Inappropriate Rigidity in Regional Center Designation Appeals to AAO

From a non-precedent AAO Decision found at: http://www.uscis.gov/err/K1%20-%20Request%20for%20Participation%20as%20Regional%20Center/Decisions_Issued_in_2009/Dec222009_02K1610.pdf

> "The regulation at 8 C.F.R. § 103.2(b)(8)(iii) states that the applicant shall submit additional evidence as the director, in his or her discretion, may deem necessary. The regulation at 8 C.F.R. § 103.2(b)(11) states that submission of only some of the requested evidence will be considered a request for a decision on the record. **The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed[1]. See 8 C.F.R. §§ 103.2(b)(8) and (12).** The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).
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> Where, as here, an applicant has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal or, by extension, certification.[2] See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the applicant had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. Id. For the reasons discussed in detail below, the director's request for additional evidence was not in error. Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.
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> Counsel does not assert that *Matter of Soriano*, 19 I&N Dec. at 764 and *Matter of Obaigbena*, 19 I&N Dec. at 533 are not applicable to applications for regional center designation and we find that they are. When an applicant fails to respond to a request for evidence, USCIS then can only consider the requested evidence within the context of a new application or petition. The effort of filing a new application or petition is a consequence of these precedent decisions for all of the petitions under the jurisdiction of the AAO. Even if binding precedents did not preclude consideration of the requested evidence submitted on certification, the proposal is not approvable for each of the reasons discussed below."

By referring to "eligibility at time of filing" AAO is invoking 8 CFR § 103.2(b)(1) and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg, Comm., 1971) inappropriately. The concept of demonstrating eligibility at time of filing is based in INA § 203 wherein, the filing date becomes the priority

[1] On April 17, 2007, 72 FR at 19105 added 8 CFR **§ 103.2 Applications, petitions, and other documents.** (b)(1) *Demonstrating eligibility at time of filing.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition. This was a codification of *Matter of Katigbak*. http://edocket.access.gpo.gov/2007/pdf/E7-7228.pdf

[2] In original, footnote 2: While **USCIS** does, on a case-by-case basis consider new evidence on certification, the fact that the regulation at 8 C.F.R. **§** 103.4(a)(2) does not specifically provide for the submission of new evidence in addition to a brief on certification, supports our finding that the **AAO** is not required to consider new evidence that would not be considered on appeal.

date for preference visa issuance purposes. Where there is no statutory prerequisite to show complete eligibility at time of filing, the application of that concept is inappropriate and *ultra vires*.

Oxford Dictionary of Politics: ultra vires

> Literally, 'beyond powers'. *Ultra vires* has two meanings: **(1)** substantive *ultra vires* where a decision has been reached outside the powers conferred on the decision taker; and **(2)** procedural *ultra vires* where the prescribed procedures have not been properly complied with. The doctrine of *ultra vires* gives courts considerable powers of oversight over decision-making. The range and variety of bodies amenable to the doctrine is large. Ministers, or any public body with statutory powers, may be included. The doctrine also applies to companies and corporations that are amenable to the remedies of declaration or injunction. Read more: http://www.answers.com/topic/ultra-vires#ixzz1EiOOAIsI

In the Federal Register Notice on April 17, 2007, which made 8 CFR § 103.2(b)(i), as part of the final rule, effective on June18, 2007, the discussion included:

