

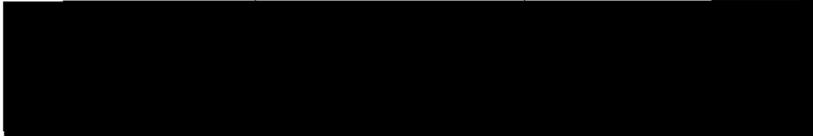


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U.S. Department of Justice

Immigration and Naturalization Service

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



Public Copy

AUG 14 2001

File: [Redacted] Office: Vermont Service Center Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Petition for 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), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. 1101(a)(27)(C)

IN BEHALF OF PETITIONER: [Redacted]

Identifying data deleted to 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

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Vermont Service Center. An appeal was dismissed by the Associate Commissioner for Examinations. The matter is again before the Associate Commissioner on motion to reopen/reconsider. The motion will be rejected.

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), in order to employ her as a lay director of the church's educational and music programs.

The Form I-360 petition for special immigrant classification was filed on May 9, 1997. The center director denied the petition determining that the proposed position was not a qualifying religious occupation for the purpose of special immigrant classification.

The petitioner filed a timely appeal. On October 27, 1998, the Associate Commissioner determined that the petitioner failed to overcome the grounds for denial and dismissed the appeal. It was also found that the petitioner failed to establish the ability to pay the proffered wage pursuant to 8 C.F.R. 204.5(g)(2) or to demonstrate that the beneficiary had had the requisite two years of experience in a religious occupation pursuant to 8 C.F.R. 204.5(m)(1).

The record shows that the petitioner was not represented by counsel on appeal. The decision was mailed to the petitioner at the address provided.

Counsel now submits a properly filed Form G-28 Notice of Entry and submits a motion to reopen/reconsider with fee. Counsel explained that the petitioner claims that it did not receive the decision of October 27, 1998 and that it obtained a copy of the decision through the Freedom of Information Act (FOIA) filed by another attorney.

According to 8 C.F.R. 103.5(a)(1)(i), any motion to reopen or reconsider must be filed by the petitioner within 30 days of the decision that the motion seeks to reopen or reconsider. Failure to file within the allotted time may be excused, in the discretion of the Service, where it is demonstrated that the delay was reasonable and beyond the control of the petitioner.

Counsel furnished a copy of a notice from the center director, issued to a separate representative, acknowledging that the FOIA request was received on October 7, 1999 and that a copy of the record was released on November 10, 1999. The motion to reopen was filed on May 15, 2000.

The motion was untimely filed. The record does not demonstrate that the failure to timely file the motion was reasonable. The

petitioner had ample time from receipt of the decision issued to the petitioner, and/or from receipt of the FOIA issued to previous counsel, to submit a motion. The delay of approximately six months from the release of the FOIA is not a reasonable delay beyond the control of the petitioner. Therefore, the motion will be rejected.

Administrative notice is made that counsel submitted new evidence on motion to support the original petition that was filed on May 9, 1997. According to 8 C.F.R. 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. In order to prevail on a motion to reopen, the petitioner must establish that the new facts and/or evidence presented were unavailable at the time the prior decision was issued. Id.

Even if the motion was considered timely filed, the petitioner would not prevail on motion. There is no evidence that the documentation now submitted was unavailable at the time of the original proceeding. The petitioner essentially seeks a readjudication of the underlying petition and a waiver of the thirty-day appeal period. There is no provision for such an adjudication on a motion to reopen or a motion to reconsider.

The petitioner is free to file a new petition without prejudice.

ORDER: The motion is rejected.