On Behalf of Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY]

File No. [IDENTIFYING INFORMATION REDACTED BY AGENCY]
March 7, 2013

*1 **DISCUSSION**: The waiver application was denied by the Field Office Director, Kingston, Jamaica. A subsequent appeal was rejected by the Administrative Appeals Office (AAO), and is now before the AAO on a motion to reopen and reconsider. The motion will be granted. However, the applicant's original appeal will be dismissed and the underlying application remains denied.

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen mother.

The director denied the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, concluding that the applicant did not meet the rehabilitative requirements of a waiver under section 212(h)(1)(A) of the Act and had also failed to show that denial of the waiver application would result in extreme hardship to his qualifying relative for purposes of a waiver under section 212(h)(1)(B) of the Act. *See Decision of Field Office Director*, dated August 14, 2009. The director further found that the applicant was convicted of an aggravated felony, constituting a permanent bar to his admission to the United States for which there was no waiver. The applicant filed a timely appeal to the AAO.

The AAO rejected the applicant's appeal without reaching the merits because the office lacked jurisdiction over the Form I-130, Petition for Alien Relative, which the applicant indicated was the basis of appeal on his Form I-290B, Notice of Appeal or Motion, dated September 11, 2009. *See Decision of AAO*, dated February 22, 2012.

On motion, counsel contends that the AAO's decision should be reopened and reconsidered because it was based on legal and factual errors. *See Form I-290B, Notice of Appeal or Motion*, dated March 19, 2012; *see also Counsel's Brief*, dated March 19, 2011, at 2. [1] He asserts that the applicant's original appeal was challenging the denied waiver application and not the Form I-130 visa petition, which had in fact already been approved. Counsel further asserts that the applicant's original appeal should be sustained because the director erred in finding that: (1) the applicant was permanently barred from admission because his conviction was an aggravated felony, and (2) he had failed to demonstrate extreme hardship to the qualifying relative.

*2 The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that the decision was based on an incorrect application

of law or Service policy: 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The record of evidence includes, but is not limited to, counsel's briefs; statement of the applicant's U.S. citizen mother; medical letters and records for the applicant's mother; the applicant's mother's bank statement; the applicant's birth certificate; western union records; and the applicant's criminal records. The entire record was reviewed and considered in rendering a decision on the motion.

After carefully reviewing the record, the AAO reopens our prior decision of February 22, 2012. Previously, we properly noted that the AAO had no jurisdiction over an appeal of the Form I-130 visa petition filed on the applicant's behalf, which the applicant indicated in his original Form I-290B to be the application and applicable receipt number being appealed. *See Form I-290B, Notice of Appeal or Motion*, dated September 11, 2009. However, we are satisfied that the record corroborates counsel's assertion on motion that this was the result of clerical error. Although counsel's statement contained in the Form I-290B contests the bases for the denial of the "immigrant visa application," the substance of counsel's statement and attached appeal brief sufficiently demonstrate that the applicant was in fact appealing the denial of his waiver application. We therefore grant the applicant's motion to reconsider his appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:
(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of --
(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime ... is inadmissible.

...

(ii) Exception.--Clause (i)(I) shall not apply to an alien who committed only one crime if-

...
(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The record indicates that the applicant resides permanently in Jamaica. He is the beneficiary of an approved Form I-130 visa petition by his U.S. citizen mother. The record discloses that the applicant was convicted on or about July 11, 1995 in Antigua and Barbuda for possession of counterfeit United States of America currency. He was sentenced to fourteen days and was deported to Jamaica on or about July 25, 1995 following completion of his sentence. A letter from the Registrar's Division in Antigua, confirming the conviction, indicates that the maximum punishment for this crime is imprisonment for life or for any term pursuant to section 4(1) of the Forgery Act (Cap. 181). [2]

***3** As the applicant has not disputed his inadmissibility on appeal, and the record does not show that finding to be in error, we will not disturb the determination that his criminal conviction renders him inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude.

However, on appeal, counsel contests the director's finding that the applicant's conviction is an aggravated felony under section 101(a)(43)(R) of the Act, 8 U.S.C. § 1101(a)(43)(R), relating to counterfeiting or forgery, that constitutes a permanent bar to his admission to the United States for which there is no waiver. The decision below does not indicate the section of the Act upon which the director relied in finding that the applicant's aggravated felony conviction was a permanent bar to his admission to the United States.