> *"C. Uniform Application of the'Preponderance of Evidence' Standard*
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> One commenter approved of the ''preponderance of the evidence'' standard as proposed at 8 CFR 103.2(b)(8)(i). The commenter, however, objected to the proposed language in 8 CFR 103.2(b)(8)(ii), which allows USCIS to deny an application or petition, request more evidence, or notify the applicant or petitioner of its intent to deny if the ''evidence submitted does not fully establish eligibility.'' The commenter stated,
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> > '[c]onflating the preponderance standard with a ''full eligibility'' standard merges two irreconcilable concepts, *unless it is clear that a preponderance of the evidence does, indeed, establish full eligibility.* The regulation would be more acceptable if the language were changed to delete the ''fully establish eligibility'' language, and if language were added to state that the only cases that may be denied without an RFE are ones in which there is *clear evidence of ineligibility*.' (Emphases in original).
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> In response to these comments, USCIS has modified 8 CFR 103.2(b)(8)(i) to remove the phrase, ''the preponderance of'' and to modify 8 CFR 103.2(b)(8)(ii) to remove the word ''fully.'' **USCIS is implementing these modifications because it believes that it would be inappropriate to apply a single standard in 8 CFR 103.2(b)(8)(i) and (ii) to all USCIS adjudications. Furthermore, these modifications clarify that adjudications can involve different evidentiary standards or burdens**. Under current regulations, some applications or petitions must demonstrate a preponderance of the evidence, while other applications or petitions require clear and convincing evidence, to establish eligibility." 72 FR at 19103 **[Emphasis added.]**

The requirement to be "eligible at time of filing" does have its proper place, when it is relevant and determinative. This is most assuredly the case in securing a priority date for issuance of a preference category visa where the filing date equates to a priority date for issuance of that visa.

A preference category visa is issued in strict adherence to worldwide numerical limits and per country limits. In such a case, establishing eligibility at time of filing is the fairest method of allocating the limited visas available. In cases where there is no such allocation limit, the application of that concept is unwarranted. Such is the case of an applicant who files a form *I-924, Application For Regional Center Under the Immigrant Investor Pilot Program*, who does not require a numerically or per country limited visa. USCIS has previously recognized that applying a single standard is wrong and that different evidentiary standards and burdens apply to different adjudications.

In addition, USCIS has invoked the form instructions as a source of "notice" to the applicants and petitioners as to the evidentiary requirements.

> "Since the 1991 proposed rule, INS and now USCIS have revised the immigration benefit forms and instructions to list the initial evidence that applicants or petitioners need to file. The forms, with instructions in a growing number of languages, are available on paper and on USCIS' Website. **Given that the forms provide complete information regarding evidentiary requirements, USCIS believes** that the twelve-week standard RFE requirement for missing initial evidence is obsolete and **filings should be complete at the beginning of the process**." 72 FR at 19102

Here, USCIS asserts a "*belief*" in a "*presumption" that the form* [instructions] *provide* ***complete information*** *regarding evidentiary requirements* to backhandedly impose the "at time of filing" requirement. In the subjective evaluation of widely variable evidence such ***complete information*** is hard to come by. This is especially true in the case involving a new form. It is presumptuous of USCIS to believe that they got it right from the very beginning even considering the advance notice and comment period that the I-924 received.

> "Recognizing the concern expressed, however, **USCIS currently intends to limit the application of its discretionary authority to deny** an application or petition for lack of initial evidence without an RFE **to cases that** are filed with little more than a signature and the proper fee, and therefore are substantially incomplete or where the applicant or petitioner has **failed to demonstrate a basis for eligibility for the benefit** sought (e.g. an application for adjustment of status as an immediate relative), where no information or evidence of a covered relationship is provided. These **skeletal applications or applications that are filed alleging eligibility for a benefit based upon having filed a separate benefit application** which has since been denied or of which USCIS has no record, clearly do not establish eligibility. DHS wishes to make clear that an applicant or petitioner is responsible for demonstrating eligibility for the benefit sought and that clearly deficient applications or petitions will not be permitted. As with RFEs, USCIS intends to issue additional internal guidance through policy memoranda, including a stipulated timeframe for responding to an RFE based on missing initial evidence. In such a case, even within the context of continuing an opportunity to respond to an RFE, giving a second opportunity to provide evidence need not result in deferring case processing for a full twelve weeks." 72 FR at 19102-19103

An I-526 that is prematurely filed based on a pending I-924 is an example of what should be denied outright but the I-924 is not similarly situated because it does not have a priority date. The only concrete prerequisite to filing is to *actually exist as* **the entity that applies**[3], i.e., incorporated or organized as a legally recognized company or partnership or if a government agency or public-private cooperative that it is authorized to pursue Regional Center Designation. Even that basic requirement is not spelled out in the regulations. It is spelled out in the form instructions that the "form may be filed by an individual on behalf of a State or local government agency, partnership, or any other business *entity*" but is drawn from the non-precedent AAO Decision footnoted above.

