Perfection of Application After Filing and Eligible at Time of Final Adjudication

By Joseph P. Whalen (February 1, 2015)

I. Immigration Benefit Requests via *Visa Petitions*

In the realm of immigration, nationality, naturalization, citizenship, and related legal benefits (hereafter, *immigration benefits*), there are two primary classes of immigration benefit request **forms**. In the immigration realm the "petition" *usually* refers to a "visa petition". A visa petition is a request for classification only. This entails submitting evidence that supports a *finding-of-fact* that the claimed relationships and/or qualifications already, in fact, **exist** *at time of filing* the visa petition, in most cases. I say "in most cases" because preference category petitions for **immigrant visas** are limited in number and therefore the *filing date* takes on greater importance. Petitions for Immediate Relatives of U.S. Citizens (IRs) are legally "immediately available" and the only "waiting" is for processing the benefit request. Certain **non-immigrant visa** categories require one to meet **prerequisites** *at time of filing*. An example would be the possession of a U.S. Masters Degree being held by the beneficiary at time of filing the USCIS Form I-129 on their behalf if seeking a Master's Cap H1-B nonimmigrant worker visa.

II. Filing Date and Priority Date

The former situation described above exists because the *filing date* of an **approved** preference category **immigrant visa** petition will be transformed into a *priority date* for visa availability and allocation purposes. Some intending immigrants have to wait a considerable amount of time for an actual immigrant visa to become available to them. They

must wait until their priority date is listed as being "current" on the State Department's monthly *Visa Bulletin*, before they may take the next step. That next step is to submit an Application for an Immigrant Visa (DOS Form DS-230) if abroad or, if legally in the United States and otherwise eligible, to file an Application for Adjustment of status (USCIS Form I-485).

III. Conditional Residents' *Petitions to Lift Conditions*

A. *Marriage-Based Conditional Residents*

Two varieties of immigrants who immigrate or adjust through this process are awarded conditional status at first. The immigrants, who gain status based on a rather new marriage to a USC[1] or LPR, will start out as conditional residents if that marriage is less than two-years old at time of entry with an immigrant visa or approval of their application for adjustment of status. This group of "marriage-based" conditional residents includes the new alien spouse and/or any qualifying alien stepchildren. They will eventually have to file a petition to lift conditions. Within the 90-day period prior to the two-year anniversary of their entry or adjustment; they file USCIS Form I-751 and have to prove that the marriage is *bona fide* or that they qualify for an exemption or waiver. The initial green-card is only good for two years and has an expiration date on it. That is the date of the "two-year anniversary" mentioned above.

[1] United States Citizen (USC); Lawful Permanent Resident (LPR).

B. *Investment-Based Conditional Residents*

Another category of immigrants are also initially afforded a conditional period of two-years. These are the immigrants who attain status through investments. Immigrant investors or entrepreneurs and their spouse and children (*who are unmarried and under 21 y/o*) enter on EB-5 visas. EB-5 stands for the employment-based, fifth preference immigrant visa category. EB-5 demands an investment of one-million dollars (or one-half million dollars in a specified "targeted employment area" (TEA)), and the creation of not fewer than 10 permanent, full-time jobs per investment, for *qualifying employees* as defined by law. Within the 90-day period before their green-card expiration date, the actual investor (or surviving spouse or surviving orphan) files USCIS Form I-829 in order to request lifting of conditions. At that point they must prove that the full amount has been expended and that the jobs have been created.

IV. Immigration Benefit Requests *via Applications*

A. *Distinguishing the Application from the Petition*

Unlike a "visa *petition*", an "*application*" for a benefit request is not necessarily tied to an absolute prerequisite "*eligibility at time of filing*". An application might be amenable to achieving, showing, and demonstrating "*full eligibility at time of final adjudication*" instead. Applications and petitions are filed under immigration or related laws which include statutes, regulations, and the

interpretations of them. Interpretations may come from agency Policy or via Precedent Decisions. Precedent Decisions may come from an Administrative Appellate Body or a Federal Court. An adjudicator, immigration practitioner, or the *pro se* applicant or petitioner needs to be very clear on exactly what the law demands of them to attain *that* benefit.

