

“New” Evidence Submitted “On Appeal” and “In Support of a Motion to Reopen” Are Not Equal

By Joseph P. Whalen (February 28, 2015)

I. Introduction & Background

USCIS¹ Form ***I-290B, Notice of Appeal or Motion*** is used for more than one thing. First and foremost, this form is used in order to file an administrative appeal to USCIS’ Administrative Appeals Office (AAO). This form is also used to file Motions with all of USCIS.² While numerous practitioners are accustomed to filing a wide variety of Motions³ with Immigration Judges (IJs) and the BIA⁴, USCIS only has two primary types. The two types of Motions that are accepted by USCIS and AAO are those described in [8 CFR § 103.5\(a\)](#) as follows.

(2) *Requirements for motion to reopen*⁵. 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. ...

* * * * *

(3) *Requirements for motion to reconsider*. 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 [USCIS] policy**. A motion to reconsider a decision on

¹ USCIS = United States Citizenship and Immigration Services, the Department of Homeland Security’s (DHS) “benefits determination agency”.

² This form is also utilized by ICE SEVP Appeals Team (SAT) for “Form I-17” Appeals or Reconsiderations of SEVIS School Designation Denials and Withdrawals.

³ IJs might entertain *Motions for Continuances* and Motions based on factors that are not in play before USCIS such as equitable tolling for late Motions. The BIA, for example, sees many *Motions to Remand* a case to the IJ.

⁴ BIA = Board of Immigration Appeals within the Executive Office of Immigration Review (EOIR) within the Department of Justice (DOJ).

⁵ There is one special sub-type of this particular class of Motion as follows:

[Replace Service with USCIS.]

A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

(i) The requested evidence was not material to the issue of eligibility;
(ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
(iii) The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service’s request was sent, and the request did not go to the new address.

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.

When there is an administrative appeal available that is within the jurisdiction of AAO, it is filed according to the regulation found at:

8 CFR § 103.3 Denials, appeals, and precedent decisions:

(a) *Denials and appeals*— [NOTE: Service is now USCIS.]

(1) *General*—

(i) *Denial of application or petition.* When a Service officer denies an application or petition filed under §103.2 of this part, the officer shall explain in writing the specific reasons for denial. If Form I-292 (a denial form including notification of the right of appeal) is used to notify the applicant or petitioner, the duplicate of Form I-292 constitutes the denial order.

(ii) *Appealable decisions.* Certain unfavorable decisions on applications, petitions, and other types of cases may be appealed. Decisions under the appellate jurisdiction of the Board of Immigration Appeals (Board) are listed in §3.1(b) of this chapter. Decisions under the appellate jurisdiction of the Associate Commissioner, Examinations⁶, are listed in §103.1(f)(2)⁷ of this part.

(iii) *Appeal*—

(A) *Jurisdiction.* When an unfavorable decision may be appealed, the official making the decision shall state the appellate jurisdiction and shall furnish the appropriate appeal form.

(B) *Meaning of affected party.* For purposes of this section and §§103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. An affected party may be represented by an

⁶ This title is an old INS position now encompassed by AAO within USCIS.

⁷ This regulation was repealed but the appellate authority as it existed upon the creation of DHS is now covered by AAO with only minor changes and is posted on the USCIS website.

attorney or representative in accordance with part 292 of this chapter.

(C) *Record of proceeding.* An appeal and any cross-appeal or briefs become part of the record of proceeding.

(D) *Appeal filed by Service officer in case within jurisdiction of Board.* If an appeal is filed by a Service officer, a copy must be served on the affected party.

(iv) *Function of Administrative Appeals Unit (AAU).* The AAU is the appellate body which considers cases under the appellate jurisdiction of the Associate Commissioner, Examinations.

(v) *Summary dismissal.* An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. The filing by an attorney or representative accredited under 8 CFR 292.2(d) of an appeal which is summarily dismissed under this section may constitute frivolous behavior as defined in 8 CFR 292.3(a)(15). Summary dismissal of an appeal under §103.3(a)(1)(v) in no way limits the other grounds and procedures for disciplinary action against attorneys or representatives provided in 8 CFR 292.2 or in any other statute or regulation.

(2) *AAU appeals in other than special agricultural worker and legalization cases—*

(i) *Filing appeal.* The affected party must submit an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by §103.7 of this part. The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions within 30 days after service of the decision.

(ii) *Reviewing official.* The official who made the unfavorable decision being appealed shall review the appeal unless the affected party moves to a new jurisdiction. In that instance, the official who has jurisdiction over such a proceeding in that geographic location shall review it.

(iii) *Favorable action instead of forwarding appeal to AAU.* The reviewing official shall decide whether or not favorable action is warranted. Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action. However, that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion under §103.5(a)(5)(i) of this part in order to make a new decision favorable to the affected party after 45 days of receipt of the appeal.

(iv) *Forwarding appeal to AAU.* If the reviewing official will not be taking favorable action or decides favorable action is not warranted, that official shall promptly forward the appeal and the related record of proceeding to the AAU in Washington, DC.