The requirement to "establish eligibility at time of filing" has statutory roots in INA §§ 201 and 203 concerning the allocation of visas based on the various family and employment based preference categories. The basis for the form I-924 and the Regional Center Designation has no such statutory counterpart that would force the establishment of "eligibility at time of filing".

INA § 203 [8 U.S.C. 1153] ALLOCATION OF IMMIGRANT VISAS

> (b) Preference Allocation for Employment-Based Immigrants. - Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as follows:

INA § 201 [8 U.S.C. 1151] WORLDWIDE LEVEL OF IMMIGRATION

> (d) Worldwide level of employment-based immigrants
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> (1) The worldwide level of employment-based immigrants under this subsection for a fiscal year is equal to-
>
> (A) 140,000 plus
>
> (B) the number computed under paragraph (2).
>
> (2) (A) The number computer under this paragraph for fiscal year 1992 is zero.
>
> (B) The number computed under this paragraph for fiscal year 1993 is the difference (if any) between the worldwide level established under paragraph (1) for the previous fiscal year and the number of visas issued under section 203(b) during that fiscal year.
>
> (C) The number computed under this paragraph for a subsequent fiscal year is the difference (if any) between the maximum number of visas which may be issued under

[3] The regulation at 8 C.F.R. § 204.6(j) notes that additional evidence other than that specified in the regulations may be required. Clearly, only an entity that exists can be designated as a regional center. Thus, it is reasonable to require evidence of the proposed regional center's existence. From a non-precedent AAO Decision at: http://www.uscis.gov/err/K1%20-%20Request%20for%20Participation%20as%20Regional%20Center/Decisions_Issued_in_2008/Nov182008_01K1610.pdf at page 5.

> section 203(a) (relating to family-sponsored immigrants) during the previous fiscal year and the number of visas issued under that section during that year.

From the USCIS Policy Memo of January 11, 2006, updating the Adjudicator's Field Manual in accordance with *Matter of Chawathe* when it was a USCIS Adopted Decision. That slightly edited AAO Decision became Precedent on October 20, 2010. *See* 25 I&N Dec. 369 (AAO, 2010).

> "The burden is on the petitioner to establish that he or she is eligible for the benefit sought *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). This means that if an alien seeking a benefit has not shown eligibility, the application should be denied. The government is not called upon to make any showing of ineligibility until the alien has first shown that he is eligible. You may contrast this in your mind with a criminal case or with a removal hearing in which the government must first prove its case.
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> Once an applicant has met his or her initial burden of proof, he or she can be said to have made a "prima facie case." This means that the applicant has come forward with the facts and evidence which show that, at a bare minimum, and without any further inquiry, he or she has initial eligibility for the benefit sought. This does not mean that your inquiry is over. An alien may have established initial eligibility, but it is up to you to determine if there are any discretionary reasons why an application should be denied, or if there are any facts in the record (including facts developed during the course of the adjudicative proceedings, such as during an interview) which would make the applicant ineligible for the benefit. If such adverse factors do exist, it is again the applicant's burden to overcome these factors."

The last prong in the holding of *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988) is:

> (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 (excerpt below) relates to a spousal petition where the district director labeled it a sham marriage in denying the first I-130 and then denied the second I-130 and in doing so, committed procedural errors. The first error was failing to put the petitioner on notice of deficiency of evidence with regard to the second I-130. The second error was failing to consider and or address the additional evidence that was submitted with the second I-130 in the denial notice. As a side matter, the appeal was accompanied by further evidence. Only because of the procedural errors was the case remanded for consideration of the evidence by the director in the first instance. The BIA would not itself consider the new evidence on appeal.