B. *Perfecting the Application vs. Material Change as to Facts*

Applications are not reliant upon the "filing date" as a "priority date". Many, if not all, immigration benefit applications are subject to "perfection after filing". This is in stark contrast to those select "petitions" that are reliant upon the filing date as a priority date or a mandatory prerequisite or condition precedent to filing. Those affected petitions are subject to denial or revocation in the event of an attempt to make a "material change" in order to conform to legal standards that were required at time of filing, but were not met.

The above described *prohibition* is against the creation of a new circumstance or fact post-filing (*post facto* change(s)). That situation is quite different than merely *supplementing the record* in order to fill in evidentiary gaps. When merely supplementing the record, while new items of evidence are submitted, and could even be newly minted (created), they are merely better explaining and demonstrating *facts that already existed at time of filing*. In other words, severe material changes that happen at the wrong time may effectively nullify a great deal of hard work while adding

to expenses caused by delays in re-filing a new petition and having to wait for a new adjudication based upon a later filing date. Please do not confuse the two distinct courses of action: (1) mere supplementation of the record as to pre-existing conditions *vs.* (2) impermissible material change.

C. *Follow-Up Petitions Treated Differently Than Visa Petitions*

Above, I referenced select "petitions" that was due to the fact that the "**petition to lift conditions**", which is **based upon** an **earlier "visa petition"** has different considerations involved. These petitions are based on different laws and have different goals and demands to reach those goals. The "marriage-based" petition (I-751) seeks proof of a sustained and *bona fide* marriage. The law that created the "conditional resident" status is known as "The Marriage Fraud Amendments" so perhaps no more needs to be said on that topic. Exceptions exist and a waiver might be attained, but the great many of these petitions that get denied are denied as having been sham marriages. Such a finding will **forever bar** the approval of **any visa petition in any category**. However, the majority of these marriages are legitimate and most conditional residents succeed in getting conditions lifted.

The second variety of conditional resident is the one based on investments and entrepreneurial ventures. The principal EB-5 visa holder needs to demonstrate that the money was spent appropriately and that the jobs have been created via the I-829 petition. While the conditional status was attained based on a

particular plan or venture, the conditions can be lifted even if the initial plan has materially changed as long as there was no fraud or other criminality involved. The statute controlling the lifting of conditions is different than the one relied upon earlier to obtain the conditional status. The *first petition* was a request to make an attempt to create jobs through the expenditure of the requisite amount. The *second petition* features the back-end burden of proof through the production of corroborating evidence of success or of being on the cusp of achieving the goals.

D. *More About Differences Between Applications & Petitions*

The major **application** adjudicated by USCIS is the N-400 which is used to apply for naturalization as a United States Citizen. While there are specific *filing prerequisites*, once those have been achieved, eligibility findings and criteria can significantly change *after filing*. An applicant for naturalization might lose eligibility if certain events occur after filing the application. On the other hand, some later events might cement one's eligibility for naturalization. That second situation is the "**perfection** of the application **after filing**".

An example of losing eligibility might be getting arrested and convicted of a crime. It could be a minor crime or it could be a major crime. A major crime might lead to a notice to appear (NTA) and the commencement of Removal Proceedings. However, a minor crime might only lead to temporary ineligibility to naturalize. A minor crime might not involve any jail time. It could

involve a fine only or perhaps probation. The mere fact of *being on probation* is not in and of itself completely disqualifying. Being on probation does prevent completion of the naturalization process in that the Oath may not be administered to someone who is currently on probation. Knowing the above information, some applicants time the filing of their N-400 so that their probation will be successfully completed before the N-400 processing is expected to reach an adjudication decision. Many try to time things so that probation is over by the time of the examination and interview. So, if an N-400 applicant finishes probation after filing the N-400, this can make them *fully eligible at time of adjudication* even though they were *not eligible to take the Oath at time of filing*.