(v) *Improperly filed appeal—*

(A) *Appeal filed by person or entity not entitled to file it—*

(1) *Rejection without refund of filing fee.* An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

(2) *Appeal by attorney or representative without proper Form G-28—*

(i) *General.* If an appeal is filed by an attorney or representative without a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28) entitling that person to file the appeal, the appeal is considered improperly filed. In such a case, any filing fee the Service has accepted will not be refunded regardless of the action taken.

(ii) *When favorable action warranted.* If the reviewing official decides favorable action is warranted

with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 to the official's office within 15 days of the request. If Form G-28 is not submitted within the time allowed, the official may, on his or her own motion, under §103.5(a)(5)(i) of this part, make a new decision favorable to the affected party without notifying the attorney or representative.

(iii) When favorable action not warranted. If the reviewing official decides favorable action is not warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 directly to the AAU. The official shall also forward the appeal and the relating record of proceeding to the AAU. The appeal may be considered properly filed as of its original filing date if the attorney or representative submits a properly executed Form G-28 entitling that person to file the appeal.

(B) *Untimely appeal—*

(1) Rejection without refund of filing fee. An appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

(2) Untimely appeal treated as motion. If an untimely appeal meets the requirements of a motion to reopen as described in §103.5(a)(2) of this part or a motion to reconsider as described in §103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

(vi) *Brief.* The affected party may submit a brief with Form I-290B.

(vii) *Additional time to submit a brief.* The affected party may make a written request to the AAU for additional time to submit a brief. The AAU may, for good cause shown, allow the affected party additional time to submit one.

(viii) *Where to submit supporting brief if additional time is granted.* If the AAU grants additional time, the affected party shall submit the brief directly to the AAU.

(ix) *Withdrawal of appeal.* The affected party may withdraw the appeal, in writing, before a decision is made.

(x) *Decision on appeal.* The decision must be in writing. A copy of the decision must be served on the affected party and the attorney or representative of record, if any.

[Matter of Soriano, 19 I&N Dec. 764 \(BIA 1988\)](#)

(1) Where a **visa petition** has once been denied based on a finding that the marriage was entered into solely to bestow an immigration benefit, the petitioner bears a heavy burden of proof with respect to any subsequently filed **visa petition** involving the same beneficiary.

(2) A **petitioner** may be put on notice of evidentiary requirements by means such as a requirement in the regulations that a particular document be submitted with the **visa petition**; a notice of intent to deny, letter, or form noting the deficiency or requesting additional evidence; or an oral statement at an interview that additional evidence is required.

(3) Where a **visa petition** is denied based on a deficiency of proof, the petitioner had not been put on notice of the deficiency and given a reasonable opportunity to address it before the denial, and on appeal the **petitioner** proffers additional evidence addressing the deficiency, the record will, in the ordinary course, be **remanded** to allow the Immigration and Naturalization Service to initially consider and address the new evidence.

(4) Where the **petitioner** was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the **visa petition** is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Service.

Soriano stands for the proposition that *if* the petitioner has been asked for particular evidence but did not submit it, the petitioner will be deemed to have been “put on notice” of that deficiency. *Then* when it is submitted on appeal for the first time, the BIA will not consider it, period—the end. It is *Soriano* that is cited when the BIA or AAO refuse to consider certain new evidence submitted on appeal. Unlike the BIA, AAO **is** routinely allowed to consider new evidence submitted on appeal in accordance with the I-290B Form Instructions; which itself is considered to be incorporated into the controlling regulation. Beyond the I-290B factor, at the time that *Soriano* was decided back in 1988, the structure of the U.S. immigration system was markedly different than it is today and indeed has been since March 2003. It has been nearly 12 years since DHS was created.

In 1988, INS decided all petitions and the BIA was the “odd man out” so to speak. The variety and number of INS [now USCIS and a few ICE] Decisions appealable to the BIA were dwindling from “all” to “few” even then. AAO was within INS and the BIA was in EOIR. However, all of them were within DOJ and exercising the delegated authority of the Attorney General. The BIA was not then nor is it now empowered to re-adjudicate most cases. There is one class of USCIS Decision that is still directly appealed to the BIA and that is the majority of family-based visa petitions. Those include the vast majority of I-130s and some I-360s. A small strictly confined subset of family-based petitions are appealed instead to AAO. The BIA cannot affirmatively consider **new** evidence and it **does not seek** new evidence from respondents on appeal. The BIA could then and can now, however, reconsider, in a full *de novo* review, the evidence of record as it existed when INS [now USCIS] made its decision. The BIA can use its own *judgment* and *discretion* without any deference to the findings below.

Today, in 2015, AAO exists within USCIS within DHS and they are exercising the delegated authority of the Secretary of Homeland Security. The BIA is still in DOJ and still exercising the authority of the Attorney General. These two appellate bodies are ***qualitatively*** different. What is good for one is not necessarily good for the other.

