U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

AUG 15 2000

File: [redacted] Office: Nebraska Service Center Date:

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(4)

Public Copy

IN BEHALF OF PETITIONER:

[redacted]

prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Nebraska Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on motion to reconsider and reopen. The motion will be dismissed.

The petitioner is a church. It seeks classification of the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(4), to serve as a teacher of religious studies and historian. The director denied the petition determining that the petitioner had failed to establish the beneficiary's two years of continuous religious work experience. The director also found that the petitioner had failed to establish its ability to pay the proffered wage.

On appeal, counsel argued that the beneficiary was eligible for the benefit sought.

The Associate Commissioner dismissed the appeal, affirming the decision of the director. The Associate Commissioner also found that the petitioner had failed to establish that the prospective occupation was a religious occupation.

On motion, counsel submits photocopied bank statements and checks. Counsel argues that the beneficiary's studies should be considered to be qualifying work experience.

8 C.F.R. 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Based on the plain meaning of "new," a new fact is held to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

When used in the context of a motion to reopen in analogous legal disciplines, the terminology "new facts" or "new evidence" has been determined to be evidence that was previously unavailable during the prior proceedings. In removal hearings and other proceedings before the Board of Immigration Appeals, "[a] motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the

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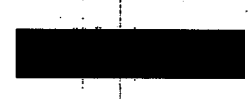
[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984) (emphasis in original).



former hearing . . . ." 8 C.F.R. 3.2 (1999). In examining the authority of the Attorney General to deny a motion to reopen in deportation proceedings, the Supreme Court has found that the appropriate analogy in criminal procedure would be a motion for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323 (1992); INS v. Abudu, 485 U.S. 94, 100 (1988). In federal criminal proceedings, a motion for a new trial based on newly discovered evidence "'may not be granted unless . . . the facts discovered are of such nature that they will probably change the result if a new trial is granted, . . . they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier, and . . . they are not merely cumulative or impeaching.'" Matter of Coelho, 20 I&N Dec. 464, 472 n.4 (BIA 1992)(quoting Taylor v. Illinois, 484 U.S. 400, 414 n.18 (1988)).

On motion, counsel has submitted photocopied bank statements and checks. A review of this evidence that counsel submits on motion reveals no fact that could be considered "new" under 8 C.F.R. 103.5(a)(2). All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. For this reason, the motion may not be granted. Furthermore, the evidence submitted on motion does not establish the beneficiary's eligibility for the benefit sought.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Doherty, *supra* at 323 (citing INS v. Abudu, 485 U.S. at 107-108). A party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, *supra* at 110.

Further, 8 C.F.R. 103.5(a)(3) requires that a motion for reconsideration state the reasons for reconsideration and be supported by any pertinent precedent decisions. A motion to reconsider must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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

The arguments made by counsel in his motion to reconsider do not have any bearing on the instant case. There is no evidence that the beneficiary was even a student during the two-year period prior to filing, much less a student furthering a religious vocation.

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

ORDER: The motion is dismissed.