Unfortunately in such a situation, many applicants do not realize that the underlying reason for the probation may have made them ineligible to file in the first place. Some crimes, even minor ones that will not lead to deportation, might temporarily or maybe permanently bar one from naturalization. If that is **not** the case and there is no specific bar to naturalization then, an Officer might consider how the applicant behaved while on probation. A record of full compliance and early release bodes well. On the other hand, a series of bench warrants for failure to make restitution payments or fine payments, failure to appear in court, failure to meet with probation officer, testing positive for drugs or alcohol; any or all of which lead to extension of probation and additional fines and community service, may lead to a

discretionary denial. With anything that bad, I'd be surprised if it didn't lead to a discretionary denial. Ultimately, one size does not fit all when it comes to adjudication of immigration benefit requests.

V. Unique Situation of EB-5 Regional Center Applications

The Form I-924 may be *perfected* after filing and is amenable to *material change* all the way through Motions and Appeals. There is some confusion when an investor's real Form I-526 is filed as a "*test case*" for a project that has not been previously submitted and vetted by USCIS as opposed to an I-924 Amendment being filed as an I-526 Exemplar Petition. The real I-526 *preference immigrant visa petition* has the issue of the **filing date** being transformed into a **priority date** while the I-526 Exemplar filed on an I-924 does not. The test case is **NOT** amenable to any material changes post-filing. The I-924 is wide open to any and all changes post filing. The I-924 Application is fully amenable to *perfection after filing* because it is the *time of adjudication* that matters. That is the point at which full eligibility must be demonstrated. That concept should flow into the appellate stage via appeals and motions. As AAO often points out, new evidence may be submitted in appeal as per the I-290B form instructions because the form instructions are incorporated into the controlling regulation per the general regulation found at 8 CFR § 103.2

> (a) *Filing*. (1) *Preparation and submission.* Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission. .....

The ability to perfect the application after filing starts with the I-924 when it is filed for initial designation as a Regional Center. Part of USCIS' job in this particular adjudication is similar to another, in fact, the only other application where USCIS is considering licensing an entity to provide services to aliens seeking an immigrant visa. The other application that is also akin to a license application is the USCIS Form *I-905, Application for Authorization to Issue Certification for Health Care Workers*. In one particular AAO non-precedent decision involving an I-905, AAO describes the request as one for **licensure**. *See (AAO Nov092006_01M4212)Only Known I-905 AAO Decision*.

VI. Unique Situation of N-400 Application for Naturalization

The Denial of an N-400 does not have an administrative appeals, *per se*, instead, the applicant may and must request a "second hearing" before a USCIS Officer before seeking judicial review. That is accomplished via Form N-336. Such a "second hearing" may be held in any manner the Officer decides, including full *de novo* (afresh) or *ad hoc* (for this purpose only). Once the "second hearing" is tried and failed, then the applicant may seek judicial review in a District Court per INA § 310(c) [8 U.S.C. § 1421(c)].

The above scenario is quite a different one than if USCIS significantly delays adjudication in the first place. Once an examination has occurred, USCIS has 120 days to render a decision and if it does not, then the applicant may petition the District Court to assume jurisdiction. In reality, the vast majority of such petitions

result in the Court Ordering USCIS to render a decision within 30, 45, or 60 days from the date of the court order. By then USCIS is usually ready to render a decision, *but for,* the Court relinquishing jurisdiction. In such cases, very often a joint Motion is filed by the naturalization applicant and the government to dismiss with the stipulation that the adjudication will proceed forthwith or within a certain period of time.

VII. Unique Situation of a Citizenship Claim

Citizenship Claims may arise as an *affirmative benefits request* via the USCIS Form N-600, *Application for a Certificate of Citizenship*, within the United States; an FS-240, Consular Report of Birth Abroad of a USC; a Passport Application filed abroad; or a *defensive claim against removal*, also domestically. A Citizenship Claim might also arise as an *affirmative defense* in *Removal Proceedings*. Each of these contexts presents a different path to follow.