The BIA is restricted in its authority as to the treatment of most *findings-of-fact*. The BIA cannot discard an **IJ's findings** unless they are *clearly erroneous*. When the BIA does come to that conclusion it usually remands the case for further proceedings. AAO does not have that restriction and is free to re-adjudicate any and all cases before it on a full *de novo* review under its inherent, unrestricted plenary powers. *Caveat*: While the AAO does not have appellate authority over its own decisions it, like the BIA, has *sua sponte* authority over its own decisions. The AAO can issue its own RFEs⁸ and NOIDs⁹ as well as Notices of Derogatory Information (NODIs).

In short, the Appeals Officer can assume the functions of the USCIS Adjudicator in any particular case and approve or deny that case. Many such cases are actually remanded with instructions and that is done for practical processing reasons. While AAO might determine that a petition or application is approved and issue a written order to that effect, it must send the case back for updating of computer systems and production or Approval Notices, and documents such as a certificate or green-card or travel document.

II. Pertinent Definitions

It is worth the effort to provide the reader with some definitions and citations now, since many *legalese* terms have been included in the foregoing discussion. Where to begin? How about at the beginning?

A. Appeal as used herein means: to challenge the initial decision by claiming that it is wrong and based on a misunderstanding and/or misapplication of the law; as well as the evidence; such that the *findings-of-fact*, *inferences* drawn, and/or *conclusions* reached are wrong. The appeal is made to a higher authority with the power to overrule the initial decision in whole, or in part, as it sees fit and in direct accord with its powers.

⁸ RFE = Request for Evidence.

⁹ NOID = Notice of Intent to Dismiss; or Deny, when issued in the proceeding below.

B. *New*, as used in this essay, and **in relation to *facts***, *may refer to evidence of*: conditions, characteristics, circumstances, qualities, and/or qualifications; indicative of eligibility, or of ineligibility, for some immigration benefit(s) which:

- i.** Did not previously exist; or
- ii.** Were, simply, not previously presented.

C. *De novo* means: anew; from the beginning; starting over. Essentially it means that absolutely no deference needs to be shown to anything in the initial decision made below. Also, when used, the term is normally italicized.

D. *Caveat* means: warning; caution. It is also usually italicized.

E. *Sua sponte* means: on our own (or my own) motion. There need not be any formal challenge made for this power to be exercised. The decision-maker is free to re-visit a case after it has been decided if he, she, or they realize that a mistake was made; or perhaps, there has been an intervening change or development in the law; or even a judicial ruling or a settlement agreement. Also, when used, the term is normally italicized.

F. *Plenary powers* means: complete and absolute power and authority over something or at least some particular aspect of something. AAO exercises plenary power of decisions over which it has been delegated appellate authority. The BIA has issued its own regulations and has actually restricted its power over certain matters. One example is the regulation concerning the “clearly erroneous” standard of review of the IJ’s *findings-of-fact*. AAO, as of this writing, is apparently in the process of writing a rule that will be published in the Federal Register and subjected to formal notice-and-comment rulemaking as per the Administrative Procedures Act (APA) [[5 U.S.C. § 551 et seq. Chapter 5](#)].

G. Findings-of-fact as used herein, before an appellate body, means: those facts that have been established to the satisfaction of the adjudicator on behalf of the deciding official, such as the Service Center; District; or Field Office, Director when dealing with DHS, specifically, USCIS; or when dealing with in the name of the Attorney General, an IJ. These *findings-of-fact* have been gleaned from the evidence submitted in support of the benefit request. Herein, “benefit request” refers to the petition or application submitted in order to affirmatively request an immigration benefit; or relief from removal. Also, when used, the term is very often italicized.

H. Prima facie means: first impression, first blush, without looking further it seems correct if true. The term is usually italicized.

I. Prerequisite means: something required before proceeding further. The term is very often italicized.

J. Motion in the general, *legal* context, means: a specific request for a specific action made to the adjudicator (judge, court, or agency) by the “movant” who is the “moving party”, *i.e. the one making the request*. The request is made through a “pleading” which can be as simple as an oral (verbal) request but most of the time the request is written and supported by a brief. Some courts or administrative agencies have standard forms of pleading which might be a cover letter, a brief template, or an actual “form” such as the I-290B.

K. Evidence means: some form of proof of something. In adjudications, evidence is submitted in an effort to establish, corroborate, and/or substantiate an alleged fact. Oral and/or documentary items are submitted to the *factfinder* in the hopes of particular *findings-of-fact* which support one’s claim or case.

III. Additional Pertinent Precedent Decisions

There are several administrative and judicial Precedent Decisions that help to illustrate and support the major propositions that are fleshed out in the next two sections. *Soriano* has already been presented above in **Section I.**, here are some more.

[Matter of Chawathe, 25 I&N Dec. 369 \(AAO 2010\)](#), is the latest AAO Precedent Decision that is most cited for its discussion of the appropriate standard of proof for immigration benefits adjudications.