> "Where a visa petition is denied based on a deficiency of proof, the petitioner was not put on notice of the deficiency and given a reasonable opportunity to address it before the denial, and the petitioner proffers additional evidence addressing the deficiency with the appeal, then in the ordinary course we will remand the record to allow the district or

> Regional Service Center director to consider and address the new evidence. A petitioner may be put on notice of evidentiary requirements by various 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. **Where, however, the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.** See Matter of Obaigbena , 19 I&N Dec. 533 (BIA 1988). **In such a case, if the petitioner desires further consideration, he or she must file a new visa petition.**
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> The district director first pointed out the deficiencies of proof with respect to the second visa petition when he denied that petition, and he suggested thereafter that the petitioner submit new evidence. We note also that the district director was in error in stating that the petitioner had submitted no evidence with the second visa petition. The affidavits of the petitioner's children were evidence, albeit of weak probative value.
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> Accordingly, we shall remand this matter to the district director so that he may consider the evidence submitted on appeal, bearing in mind the petitioner's heavy burden of proof."

In *Soriano,* the petitioner was a USC and as such the beneficiary's immigrant petition was legally "immediately available" so, it was only a rigid procedural stance that was being thrown up. It is unclear if such a stance would have stood up to judicial review in that case. That prospect will have to be tested in some other case because the petition in *Soriano* was remanded. The basic principle espoused does have a solid foothold and is fully applicable to preference visa petitions as they are tied to a filing date as a priority date. This stance was previously taken in *Katigbak* which **did** involve a preference petition.

From a non-precedent AAO Decision found at: http://www.uscis.gov/err/K1%20-%20Request%20for%20Participation%20as%20Regional%20Center/Decisions_Issued_in_2009/Dec222009_02K1610.pdf

> "On certification counsel asserts that only a general proposal is required at the regional center application stage and that U.S. Citizenship and Immigration Services (USCIS) has approved other regional centers with several proposed areas of investment. Regardless counsel states that the applicant has agreed to narrow its initial focus to two projects with the understanding that future projects could be the subject of applications for amendments to the regional center approval. Counsel also questions why the original economic analysis for two sample projects was found lacking. The applicant submits a business plan for the regional center, an updated economic analysis, materials about the proposed development projects and additional evidence regarding the source of the funds used to start up the regional center.

> For the reasons discussed below, while we withdraw the director's concern that the original regional center area was not contiguous, **the materials submitted on certification should have been submitted in response to the director's request for additional evidence and need not be considered on certification**. *at 2.*
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> That said, the matter was certified to the AAO pursuant to 8 C.F.R. § 103.4 for guidance on the issues before the director. **Thus, in the interest of providing such guidance, we will address the evidence submitted on certification. Even considering this evidence, however, there are numerous deficiencies that would preclude approval of the application.** *We note these deficiencies below as they would need to be resolved should the applicant use this evidence to support a* ***new application****……..*" *at 3.*

The AAO stated stance of refusing to consider evidence submitted on appeal or certification may have been harmless error under the circumstances as they existed at the time of *that* decision but would that reason stand up to judicial review under the subsequent procedural changes? At that time, there was no form or fee and very little guidance on how to apply for a Regional Center and precious little formal guidance on how to adjudicate that request. Considering that the filing fee for a form *I-924, Application For Regional Center Under the Immigrant Investor Pilot Program*, is $6,230.00 and a form *I-290B, Notice of Appeal or Motion*, costs only $630.00. That is a difference of $5,600.00. It is over nine (9) times as expensive to file a new I-924 as it is to file an I-290B just to submit further evidence and perfect an application that has already been poured over by USCIS Adjudicators and AAO Appeals Officers. Such a requirement could be shown to be "arbitrary, capricious, an abuse of discretion,…" or "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."[4]

> *(cont'd)*
> "The AAO maintains plenary power to review each matter on a *de novo* basis. 5 U.S.C. § 557(b) ("'On appeal from *or review of* the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v.US. Dept. of Transp., NTSB,* 925 F.2d 1 147, 1 149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)." *at 3.*

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[4] 5 USC § 706 Scope of review:
To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.
The reviewing court shall--
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

By what notice or rule does the AAO decline to perform a *full de novo review* of an application that is not tied to the filing date as a priority date and which has no statutory requirement to fully demonstrate eligibility at time of filing?