If USCIS denies an N-600, the applicant is afforded an administrative appeal. If the applicant fails to file an appeal, the applicant may file a Motion, but may not file a second N-600. District Courts are reluctant to deal with an affirmative Citizenship Claim without AAO weighing in on the matter if that claim arises through an N-600. District Courts nearly universally demand that an agency action be **final.** Courts want the administrative appellate bodies to issue the decisions that are being brought before it. The Courts don't want to see the *initial* denial decision from the first line adjudicator.

USCIS Form N-600 appeals and motions are filed on USCIS Form I-290B. The Appeal may be treated like a Motion by the Office that issued the denial if the application can be favorably decided. An Appeal must be forwarded to AAO if the Deciding Official below is unable to act favorably. The N-600 is in a class by itself and has specific statutory and regulatory provisions that supersede the "general" regulations at 8 CFR Part 103. Those specific processes are mainly controlled by 8 CFR § 341.5, *especially*:

> (d) *Denial.* If USCIS denies the application, the applicant will be furnished the reasons for denial and advised of the right to appeal in accordance with 8 CFR 103.3.
>
> (e) *Subsequent application.* After an application for a certificate of citizenship has been denied and the time for appeal has expired, USCIS will reject a subsequent application submitted by the same individual and the applicant will be instructed to submit a motion to reopen or reconsider in accordance with 8 CFR 103.5. The motion must be accompanied by the rejected application and the fee specified in 8 CFR 103.7.

Most of the more recent N-600 cases also rely on 8 CFR § 320. Of particular applicability to this discussion is

§320.5 Decision:

> (a) *Approval of application.* If the application for the certificate of citizenship is approved, after the applicant takes the oath of allegiance prescribed in 8 CFR 337.1 (unless the oath is waived), USCIS will issue a certificate of citizenship.
>
> (b) *Denial of application.* If the decision of USCIS is to deny the application for a certificate of citizenship under this section, the applicant will be advised in writing of the reasons for denial and of the right to appeal in accordance with 8 CFR 103.3(a). An applicant may file an appeal within 30 days of service of the decision in accordance with the instructions on the form prescribed by USCIS for that purpose, and with the fee required by 8 CFR 103.7(b)(1).

> (c) *Subsequent application.* After an application for a certificate of citizenship has been denied and the time for appeal has expired, USCIS will reject a subsequent application submitted by the same individual and the applicant will be instructed to submit a motion for reopening or reconsideration in accordance with 8 CFR 103.5. The motion must be accompanied by the rejected application and the fee specified in 8 CFR 103.7(b)(1).

To summarize, one must exhaust the administrative appeal process afforded under the law by first appealing to the AAO [see 5 USC § 704] before one may seek judicial review of the agency decision in the case, which would be to file a *Petition for Declaratory Judgment of U.S. Nationality* (includes Citizenship Claims) in a U.S. District Court under INA § 360(a) [8 U.S.C. § 1503(a)] and pursuant to 28 U.S.C. § 2201.

When a Citizenship Claim arises as an *affirmative defense* in *Removal Proceedings*, there is usually **no** N-600 involved and AAO will not have issued an appellate decision. The existence of concurrent *Removal Proceedings* would preclude U.S. District Court judicial review under this section and restrict review to a *Petition for Review* in a U.S. Circuit Court of Appeals of any *Removal Order* following a BIA Dismissal of the Appeal of a *Removal Order* under 8 USC § 1252(b) [INA § 242(b)].

Ortega v. Holder, et. al, 592 F.3d 738 (7th Cir. 2010)[2] provides:

> "…. Congress's solicitude in providing all others with a means of obtaining a certificate of citizenship either through the general application process or through the removal process evinces Congress's concern that individuals be able to settle, definitively, the issue of citizenship."….. "As we have

[2] See also the underlying District Court Memorandum and Order from the N. District of IL, dated November 5, 2010, which was appealed to the 7th Circuit.

> discussed in some detail, 8 C.F.R. § 341.6[*] requires that any subsequent application for citizenship [should] be filed as a motion to reconsider or to reopen. ..."