[Matter of Katigbak, 14 I&N Dec. 45 \(R.C. 1971\)](#), is the definitive Precedent for the concept of “*eligibility at time of filing*”. Unfortunately, the concept had been misconstrued for a while and was extended inappropriately beyond its intended reach. This case involved a petition for a limited availability preference visa equivalent to the present EB-3. It led the way to understanding that when one files for a visa that is dependent upon the filing date of the petition to establish a priority date for visa allocation and issuance purposes that to accord preference to someone who only became legally eligible after the petition had been filed is simply unfair and not to be tolerated. It was determined to be cutting in line or jumping the queue. The unfortunate aspect was when it was applied to petitions and applications to which the concept simply did not apply.

[Matter of Izummi, 22 I&N Dec. 169 \(AAO 1998\)](#): This is the case that was instrumental in pushing the concept of “*eligibility at time of filing*” beyond its intended reach. *Izummi* involved an EB-5 investor who was investing through a Regional Center and as such was allowed to have a bit more flexibility. The third prong of the holding went too far, in my opinion. It reads: “[a] petitioner may not make material changes to his petition in an effort to make a deficient petition conform to Service requirements.” The concept of “material change” was applied too rigidly to the supporting documentation, specifically, business plans and other business-related documents and actual effectuation of those plans. While *Izummi*’s actual case had many other problems and was doomed to fail from the start, that single concept became onerous and was draconian.

[Matter of Pazandeh, 19 I&N Dec. 884 \(BIA 1989\)](#), holds:

(1) In visa petition appeals involving section 204(a)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(2)(A) (Supp. IV 1986), the Board will not review the issue of the *bona fides* of the petitioner's prior marriage if 5 years have elapsed since the petitioner obtained her lawful permanent residence.

(2) Where the visa petition was **initially approvable subject to the petitioner's meeting a burden which has lapsed with the passage of time**, the majority finds the rationale expressed in *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), *not applicable*. *Matter of Atembe*, 19 I&N Dec. 427 (BIA 1986); and *Matter of Drigo*, 18 I&N Dec. 223 (BIA 1982), *distinguished*.

[Matter of Atembe, 19 I&N Dec. 427 \(BIA 1986\)](#), held:

Notwithstanding the fact that an illegitimate child may qualify for immigration purposes as the "child" of his or her natural father following the amendment on November 6, 1986, of section 101(b)(1)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(D) (1982), provided paternity is established and the father "has or had a bona fide parent-child relationship" with the child, a visa petition filed prior to the effective date of the amendment may not be used to obtain preference status for the beneficiary under section 203(a) of the Act, 8 U.S.C. § 1153(a) (1982), because approval of the visa petition would give the beneficiary a priority date to which he or she was not entitled at the time the visa petition was filed. *Matter of Drigo*, 18 I&N Dec. 223 (BIA 1982); and *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), *followed*.

[Matter of Bardouille, 18 I&N Dec. 114 \(BIA 1981\)](#), is the case that affirmatively brings the concept of "*eligibility at time of filing*" into the family-based arena. This particular case resulted in the denial of a relative petition for a "legitimated" son because the act of legitimation took place only after the petition had been filed. Re-filing probably fixed the situation.

[Matter of Drigo, 18 I&N Dec. 223 \(BIA 1982\)](#), involved a case where the adoption took place when the child was over 14 but less than 16, but when the petition was filed, it had to have been before turning 14. A subsequent change in the law (after filing) increased the cut-off age to: before turning 16 (as it remains today). Again, re-filing solved the problem. In this case and the one above, the reasoning was that to approve that particular petition would accord the beneficiary a priority date to which (s)he was not entitled.

[Matter of Wing's Tea House, 16 I&N Dec. 158 \(Acting R.C. 1977\)](#), is the case that is most noteworthy for examining the labor certification as to the listed qualifications at time of labor cert filing. (*Experience acquired subsequent to the filing date of the petition may not be considered in support of the petition because to do so would accord the beneficiary a priority date for the issuance of a visa as of a date when he was not qualified for the preference sought.*)

[Matter of Sonegawa, 12 I&N Dec. 612 \(R.C. 1967\)](#), is included herein for the use of a “**qualitative**” analysis when a pure “**quantitative**” analysis was inappropriate and would have led to an unjust and unfair denial when an approval was appropriate after all of the evidence was viewed collectively, in other words, taking a “big picture” approach.

[Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 \(Comm. 1987\)](#), is included for the “successor-in-interest” concept, which could be an issue in a Motion or Appeal. *Dial Auto* held:

(1) In a third- or sixth-preference visa petition involving an individual labor certification, successorship in interest will be recognized only where the Department of Labor has formally acknowledged the continuing validity of the certification for the employment proposed by the successor entity.

(2) Where a successorship in interest is recognized, the petitioner bears the burden of proof to establish eligibility in all respects as of the date the application for labor certification as originally accepted for processing by the Department of Labor.