Section 101(a)(43) provides in pertinent part:
The term "aggravated felony" means --

...
(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered *for which the term of imprisonment is at least one year.*

(emphasis added). The AAO notes that convictions for certain types of offenses qualify as an "aggravated felony" under section 101(a)(43) of the Act only where the term of imprisonment is at least one year. The phrase "term of imprisonment" refers to the actual sentence imposed. *See Matter of Song*, 23 I&N Dec. 173, 174 (BIA (2001) (finding that a conviction no longer constituted an aggravated felony under section 101(a)(43)(G) where the original one year sentence was modified to less than one year); *In re Cota-Vargas*, 23 I&N Dec. 849, (BIA 2005) (same). The AAO notes that the record establishes that the sentence imposed for the applicant's conviction was fourteen days. Accordingly, even if the applicant's conviction for possession of counterfeit U.S. currency is a counterfeiting or forgery offense, it does not constitute an aggravated felony within the meaning of section 101(a)(43)(R), as he was not sentenced to a term of imprisonment of at least one year. His conviction therefore does not render him subject to a "permanent bar" for which there is no waiver.

The term "permanent bar" as applied by the director likely references inadmissibility under sections 212(a)(9)(A)(i) and (ii) of the Act, which are triggered where an alien who has been previously ordered removed (or has departed the United States while a removal order was outstanding), seeks admission within five (or ten) years of the date of the alien's removal (or departure). This ground of inadmissibility becomes, in a sense, a "permanent bar" to admission if the alien has been convicted of an aggravated felony, because inadmissibility is triggered "at any time" the alien seeks admission to the United States, regardless of the passage of time. INA §§ 212(a)(9)(A)(i) and (ii). We note, however, that section 212(a)(9)(A)(iii) provides for an exception to inadmissibility where the alien is seeking admission within the period of inadmissibility, if the Attorney General has consented to the alien's reapplying for admission. Thus, even if the applicant here had been convicted of an aggravated felony, he would be still be eligible to seek permission to reapply for admission to the United States. However, we note that section 212(a)(9)(A) is otherwise inapplicable in the applicant's case, regardless of whether he has an aggravated felony conviction, because there is no evidence that he has ever been previously ordered removed.

***4** As noted, however, the applicant remains inadmissible for having been convicted of a crime involving moral turpitude. He is, however, eligible for a waiver under section 212(h) of the Act. The applicant's qualifying relative for purposes of a waiver under section 212(h) of the Act to overcome this ground of inadmissibility is his U.S. citizen mother.

Section 212(h) of the Act provides, in pertinent part:
The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) ... of subsection (a)(2) ... if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter, of such alien ...; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Pursuant to section 212(h)(1)(A) of the Act, the ground of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act may be waived in the exercise of discretion, if the applicant demonstrates that the activities for which he is inadmissible occurred more than 15 years before the date of his application for a visa, admission, or adjustment of status. In addition, the applicant must demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated in order to qualify for a waiver under this provision.

The record demonstrates that the applicant's criminal conduct leading to his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act occurred more than 15 years ago. An application for admission is a "continuing" application, and admissibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). We consider whether the applicant's admission to the United States would be contrary to the national welfare, safety, or security of the United States, and if he has been rehabilitated.

***5** The record discloses only one arrest and conviction for the applicant, who indicated at his consular interview that he was arrested at the airport in Antigua for possessing counterfeit U.S. currency. He claimed that he was unaware that the money was counterfeit. We note, however, that the applicant has not produced any actual conviction records, including an arrest report, complaint, or judgment of conviction to corroborate his claim. Moreover, the statute under which he appears to have been convicted in 1995 for possession of counterfeit currency, provided, in pertinent part:

> Every person shall be guilty of felony and on conviction thereof shall be liable to imprisonment for any term not exceeding fourteen years, who, without lawful authority or excuse, the proof whereof shall lie on the accused, purchases or receives from any person, or has in his custody or possession, a forged bank note, or a forged currency note, *knowing the same to be forged.*

Section 11(1) of the Forgery Act (Cap. 181) (Antigua). Thus, a conviction for possession of forged currency notes requires a finding of knowledge, contradicting the applicant's assertion that he had no knowledge. Finally, we note that the record contains no statement from the applicant, expressing any remorse or explanations for his arrest or subsequent rehabilitation and

good moral character. Although the lack of subsequent criminal history is compelling and is some evidence of the applicant's rehabilitation, we note that the burden is on the applicant to produce affirmative evidence of such. Instead, the record is otherwise silent as to the applicant's rehabilitation and general character. The record does not contain any character references, or even a police certificate indicating that the applicant has not been arrested or convicted in Jamaica. Although the record does contain a letter from the applicant's mother, she does not address the applicant's arrest, his character, or any attempts at rehabilitation. Without such evidence, the AAO is unable to meaningfully assess whether the applicant has rehabilitated or whether his admission would be contrary to the national welfare, safety, or security of the United States. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO finds that the applicant has not demonstrated that his admission to the United States is not contrary to the national welfare, safety, or security of the United States and that he has been rehabilitated, as required by section 212(h)(1)(A) of the Act.