[[*] § 341.6 has been repealed, this issue is now covered by § 341.5(e) per 76 FR 53764, 53805 (8/29/11), effective Nov. 28, 2011.] The regulation is still clunky. However, the court stated it in a workable manner.

In the *Removal Proceedings* context, neither the Immigration Judge (IJ), nor the Board of Immigration Appeals (BIA) has the authority to affirmatively rule on a citizenship claim. The Homeland Security Act of 2002 (HSA 2002) shifted this function from the Attorney General and DOJ to the Secretary and DHS, and then delegated on down the line to USCIS via the N-600 and AAO for appeals thereof. An IJ can **refuse** or **accept** the government's case as to the respondent being an alien for lack of "clear and convincing evidence". However, the IJ cannot affirmatively conclude that the respondent is a United States Citizen (or non-citizen national).

An IJ can terminate or continue proceedings while the respondent files an N-600. The judge might go so far as to order the filing of an N-600, order a fee waiver, and officially request an expedited adjudication for a particularly sensitive case. The main point in including this discussion in this essay is that the bottom line on the question of recognition of citizenship is that: "it ain't over 'til it's over!" The critical time for making the case is the at time of adjudication and not until then.

VIII. Appeals, Motions, & Judicial Review-*In General*

Many but not all petitions and applications have an administrative appeal option. In general, before one may resort to filing a challenge in court, the administrative remedies must be exhausted. That means that the vast majority of initial administrative decisions must be appealed administratively first if there is an administrative appeal option. Rare exceptions do exist but since they are rare, they will not be addressed in this essay.

When the administrative appeal has been denied, there is no further obligation to stay in the administrative arena. If there was no administrative appeal available, there is no obligation to file any MTR before filing a *Petition for Review* in a Federal Court. Determining which court has jurisdiction may take a little bit of work. Different requests for benefits (or relief) have different statutes controlling their federal court jurisdiction. Some administrative denials belong to the U.S. District Court and others belong to the Circuit Court of Appeals. Some denials are challenges under the Administrative Appeals Act (APA) while others are challenged under the Declaratory Judgments Act, Mandamus Act, or all Writs Act. It also matters from which Agency the challenge is being made (DHS, DOJ, DOL, or DOS). Some decisions are unreviewable in court as per statute. It depends.

IX. Petitioner for Reopening or Remand Bears a Heavy Burden

Finality in any proceeding whether held before an administrative body or upon judicial review *is sometimes elusive*. Some immigration cases can drag on for years or perhaps decades. It

is that reason that agencies and court are reluctant to reopen cases and allow cases to drag on. The BIA has summed up that sentiment in the following case which is often cited. A party seeking to reopen a case bears a "heavy burden" indeed. While striving for "fairness" and removing "bias", regulatory procedures have been established to try to prevent long drawn out cases from happening.

Matter of Coelho, 20 I&N Dec. 464, 473 (BIA 1992), held:

> (1) The Board of Immigration Appeals may deny a motion to remand or motion to reopen proceedings where a *prima facie* case for the relief sought has not been established or in the absence of previously unavailable, material evidence or where the ultimate relief is discretionary, if the relief would not be granted in the exercise of discretion.
>
> (2) A party who seeks a remand or to reopen proceedings to pursue relief bears a "heavy burden" of proving that if proceedings before the immigration judge were reopened, with all the attendant delays, the new evidence would likely change the result in the case.

X. "Standard of Review" Is Up To the Appellate Reviewer

Federal Judges who preside over challenges to agency final actions have preliminary steps to go through before getting to the heart of the matter being challenged. They are required to determine first if they actually have jurisdiction to hear the case. The burden to point the judge in the right direction falls upon the party that brings the suit. Once that question is satisfactorily answered, the reviewer must then determine the appropriate level of review for that case.