[Matter of Michelin Tire Corp., 17 I&N Dec. 248 \(Reg'l Comm'r 1978\)](#), is cited for the proposition that a visa petition may not be approved at a future date after the petitioner or beneficiary “becomes eligible under a new set of facts”. This is actually a non-immigrant visa petition case for an intracompany transferee (L1). I happen to disagree with this because it goes too far—or perhaps it has led to many adjudicators going too far in denying L petitions and many other non-immigrant petitions inappropriately. While there are some **filing prerequisite** for some non-immigrant classifications, the “L” visa qualifications must be met “at time of application for admission”. Many intracompany transferees apply for their “L” non-immigrant visas from **CBP** at the border or at pre-flight inspection locations abroad instead of **USCIS** via an I-129 petition. Those that go through **CBP** often have difficulty when trying to extend their stay or when an I-140 is filed for an immigrant visa as a multinational manager or executive (EB-1C or E13/E18).

[Matter of Church Scientology International, 19 I&N Dec. 593 \(Comm'r 1988\)](#), is cited for the proposition that USCIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *Id.* at 597. This one is cited way too much!

IV. New Evidence Submitted *In Support of a Motion*

When submitting a ***Motion to Reconsider*** (MTR), the underlying and overarching, consideration is to challenge the decision as incorrect and to submit “argument”. That means that a *Legal Brief* is essential in most cases. I say “most” because there is room on the Form I-290B to write something but there is not much room. When challenging a decision by means of an MTR (reconsider), it is supposed to be supported by citing to precedent decisions, statutes, regulations, and policy; or items of evidence in the record of proceeding (ROP) and explaining how it has been misinterpreted and/or misunderstood; or has undergone a change that should be applied retroactively or might be dispositive prospectively. This

type of Motion is not supposed to be reliant on new evidence. However, this type of Motion can be combined with the next.

On the flipside, a ***Motion to Reopen*** (MTR) demands the submission of new evidence. What then, constitutes “new evidence”? “New evidence” can be as simple as evidence that was not submitted previously which proves or helps to prove a pre-existing fact. New evidence can also be evidence of a new fact that did not exist at the time of the prior decision. Depending upon the nature of the petition or application under examination, ***evidence of a truly new fact might be prohibited or may be permitted*** from supporting an MTR of either variety. It depends.

If the pertinent *prerequisite* fact had to exist in order to file a petition or application in the first place; then if it is found to have existed in reality at time of filing; such fact may be proven by evidence that was not previously introduced whether or not that particular evidence existed or not. The foregoing describes the “nuts and bolts” of the concept of “***eligibility at time of filing***”. However, when a fact merely needs to be proven by the time of final adjudication; the existence of proof of that fact existing at time of filing becomes immaterial to the outcome of the case. The latter part of that discussion describes the “nuts and bolts” of the concept of “***eligibility at time of final adjudication***”. More to follow, below.

Take note of this next case because it is an example of a substantial re-interpretation of the law and as such is enough to support a ***Motion to Reconsider*** any case decided on the primary issue which would most likely lead to a different result now. It must be sufficiently supported either by the evidence already in the record or as supported by new evidence submitted in support of the claim. If ***new evidence*** *is* needed then it would be a ***combined Motion to Reopen and Reconsider***.

Now, I want to discuss what is the BIA’s most recent Precedent Decision, *as of this writing*. In ***Matter of Cross, 26 I&N Dec. 485 (BIA 2015)***, the BIA tells us their latest thinking on the subject of “legitimation” as applied to the INA definitions of “child” in Title II and in Title III. In doing so, they find that they must recede from and overrule two Precedents

that had created a paradox when they overruled the two Precedents that are now being resurrected and restored, *i.e., reinstated and reaffirmed*. This subject has seemed quite muddled for several years, at least it has to me, and so, I am glad to see this development. This topic needs to be viewed and treated in line with reality instead of artifice as it has been in recent years.

The BIA had previously belabored the analysis of foreign; and various state; legitimation laws to determine when a child was a “child” for *visa purposes* and when a child was a “child” for *citizenship/derivation purposes*. The BIA went to extremes in order to give out vs. restrict benefits and in so doing was flip-flopping back and forth. The issue of legitimation came up in a decision remanded from the 2nd Circuit Court of Appeals on May 31, 2011, [Watson v. Holder, 643 F. 3d 367 \(2d. 2011\)](#), with instructions to provide a clear meaning of “legitimation”; and concluded:

“For the foregoing reasons, we **GRANT** the petition for review and **REMAND** the cause **to the BIA for proceedings consistent with this opinion**. If and when petitioner seeks review of BIA determinations following this remand, the cause shall be referred to this panel. See [Butt v. Gonzales, 500 F.3d 130, 137 \(2d Cir.2007\)](#); [United States v. Jacobson, 15 F.3d 19, 21-22 \(2d Cir.1994\)](#).

The mandate shall issue forthwith.” [**Highlighting** added for emphasis.]