We now turn to the counsel's primary argument on appeal that the applicant qualifies for a discretionary waiver under section 212(h)(1)(B) of the Act, on the basis that the bar to admission would cause extreme hardship to his qualifying relative, his U.S. citizen mother. Section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

***6** Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (Board) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative

hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

*7 Counsel contends that the denial of admission to the applicant would result in physical and emotional hardship to the applicant's seventy-three-year-old mother, as a result of her medical and physical conditions. Counsel asserts that the applicant's mother suffered a fall in 2006 causing a permanent injury to her right knee. She indicates that the applicant's mother now suffers also from arthritis, high blood pressure, and high cholesterol, for which she is being treated. Counsel states that as a result, the applicant's mother will be forced to retire and will have increasing difficulty in caring for herself or performing ordinary physical duties, such as cooking, cleaning and laundry. The applicant's mother, in her May 21, 2008 statement, indicates that she is also having fainting spells from the high blood pressure, severe headaches, and sinus and allergy problems.

The record also contains two letters from the applicant's mother's physicians, [IDENTIFYING INFORMATION REDACTED BY AGENCY] dated September 9, 2009, and [IDENTIFYING INFORMATION REDACTED BY AGENCY], dated September 10, 2009, as well as a report of the applicant's mother's medical examination by [IDENTIFYING INFORMATION REDACTED BY AGENCY] on April 3, 2009. The records corroborate that the applicant's mother suffers from the arthritis, high blood pressure, and high cholesterol. Both doctors also indicate that the applicant's mother resides alone and faces hardship that would be alleviated by the applicant's presence. We note, however, that the letters and medical records show that the applicant's mother is being treated for her ailments and appears to be able to work and manage her day to day activities without assistance. In fact, the medical examination report indicates that the applicant's mother has only been able to work as a home attendant three days a week in 2009 because there was not enough work. *See Medical Examination Report*, at 1-2. There is no indication in any of the reports or letters that the applicant's mother is unable to work or care for herself because of her age or medical ailments. While it may be true that having the applicant in the United States would make things somewhat easier for his mother, the applicant has not shown that medical and physical issues faced by his mother, together with other hardship factors, are such that the denial of his admission to the United States would cause his mother extreme hardship.

Counsel also asserts that the applicant's mother faces financial hardship and will face homelessness as a result of ongoing separation from the applicant. She asserts that the applicant's mother pays $600 per month for rent and has other regular expenses, including food, transportation, and clothing. In addition, the applicant's mother sends the applicant approximately $100 per month to assist him financially. *See Western Union Receipts*. Counsel contends that the applicant's mother makes a varied salary between $300 to $700 biweekly, depending on the number of hours she is able to work, and receives $880 social security monthly. Counsel maintains that when the applicant's mother is no longer able to work, she will be unable to survive on the monthly social security payments without help. She states that the applicant is his mother's only child and is the only one able to help as she faces retirement. In support of these assertions, the applicant has submitted western union receipts and a single month's bank statement for the applicant's mother. However, we observe that the record lacks any Internal Revenue Service (IRS) Forms W2, Wage and Tax Statement, tax returns, social security earnings statements, or other evidence of the applicant's mother's income and expenses to support counsel's claim of financial hardship or to enable the AAO to assess the financial impact on the applicant's mother of the ongoing separation from her son. We note that the applicant's mother's statement is also devoid of any reference to the financial hardship she faces as a result of the separation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

*8 Having considered the evidence of record, the AAO finds that it does not demonstrate that the applicant's mother would experience extreme hardship as a result of separation from the applicant. The applicant has not shown the hardship his mother would suffer constitutes "significant hardship over and above the normal disruption of social and community ties" normally associated with deportation or refusal of admission. *Matter of O-J-O-*, 21 I&N Dec. at 385.,