USA v. Jose Torres-Perez et al., ___ F. 3d ___, (5th Cir. 2015) [No. 14-10154 cons. w/ 14-10202 January 29, 2015] states, in pertinent part:

> "The defendants-appellants concede that plain error review applies. Nevertheless, it is this court, and not the parties, that must determine the

> appropriate standard of review. *United States v. Vonsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc) ("[N]o party has the power to control our standard of review. . . . If neither party suggests the appropriate standard, the reviewing court must determine the proper standard on its own[.]"); *United States v. Molina*, 174 F. App'x 812, 815–16 (5th Cir. 2006) (finding an error preserved for harmless-error review despite the defendant-appellant's concession that plain error review applied)." At p. 3.

The AAO reserves *plenary powers* (absolute authority) and may review everything *de novo* (anew) and very often does. That being said, AAO is also free to review certain aspects of the record of proceeding (ROP) for "substantial evidence" which is supportive of findings and/or "plain error" and/or "clear error"; also characterized as "clearly erroneous"; as to any and all *findings-of-fact* made below. If an error is found, the reviewer then determines if it is "harmless error" or if it did, in fact, adversely affect the decision below or not. AAO often addresses these basic issues but not in every case.

XI. AAO's Standards of Review and Proof On Appeal

AAO standards are not explicitly spelled out in the pitifully inadequate regulations currently at its disposal in 8 CFR Part 103. AAO draws its procedures from a variety of sources. The Administrative Procedures Act (APA) and a variety of Judicial Precedents are frequently used. However, since much of AAO's case-law is adapted from pertinent and important District Court cases, there is a definite need for updated procedural regulations specifically designed for AAO. USCIS has been promising to put forth an AAO Procedural rulemaking for quite a few years now but nothing has yet emerged. It is for this reason that it is useful to examine AAO non-

precedential decisions and try to decipher the most common procedures currently applied to Appeals and Motions adjudicated by AAO. The following is drawn from a recent AAO non-precedent decision denying an H1-B--I-129 [link below].

"I. EVIDENTIARY STANDARD ON APPEAL

As a preliminary matter, and in light of counsel's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within its purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

> Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.
>
> * * *
>
> The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.
>
> * * *
>
> Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

> We conduct appellate review on a *de novo* basis. *See* Soltane v. DOJ, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved.
>
> Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true."

(AAO JAN082015_05D2101) H1-B Denied See Esp. I. EVIDENTIARY STANDARD ON APPEAL At pp. 2-3.

The above excerpt not only explains the standard employed by AAO on review but the evidentiary standard and the standard of proof. These are actually three distinct but intricately entwined concepts. The "preponderance" standard is used in connection with adding up the *findings-of fact* in search of the "truth" in this *inquisitorial* adjudication. Unfortunately, far too many practitioners make the mistake of preparing the case as if it were in an *adversarial* proceeding.

They put up strenuous **fights** when they should be *producing* sufficient *evidence* and *crafting* a convincing *argument* in their brief in order to *persuade* the *adjudicator* which *facts to find* to *prove the truth* as to **eligibility**. It is a wasted effort; to simple argue for the

sake of arguing. It is a wasted effort to ask for the exercise of discretion where no discretionary authority exists. It is crucial that all who enter this arena know what it is that they need to prove.

XII. In-Depth on Motions to Reopen and/or Reconsider (MTRs)

In the event that a petition or application is denied, the petitioner or applicant may either appeal that denial or submit a motion. For those petitions or applications that have no appeal rights, the petitioner or applicant may still file a motion or MTR. Since the vast majority of **petitions** are subject to being "eligible at time of filing", then even when "new evidence" is permitted, that evidence must simply be "new" in the sense that it was not available before this MTR filing. AAO and the BIA won't accept or review evidence in motions for visa petitions when that evidence was previously available, especially if the petitioner was already asked to present it but did not do so. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), held, in pertinent part:

> (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.

While the BIA stands firmly on this point, I don't believe that AAO must. It is a punitive measure if it leads to devotion to "form over function". Blind obedience to a rule taken out of context is harmful error. It must be remembered that *Soriano* dealt with an IR petition filed by a U.S. Citizen for his spouse. The visa in that case was legally "immediately available" therefore the filing date had no

effective meaning for visa allocation and issuance purposes. It merely related to the place in the "processing queue" and nothing more. Applying Soriano to "preference visa petitions" is something that an astute judge will overturn as capricious and unduly punitive.