Overruled by Cross	Reinstated & Reaffirmed by Cross
<p><u>Matter of Hines, 24 I&N Dec. 544 (BIA 2008)</u>, held:</p> <p>(1) Under Jamaican law, the sole means of “legitimation” of a child born out of wedlock is the marriage of the child’s natural parents. <u>Matter of Clahar, 18 I&N Dec. 1 (BIA 1981)</u>, <i>overruled</i>.</p>	<p><u>Matter of Clahar, 18 I&N Dec. 1 (BIA 1981)</u>, held:</p> <p>(1) To qualify for visa preference status as a brother or sister under section 203(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(a)(5), both the petitioner and the beneficiary must once have qualified as the "child" of a common "parent" within the meaning of sections 101(b)(1) and (2) of the Act.</p>

(2) The respondent was born in Jamaica of natural parents who never married, and therefore his paternity was not established "by legitimation" so as to disqualify him from deriving United States citizenship pursuant to former section 321(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1432(a)(3) (1988), through his mother's naturalization in 1991.

(2) A child within the scope of the Jamaican Status of Children Act of 1976 is included within the definition of a legitimate or legitimated "child" as set forth in section 101 (b) (1) of the Immigration and Nationality Act, 8 U.S.C. 1101 (b) (1), so long as the requisite family ties are established and the status arose within the time requirements of section 101(b)(1). *Matter of Clahar*, 16 I&N Dec. 484 (BIA 1978), modified. [The earlier decision stated that the mere act of acknowledgement of paternity was not enough to "equate" to legitimate or legitimated.]

(3) To meet the definitional requirements of a "child" as set forth in section 101(b)(1) of the Act, the person must be under as years of age and any legitimation must have taken place before the child reached the age of 18 years.

(4) A brother-sister visa petition involving a petitioner and beneficiary who were both illegitimate at birth in Jamaica was properly denied for failure to satisfy the definitional requirements of section 101(b)(1) where the petitioner was 33 years old and the beneficiary 19 years old when the Jamaican Status of Children Act was enacted.

Matter of Rowe, 23 I&N Dec. 962 (BIA 2006), held:

(1) Under the laws of Guyana, the **sole means** of legitimation of a child born out of wedlock is the **marriage** of the child's

Matter of Goorahoo, 20 I&N Dec. 782 (BIA 1994), held:

(1) In order to obtain preference status for the beneficiary as his son pursuant to section 203(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(2)

natural parents. [Matter of Goorahoo, 20 I&N Dec. 782 \(BIA 1994\)](#), *overruled*.

(2) Where the respondent was born out of wedlock in Guyana and his natural parents were never married, his paternity has not been established by legitimation, so he is not ineligible to obtain derivative citizenship under former section 321(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1432(a)(3) (1994).

(1988), a petitioner must establish that the beneficiary qualifies or once qualified as his "child" within the meaning of section 101(b)(1) of the Act, 8 U.S.C. § 1101(b)(1) (1988).

(2) When the country where a child is born eliminates all legal distinctions between illegitimate and legitimate children, all natural children are deemed to be the legitimate offspring of their natural parents from the time that country's laws are changed.

(3) By virtue of the Children Born Out of Wedlock (Removal of Discrimination) Act, effective May 18, 1983, Guyana has eliminated all legal distinctions between legitimate and illegitimate children.

(4) Children born out of wedlock in Guyana after May 18, 1983, and children who are under the age of 18 prior to that date are deemed legitimate and legitimated children, respectively, pursuant to sections 101(b)(1)(A) and (C) of the Act. [Matter of Gouveia, 13 I&N Dec. 604 \(BIA 1970\)](#), *modified*.

“Although neither *Hines* nor *Rowe* elucidates the Board’s reasons for concluding that “legitimation” must be interpreted uniformly throughout the Act, we apparently understood it to be required by the Supreme Court’s decision in [Clark v. Martinez, 543 U.S. 371 \(2005\)](#). In that case, the Court held that a single statutory phrase cannot have different meanings in different factual contexts. *Clark v. Martinez*, 543 U.S. at 386 (rejecting “the dangerous principle that judges can give the same statutory text different meanings in different cases”). Thus, *Clark* would forbid us from giving the statutory phrase “paternity . . . has not been established by legitimation” one meaning for people born in Jamaica and another for those born in Guyana. *Id.* at 378 (“To give [the] same words a different meaning . . . would be to invent a statute rather than interpret one.”).

In *Hines* and *Rowe*, however, we read *Clark* much more broadly, as if it required us to interpret the term “legitimation” identically throughout the Act, regardless of variations in statutory context. That understanding was erroneous and conflicts with the well-settled rule that “[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.” *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (alteration in original) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)) (internal quotation marks omitted). In short, “[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies,” even if the term is statutorily defined. *Id.* (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)). Therefore, in finding that *Clark v. Martinez* required us to interpret the concepts of “legitimation” in section 101(c) of the Act and “paternity . . . established by legitimation” in former section 321(a)(3) as the same, we misconstrued the Supreme Court’s decision.” *Cross* at 490-491

When is “new” evidence actually “new”, and when is it not?

Ogundipe v. Mukasey, 541 F. 3d 257 (4th Cir. 2008), is one of my favorites. It deals with the concept of what **is** or **is not** “*meritorious in fact*”. The Fourth Circuit clearly stated that an Immigration Judge was free to accept and examine evidence never previously presented to USCIS that actually demonstrated that a fact existed at the time of filing.