The I-924 is a new USCIS form as of November 23, 2010. The prior method for requesting and obtaining Regional Center Designation was the submission of a "Proposal". Before the I-924, an entity seeking Designation as a Regional Center submitted a Proposal, but in business, there is normally a Request for Proposal (RFP) out there to work with. INS and USCIS had no RFP, instead, the applicant had to rely on 8 CFR § 204.6(m)(3)(i-v), as did the adjudicator.

> **Proposal:** A formal description of the creation, modification or termination of a contract. A proposal may serve as the blueprint for a future agreement and may be accepted or rejected by the entity or entities that receive it.
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> Read more: http://www.investorwords.com/3905/proposal.html#ixzz1EjD2xFRJ
> *****
> **proposal** (Report), *noun* analysis, appraisal, commentary, critical analysis, examination, in-depth analysis, plan, summary, writing
>
> **proposal** (Suggestion), *noun* design, draft, idea, measure, motion, offer, overture, plan, presentation, proffer, proposition, recommendation, scheme, submission, suggestion, tender, thought
>
> http://legal-dictionary.thefreedictionary.com/proposal
>
> *****
> A **request for proposal** (**RFP**) is an early stage in a procurement process, issuing an invitation for suppliers, often through a bidding process, to submit a proposal on a specific commodity or service. The RFP process brings structure to the procurement decision and allows the risks and benefits to be identified clearly upfront.
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> ***The RFP may dictate to varying degrees the exact structure and format of the supplier's response. Effective RFPs typically reflect the strategy and short/long-term business objectives, providing detailed insight upon which suppliers will be able to offer a matching perspective.[Emphasis added.]***
>
> http://en.wikipedia.org/wiki/Request_for_proposal

USCIS did not provide a sufficient description of what would be required in the Regional Center Proposal. The form I-924 is now available but is still in its infancy and subject to modification as are the regulations. Being too rigid from the outset is arbitrary and capricious and to be avoided.

The former "Proposal for Designation as a Regional Center" consisted primarily of a Business Plan and an Economic Analysis or Model. AAO did offer guidance on Business Plans but it was in the context of the I-526, not the Regional Center Proposal or the non-existent I-924.

In *Matter of Ho*, 22 I&N Dec. 206 (BIA 1998)[5], the last part of the holding says:

> (5) In order to demonstrate that the new commercial enterprise will create not fewer than 10 full-time positions, the petitioner must either provide evidence that the new commercial enterprise has created such positions or furnish a comprehensive, detailed, and credible business plan demonstrating the need for the positions and the schedule for hiring the employees.

Ho, *at 213*, goes on to clarify that:

> "A **comprehensive** business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible."

The justification for the comprehensive business plan is explained in this way:

> "Certainly no astute investor would place half a million or a million dollars into a business that he had not thoroughly researched. Creating a comprehensive business plan as described above is normal practice for any businessman seeking to operate a viable business. Without knowing whether a business is feasible and has the potential for long-term survival, neither the petitioner nor the Service can reasonably conclude that it will create permanent, full-time employment. It is not too onerous to ask a petitioner who has not yet met the employment-creation requirement to submit to the Service a real business plan. Other administrative agencies, such as the Small Business Administration, and private financial institutions routinely require the submission of detailed business plans before extending loans to businesses. Permanent resident status is no less significant a matter than a loan." *at 213.*

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[5] In 1998, the AAO through the BIA, issued four EB-5 Precedent Decisions, but they are for the Immigrant Investors, Not Regional Centers.
Matter of Ho http://www.justice.gov/eoir/vll/intdec/vol22/3362.pdf
Matter of Hsuing http://www.justice.gov/eoir/vll/intdec/vol22/3361.pdf
Matter of Izummi http://www.justice.gov/eoir/vll/intdec/vol22/3360.pdf For the I-924, the most pertinent part of the 15 part holding is number "(9) The Service does not pre-adjudicate immigrant-investor petitions; each petition must be adjudicated on its own merits." However, the AAO inappropriately applies number "(3) A petitioner may not make material changes to his petition in an effort to make a deficient petition conform to Service requirements."
Matter of Soffici http://www.justice.gov/eoir/vll/intdec/vol22/3359.pdf