XIII. Full Eligibility At Time of Filing *vs*. Time of Adjudication

The best example I can think of to illustrate the differences between these two adjudicative contexts is the request for adjustment of status (AOS) via USCIS Form I-485. The applicant must actually be eligible to file for adjustment and a visa must be available to them (be the beneficiary of an approved petition or be eligible for concurrent filing). The prerequisites must be met because the act of USCIS accepting the application package makes the applicant eligible for interim benefits. These basic prerequisites must be met **at time of filing**.

There is no administrative appeal of the denial of adjustment of status (AOS) by USCIS. However, if USCIS issues an NTA, the applicant can "renew" their request for adjustment of status in *Removal Proceedings* before an Immigration Judge (IJ). If the IJ also denies AOS then an appeal lies before the Board of Immigration Appeals (BIA or Board) within the Department of Justice's (DOJ's) Executive Office of Immigration Review (EOIR). Once that is attempted and fails, then the BIA Decision may be challenged in the Circuit Court of Appeals, with jurisdiction over petitioner's residence, on a *Petition for Review* per INA § 242 [8 U.S.C. § 1252].

Even at such a late stage in the process, redress can be found. Also, even when an appellant is unsuccessful in their particular case, the decision may hold hope for others. Such was the case for a certain applicant for an employment-based, fourth preference immigrant visa as a "Special Immigrant Religious Worker" [SD-1 (visa code) or SD-6 (adjustment code)]. That Fourth Circuit Decision reaffirmed that evidence may be introduced at a late stage when it will establish the fact of eligibility at time of filing.

The administrative appellate reviewer is not inextricably bound to the record before the initial adjudicator when newly presented evidence will show that the request is "*meritorious in fact*". This is especially appropriate when dealing with statutes that were meant to be **ameliorative** in the first place. It is also essential when dealing with an improved record that supports a finding as to an "**entitlement**". An entitlement, such as citizenship from birth or at a later date through an action of law, is a *legally enforceable right*. To deny an entitlement on procedural grounds through nonsensical application of burdensome regulations would be held to be unconstitutional. That last situation is one best avoided. As for the notion of what constitutes "*meritorious in fact*", the 4th Circuit had the following to say on this topic:

> "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."

Ogunpide v. Mukasey, 541 F. 3d 257 (4th Cir. 2008) [Nos. 07-1075 & 07-1592 September 2, 2008). At 260-261. [Slip Op. pp. 7-8]

The last consideration for AOS is whether a visa remains available ***at time of adjudication***. Even if approval is warranted via a *favorable exercise of discretion* to one who has been found worthy of tat generosity, a visa must be available. If no visa is available then the final adjudication must be delayed. For adjustment of status cases, the interim benefits of work authorization and advance parole will continue while the applicant waits. Some petitioners and their counsel can be a bit confused on the differences between *supplementing a record* and making a *material change*. This may be because of seemingly conflicting precedents. For instance, an often stated position in many AAO decisions is 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. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978)."

(AAO JAN082015_06D7101) L1-B MTR Granted, Appeal Dismissal Affirmed

The preceding quote appears in a vast number of non-precedents, especially those concerning the "L" non-immigrant classification for intracompany transferees which was the classification at issue in *Michelin*. This sentiment and solid principle

may seem to be at odds with some of the sentiments in the next two sections.