In *that* case, an I-360 petition for an EB-4 immigrant “religious worker” visa defined in, and issued pursuant to, in INA §§ 101(a)(27)(C) and 203(b)(4) [[8 U.S.C. § § 1101\(a\)\(27\)\(C\)](#) and [1153\(b\)\(4\)](#)]; respectively, that had previously been denied was instrumental to being considered “grandfathered” for the “penalty adjustment clause” INA § 245(i) [[8 U.S.C. § 1255\(i\)](#)] based on a new petition filed in Mr. Ogundipe’s behalf. It hinged on proving that the earlier I-360 was “approvable when filed” based on *pre-existing* facts which could only be proven by submitting additional “new” evidence. Such additional evidence need only be “new” in the sense that it was not previously submitted. Such “new evidence” may include newly created evidence to demonstrate “**earlier**” or “**pre-existing**” conditions, characteristics, circumstances, qualities, and/or qualifications, had “in fact” existed *at the time of filing*.

“We agree with **Ogundipe** that the determination of whether a visa petition is approvable when filed is not limited to the question of whether the petition was actually approved. **We find nothing in the applicable statutes or regulations that prevents an IJ in removal proceedings from considering other evidence that a petition was approvable when filed, even if that evidence was never submitted in conjunction with the original petition.** This conclusion flows from the text of § 1245.10(a)(3). “Meritorious” means “meriting a legal victory” or “having legal worth,” *Black’s Law Dictionary* (8th ed. 2004), but does not require actual legal success. Moreover, § 1245.10(a) (3) requires that the determination of whether a petition is meritorious in fact “be made based on the circumstances that existed at the time the qualifying petition or application was filed.” This provision contemplates that evidence other than that actually submitted in support of the petition might be considered for purposes of determining whether an alien is grandfathered.” *Id.* at 260-261.

V. New Evidence Submitted On Appeal

While the BIA might heavily restrict the ability to submit evidence of **new facts** on appeal, the AAO is, *as stated above*, more freely able to accept new evidence on appeal. As stated above, the instructions for Form I-290B allow the submission of new evidence on appeal. Usually, AAO invokes *Matter of Soriano* only in order to disallow evidence that was previously requested in an RFE or NOID, *especially* when the Appeal submission is so substandard that it is nothing but a futile delaying tactic.

As will be discussed further below, the **context** for the decision-making may be **controlling** as to **when** a particular fact must be **proven**; but the **context may also control when a particular fact must exist.** For the vast majority of visa petitions, all pertinent facts must already exist “at time of filing”. This is because of the importance of the prerequisites for all “preference category” immigrant visas and by extension in the subsequent efforts in the continuing quest to obtain one. A “filing date” of an approved preference visa petition will be transformed into a “priority date” used for visa allocation and issuance purposes. Also, certain applications have critical prerequisites or required initial evidence. For certain applications, the mere acceptance for filing may entitle the applicant to “interim benefits” during the pendency of the adjudication. The

classic example is work authorization while awaiting adjudication of an I-485 for adjustment of status (AOS) to lawful permanent resident (LPR).

VI. AAO and BIA → Separate But NOT Equal

After having considered all of the foregoing discussion, I believe that AAO and BIA are not rightly bound by all of the **same** existing I&N Administrative Precedents. Some of those decisions were decided so long ago by so many different compositions or conglomerations or incarnations of appellate authorities that it has become an unruly and often inaccurate mish mash of muddled ideas. One example that I want to bring to the attention of the “powers that be” is *Soriano, supra*. I do not believe that AAO should be bound by the 4th prong of that decision and here is why!

AAO has full adjudication authority and is located within a **fee-funded benefits determination agency concerned with customer service**. USCIS and AAO operate within an **inquisitorial adjudicative framework** and are in search of the truth. AAO should be free to accept any “late submission” of evidence if it is dispositive of the outcome. Adherence to ridiculous and pointless procedures that are nothing more than futile gestures made in an homage to “form over function” must not be allowed to continue.

The standard of proof used by USCIS is usually by the preponderance of the evidence unless specified otherwise in the law. *Chawathe, Supra*. The standard is applied to the *fact-finding* activities. However, in reaching a **judgment on the merits**, the evidence must be weighed so that it **is or is not** found to be credible “**to the satisfaction of**” the decision-maker. The “*weighing of the evidence to the satisfaction of*” is usually the standard of review employed by AAO whether they spell it out that way or not. AAO far too often only restricts its powers when to do so is to arrive at a denial of a benefit. On the flipside is the tendency to utilize full *de novo* review and all available plenary power to find additional reasons to dismiss an appeal or deny a motion. AAO, as part of USCIS, is NOT an arm of a law enforcement agency and is not supposed to be making decisions that are punitive measures, save for review of ICE bond breaches.