In *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988), it was held that:

> (1) A petitioner must be afforded a reasonable opportunity to rebut the derogatory evidence cited in a notice of intention to deny his visa petition and to present evidence in his behalf before the district director's decision is rendered.
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> (2) Reasonable and timely requests for an extension of time to submit a rebuttal to the notice of intention to deny a visa petition should be dealt with by the district director in a reasonable and fair manner, particularly when a petition has been pending for a prolonged period or where the notice of intention to deny contains extensive investigative findings or factual allegations.
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> (3) To be considered "reasonable," a request for an extension of time to submit a rebuttal must state with specificity the reasons for the request and be limited to a finite period, and it must not be for the purpose of obtaining documents which should have initially been submitted with the petition by regulation.
>
> (4) Where a petitioner fails to timely and substantively respond to the notice of intention to deny or to make a reasonable request for an extension, **the Board of Immigration Appeals will not consider any evidence first proffered on appeal as its review is limited to the record of proceeding before the district director; for further consideration, a new visa petition must be filed**.

The fourth prong above may be appropriate in certain circumstances, especially when the eligibility at time of filing is applicable. Overall, competent filings should be encouraged, but when the matter involved in the adjudication is highly complex, some leeway is due as noted in the third prong just above it in stressing "reasonable" requests for time to submit evidence. The non-specific regulations that generally apply to appeals tend to be lenient and written in the spirit of giving the applicant the *benefit of the doubt* and other implementing regulations generally require most benefits adjudications to be satisfied on the *preponderance of the evidence* standard. Harsh rigidity in enforcement of just a very few narrowly written extremely strict regulations and wielding them like the *Sword of Damocles*[6] could be seen as improper by a reviewing court. The BIA is in a different forum than AAO. The BIA is the appellate body from an **adversarial** administrative proceeding which much more resembles a criminal trial while the AAO is the appellate body from an **inquisitorial** administrative paper-based and faceless adjudication. The BIA and AAO are qualitatively different in nature. Since March 1, 2003, the AAO should have been forming a new self identity in accordance with its new home in a customer service oriented agency. USCIS is charged with the fair and impartial evaluation of eligibility for benefits under the Immigration and Nationality Act. AAO needs to re-evaluate its place in the grand scheme of the current reality as a part of the U.S. Citizenship and Immigration Services.

[6] The Sword of Damocles is frequently used in allusion to this tale, epitomizing the imminent and ever-present peril faced by those in positions of power. **More generally, it is used to denote the sense of foreboding engendered by a precarious situation**, especially one in which the onset of tragedy is restrained only by a delicate trigger or chance. http://en.wikipedia.org/wiki/Damocles

8 CFR § 103.2 Applications, petitions, and other documents.

(b) *Evidence and processing*

(8) *Request for Evidence; Notice of Intent to Deny* —(i) *Evidence of eligibility or ineligibility.* If the evidence submitted with the application or petition establishes eligibility, USCIS will approve the application or petition, except that in any case in which the applicable statute or regulation makes the approval of a petition or application a matter entrusted to USCIS discretion, USCIS will approve the petition or application only if the evidence of record establishes both eligibility and that the petitioner or applicant warrants a favorable exercise of discretion. If the record evidence establishes ineligibility, the application or petition will be denied on that basis.

(12) *Effect where evidence submitted in response to a request does not establish eligibility at the time of filing.* An application or petition shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the application or petition was filed. An application or petition shall be denied where any application or petition upon which it was based was filed subsequently.

(14) *Effect of request for decision.* Where an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall be issued based on the record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition. Failure to appear for required fingerprinting or for a required interview, or to give required testimony, shall result in the denial of the related application or petition.

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

(a) *Denials and appeals*

(1) *General*

(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. **[In the grand scheme of these regulations, it seems that only *Meritless Appeals* (whether or not frivolous) get *Summarily Dismissed* because even if untimely, an appeal that shows Merit must be treated as a Motion and decided on the merits.]**

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

(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*

(*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.

(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. **[This seems to only apply to *Meritless Appeals* which are then *Summarily Dismissed*.]**

(*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.