XIV. Significant New Facts and Attendant Delays Change Outcome

Where the 4th Circuit tried to open the door, AAO and the BIA try to shut it. There may be situations, circumstances, and scenarios that do not lend themselves to denying reality. Some appellate reviewers refuse to see what is right in front of them. That is arbitrary, capricious, and downright "wrong". AAO is now clearly housed in a benefits determination agency. Some say that USCIS is a "benefits granting agency", however, that does not reflect that fact that they also deny, revoke, and terminate benefits, as applicable. With that said, some cases get drawn out so long that major changes occur that are beyond the control of the petitioner, applicant, beneficiary, sponsor, and/or the agency itself. Let's not forget that the rigorous adherence to regulations that have become obsolete or even detrimental to the immigration case or the system in general has lead to a large number of small legislative "fixes" (or "interferences", *as applicable*); injunctions, lawsuits, and "settlement agreements". So, sometime the generosity or ben*e*volence of an agency to use its discretionary authority or *sua sponte* authority to revisit any case in order to right a wrong may be the best approach for all parties.

(AAO JAN082015_02B4203.pdf) EB-1C MTR Dismissed

> "... Further, the new facts must possess such significance that, "if proceedings ... were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); see also *Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013). At p. 3.

Maatougui looked like a case worth examining further. So that is what I did and here is the full passage from which the AAO selected a handful of words. I have highlighted the quoted excerpt above *in situ*. We can see that this is the root of the concept of the "heavy burden" and, in fact, *Maatougui* is quoting a passage from Coelho. The Tenth Circuit was also quoting from *Abudu*, a Supreme Court decision. Recognizing change is not a foreign concept, even to AAO.

Maatougui v. Holder, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

> "'[W]e review the BIA's decision on a motion to reopen [only] for an abuse of discretion. The BIA abuses its discretion when its decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." *Infanzon v. Ashcroft*, 386 F.3d 1359, 1362 (10th Cir.2004) (internal quotation marks omitted). The BIA does not abuse its discretion when "its rationale is clear, there is no departure from established policies, and its statements are a correct interpretation of the law," even when the BIA's decision is "succinct." *Id.*
>
> "There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988). And "the reasons for giving deference to agency decisions on petitions for reopening . . . in other administrative contexts apply with even greater force in the [immigration] context." *Id.* at 110, 108 S.Ct. 904. Accordingly, motions to reopen immigration cases are "plainly disfavor[ed]," and Maatougui bears a "heavy burden" to show the BIA abused its discretion. *Id.*
>
> To merit reopening her case, Maatougui "must 'state the new facts that will be proven at a hearing to be held if the 1240*1240 motion is granted,'" and she must support those facts with "'affidavits or other evidentiary material.'" *Xiu Mei Wei v. Mukasey*, 545 F.3d 1248, 1251 (10th Cir.2008) (quoting 8 U.S.C. § 1229a(c)(7)(B) (2008)).

> And not just any new facts will do. The new facts Maatougui presents must demonstrate that "if proceedings ~~before the [IJ]~~ were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *In re Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A.1992). Even then, "the BIA has discretion to deny a motion to reopen [though] the alien has made out a prima facie case for relief." *Abudu*, 485 U.S. at 105-06, 108 S.Ct. 904."

XV. A Burden Which Has Lapsed With the Passage Of Time

If there was ever an administrative precedent decision made for the topic discussed in these pages, it has to be *Matter of Pazandeh*. This case is one my favorites for the concept of dropping an issue; the importance of which has "lapsed with the passage of time". If something is no longer a relevant factor, then it is OK to just drop it.

Matter of Pazandeh, 19 I&N Dec. 884 (BIA 1989), held:

> (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*.

More appellate reviewers need to refresh their memories on these topics involving **context** and **flexibility**. Far too many folks are getting "**hidebound**" or "**stuck in a rut**" unable to change with the times. There are a number of administrative precedents that need to be re-visited & either modified or dumped. *Reader, please keep on reading!*

XVI. About the Author

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

Joseph P. Whalen

Independent EB-5 Consultant, EB-5 Advocate, Mentor, Trainer and Advisor

238 Ontario Street | No. 6 | Buffalo, NY 14207

Phone: (716) 604-4233 (*cell*)

or (716) 768-6506 (*home, land-line*)

E-mail: joseph.whalen774@gmail.com

web http://www.slideshare.net/BigJoe5 or

http://eb5info.com/eb5-advisors/34-silver-surfer

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That's My Two-Cents, For Now!

[3] 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