There is a particular aspect of these USCIS *inquisitorial* immigration decisions that needs reiteration. There are two potential points at which eligibility must be met. Depending upon the context and the actual demands of the law, an applicant or petitioner might have to demonstrate “*eligibility at time of filing*” **or** may build their case along the way and prove their “*eligibility at time of final adjudication*”. In the latter scenario, there might be certain *prerequisites*, a *prima facie* showing, or *specific initial evidence* demanded up front in order to proceed any further. For example, an applicant for naturalization is free to study for their civics exam and is automatically allowed two chances to pass. That is a very simple example but it hits it right on the head. A *continuing opportunity to meet requirements* is inherent in some contexts. Nuances do exist.

The BIA is the **appellate body over an administrative court system** comprised primarily of administrative law judges titled “Immigration Judges”. This part of the U.S. immigration system operates within an **adversarial adjudicative framework**. There are two “sides” each of whom are trying to be declared the winner in a *Removal Proceeding*. ICE Counsel appears for the government and the alien respondent may or might not be represented by counsel. While the IJ often utilizes a quasi-inquisitorial approach when a respondent is unrepresented, these proceedings nonetheless usually result in a BIA affirmed **Order of Removal** which can be challenged in a *Petition for Review* in the Circuit Court of Appeals with jurisdiction.

Immigration Courts and OCAHO¹⁰ with its Administrative Law Judges who are simply referred to as ALJs are more akin to Magistrate Judges within the U.S. District Courts presiding over civil cases. They determine whether or not to approve of, disallow, or re-determine fines or sanctions levied by ICE. IJs on the other hand are more like District Court Judges presiding over criminal trials. Add both of the foregoing together and we have the Executive Office of Immigration Review (EOIR) in DOJ, all of whom are exercising specific delegated authority of the Attorney General. In short, EOIR has two types of proceedings but both usually result in a

¹⁰ OCAHO = Office of the Chief Administrative Hearing Officer.

punitive measure: fines, sanctions, and *Orders of Removal*; and even denial of bond and continued confinement awaiting removal; it is often punitive.

VII. Conclusion

Whether new evidence may be submitted, accepted, and considered on appeal or in support of a motion is highly situational. There is more than one immigration –related administrative appellate body. The highest such body is the BIA because it is exercising the authority of the Attorney General (A.G.) and the controlling statute makes A.G. the top administrative authority in matters of legal interpretation.

8 U.S.C. §1103. Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling*.

Some of the questions raised in, or suggested by, this essay have not been put to the test. Is AAO strictly bound to, now outdated, Precedent Decisions? Can AAO overrule an earlier I.N.S. Precedent on its own or must it seek permission from the BIA first? May AAO, instead, overrule such a Precedent and seek concurrence later, and risk being overruled itself? Would it be more prudent to work within DHS to get the *Secretary* to confer with the *A.G.* more formally to work out these issues and proceed with a joint rulemaking? The public may never know the nitty-gritty, and probably quite tedious, details but we need to see change; and see it soon!

<http://www.slideshare.net/BigJoe5>

VIII. About the Author

I tell you what you NEED to hear, not what you WANT to hear!



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DISCLAIMER: *The opinions expressed in my training are those of me only. That is to say that they are opinions of a layperson, non-attorney, non-economist, non-accountant, non-FINRA or SEC registered broker or adviser. Any information or consultation that seems like “incidental investment advice” is intended merely as educational, coaching, and mentoring¹¹. Opinions are based on work experience as an Adjudications Officer within INS and USCIS with particular involvement in the revitalization of USCIS’ EB-5 Program, especially that portion dealing with Regional Centers. I wrote the “Unofficial Instructions” on how to apply for Regional Center Designation which later formed the basis for the I-924 Form Instructions. I am an outspoken advocate for improved adjudications at USCIS. Lastly, I have been published in various immigration law outlets with well over 125 scholarly articles and opinion pieces widely circulated as well as a published contributing author in three EB-5 Law Books; co-editor in the most recent. Please click the hyperlinks above and explore my writings.*

Training is available for any subject under immigration and nationality law.

[*NAICS Code: 611430 Professional and Management Development Training*](#)

2012 NAICS Definition: 611430 Professional and Management Development Training

This industry comprises establishments primarily engaged in offering an array of short duration courses and seminars for management and professional development. Training for career development may be provided directly to individuals or through employers’ training programs; and courses may be customized or modified to meet the special needs of customers. Instruction may be provided in diverse settings, such as the establishment’s or client’s training facilities, educational institutions, the workplace, or the home, and through diverse means, such as correspondence, television, the internet, or other electronic and distance-learning methods. The training provided by these establishments may include the use of simulators and simulation methods.

That’s My Two-Cents, For Now!

¹¹ See: 15 U.S.C. §80b-2. (a)(11) or go to: [http://uscode.house.gov/view.xhtml?req=\(title:15%20section:80b-2%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title15-section80b-2\)&f=treesort&edition=prelim&num=0&jumpTo=true](http://uscode.house.gov/view.xhtml?req=(title:15%20section:80b-2%20edition:prelim)%20OR%20(granuleid:USC-prelim-title15-section80b-2)&f=treesort&edition=prelim&num=0&jumpTo=true)