Counsel also contends that the applicant's mother would face extreme hardship upon relocation to Jamaica. She contends that if the applicant is denied admission, the applicant's mother would be forced to relocate to Jamaica, where the applicant would not be in a position to provide for her financially. In addition, counsel asserts that the applicant's mother would lose the care her primary doctor and specialist in the United States and would not have access to the medical care she needs for her ailments in Jamaica. However, the record contains no evidence corroborating these assertions. There is no assertion by the applicant or his mother that the applicant would not be able to provide financially for his mother. Similarly, there is no evidence that the applicant's mother would not be able to receive proper medical care for arthritis, high cholesterol, or high blood pressure in Jamaica. As previously noted, the assertions of counsel are insufficient to meet the applicant's burden. Moreover, we note that the U.S. Department of State reported that although medical care is more limited in Jamaica than in the United States, comprehensive emergency medical services are located only in Kingston and Montego Bay, and smaller public hospitals are located in each parish. *See* Bureau of Consular Affairs, U.S. Dep't of State, *Country Specific Information: Jamaica* (Nov. 17, 2011). There is nothing in the record to indicate that the applicant's mother suffers from conditions that require treatment that is unavailable in Jamaica.

Moreover, we note that relocation for the applicant's mother would not entail adaptation to a new culture or language. The applicant's mother is a native of Jamaica and presumably resided there until she immigrated to the United States in 1996. While the record contains virtually no evidence of any close ties she has in the United States, aside from her employment, it shows that in Jamaica she would be reunited with her son, grandchildren, and potentially other family or friends from her many years there.

Having considered all the evidence of record, the AAO does not find that it demonstrates that the applicant's mother would suffer extreme hardship as a result of relocation to Jamaica. We acknowledge that the usual hardships arising from relocation will be distressful to the applicant's mother. However, the applicant has failed to show that the hardships upon relocation, even when considered in the aggregate, rise beyond the normal results of a bar to admission.

*9 In proceedings for a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, although the motion to reopen and reconsider has been granted, the applicant's original appeal is dismissed and the underlying application remains denied.

ORDER: The motion is granted, but the appeal is dismissed and the underlying application remains denied.

Ron Rosenberg
Acting Chief
Administrative Appeals Office

Footnotes

1 The record indicates that the year is a typo and that the date of the brief should read March 11, 2012.

2 The AAO notes, however, that section 4(1) of the Forgery Act relates specifically to forgery, rather than the offense of possession of counterfeit currency for which the applicant was convicted. The latter offense appears to fall within section 11 of the Forgery Act and is punishable by a term of imprisonment for any term not exceeding fourteen years. Regardless, in either scenario, the record indicates that the maximum possible punishment for the applicant's offense is more than one year. As such, his offense does not fall within the petty offense exception to a finding of inadmissibility for a crime involving moral turpitude. *See* INA § 212(a)(2)(A)(ii)(II).

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TAB G

AAU EAC 09 112 73035 (DHS), 2010 WL 4089064

U.S. Department of Homeland Security

U.S. Citizenship and Immigration Services

Administrative Appeals Office (AAO)

Vermont Service Center

IN RE: Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY]
APPLICATION: Application for Employment Authorization under 8 C.F.R. § 274a.12(c)(19)
In Behalf of Applicant: Self-represented

File Nos. [EAC 09 112 73035-I-765], [EAC 10 046 50775-motion]
May 6, 2010

*1 **DISCUSSION**: The Director, Vermont Service Center, denied the application. The application is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further action.

The applicant is a native and citizen of El Salvador who was granted Employment Authorization under 8 C.F.R. § 274a.12(c)(12) as an alien with an approved application for Temporary Protected Status (TPS). On October 28, 2005, the director withdrew the applicant's TPS because the applicant had been convicted of two misdemeanors. The AAO, in dismissing the appeal on March 26, 2007, concurred with the director's findings.

On November 4, 2009, the director denied the current Form I-765, Application for Employment Authorization, because the applicant's TPS had been withdrawn. In response to the director's decision, the applicant filed a Form I-290B, Notice of Appeal or Motion.

At Part 2 of the Form I-290B, the applicant indicated that he was filing a motion to reopen the Form I-765 dated November 4, 2009. The applicant, however, inadvertently listed the receipt number for the TPS application instead of the receipt number for the Form I-765.

The AAO has no jurisdiction over applications for Employment Authorization. The director erroneously annotated the Form I-290B as a motion to reopen for the Form I-821 and forwarded the matter to the AAO. Therefore, the case will be remanded and the director shall consider the applicant's response as a motion to reopen.

Assuming, arguendo, the applicant was filing a motion to reopen of the AAO's decision of March 26, 2007, the motion would be denied as it would have been untimely filed. *See* 8 C.F.R. § 103.5(a)(1)(i).

As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. §1361.
ORDER: The case is remanded to the director for further action consistent with the above and entry of a decision.

Perry Rhew
Chief
Administrative Appeals Office

AAU EAC 09 112 73035 (DHS), 2010 WL 4089064

End of Document

TAB H

2013 WL 5537946 (DHS)

U.S. Department of Homeland Security

U.S. Citizenship and Immigration Services

Administrative Appeals Office (AAO)

Oakland Park, FL

IN RE: Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY]
APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v)
On Behalf of Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY]

File No. [IDENTIFYING INFORMATION REDACTED BY AGENCY]
April 8, 2013

*1 **DISCUSSION:** The waiver application was denied by the Field Office Director, Oakland Park, Florida. The Administrative Appeals Office (AAO) rejected a subsequent appeal. The matter is now before the AAO on motion. The motion will be granted and the appeal will be dismissed as the applicant is not inadmissible and the underlying waiver application is unnecessary.

The applicant is a native and citizen of Colombia who entered the United States on or about September 18, 1992. The applicant departed the United States in March 1999 based on a grant of advance parole. He was paroled into the United States on May 9, 1999. Upon adjudication of the application for adjustment of status, the. Field Office Director found the applicant to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within 10 years of his last departure. The applicant filed an application for a waiver of inadmissibility in conjunction with his application for adjustment of status in order to reside in the United States with his wife.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director,* dated May 20, 2009. The AAO rejected a subsequent appeal, finding that the appeal was from an Application to Register Permanent Residence or Adjust Status (Form I-485), for which the AAO does not have jurisdiction.

Counsel has filed a motion to reconsider contending that although the Form I-290B stated that the appeal was from a Form I-485, the receipt number indicated on the Form I-290B was of the Form I-601 waiver application and the brief submitted addressed the waiver application.

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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the applicant's submission meets the requirements of a motion to reconsider. Accordingly, the motion is granted.

*2 Section 212(a)(9)of the Act provides:
(B) ALIENS UNLAWFULLY PRESENT.-
(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the Board of Immigration Appeals (BIA) held that an applicant for adjustment' of status who left the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act did not make a departure from the United States within the meaning of section 212(a)(9)(B)(i)(II) of the Act. Here, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled into the United States. In accordance with the BIA's decision in *Matter of Arrabally*, the applicant did not make a departure from the United States for the purposes of section 212(a)(9)(B)(i)(II) of the Act. Accordingly, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant's waiver application is thus unnecessary and the appeal will be dismissed.

ORDER: The motion will be granted and the appeal is dismissed as the underlying waiver application is unnecessary.

Ron Rosenberg
Acting Chief
Administrative Appeals Office

2013 WL 5537946 (DHS)

End of Document

TAB I

AAU EAC 09 112 73035 (DHS), 2010 WL 4089064

U.S. Department of Homeland Security

U.S. Citizenship and Immigration Services

Administrative Appeals Office (AAO)

Vermont Service Center

IN RE: Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY]
APPLICATION: Application for Employment Authorization under 8 C.F.R. § 274a.12(c)(19)
In Behalf of Applicant: Self-represented

File Nos. [EAC 09 112 73035-I-765], [EAC 10 046 50775-motion]
May 6, 2010

*1 **DISCUSSION**: The Director, Vermont Service Center, denied the application. The application is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further action.

The applicant is a native and citizen of El Salvador who was granted Employment Authorization under 8 C.F.R. § 274a.12(c)(12) as an alien with an approved application for Temporary Protected Status (TPS). On October 28, 2005, the director withdrew the applicant's TPS because the applicant had been convicted of two misdemeanors. The AAO, in dismissing the appeal on March 26, 2007, concurred with the director's findings.

On November 4, 2009, the director denied the current Form I-765, Application for Employment Authorization, because the applicant's TPS had been withdrawn. In response to the director's decision, the applicant filed a Form I-290B, Notice of Appeal or Motion.

At Part 2 of the Form I-290B, the applicant indicated that he was filing a motion to reopen the Form I-765 dated November 4, 2009. The applicant, however, inadvertently listed the receipt number for the TPS application instead of the receipt number for the Form I-765.

The AAO has no jurisdiction over applications for Employment Authorization. The director erroneously annotated the Form I-290B as a motion to reopen for the Form I-821 and forwarded the matter to the AAO. Therefore, the case will be remanded and the director shall consider the applicant's response as a motion to reopen.

Assuming, arguendo, the applicant was filing a motion to reopen of the AAO's decision of March 26, 2007, the motion would be denied as it would have been untimely filed. *See* 8 C.F.R. § 103.5(a)(1)(i).

As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. §1361.
ORDER: The case is remanded to the director for further action consistent with the above and entry of a decision.

Perry Rhew
Chief
Administrative Appeals Office

AAU EAC 09 112 73035 (DHS), 2010 WL 4089064

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