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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

C1

[redacted]

Date: AUG 1 3 2012 Office: CALIFORNIA SERVICE CENTER [redacted]

IN RE: [redacted]

PETITION: Immigrant 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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) remanded the matter for consideration under new regulations. The director again denied the petition and, following the AAO's instructions, certified the decision to the AAO for review. The AAO affirmed the director's decision on December 14, 2011. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed.

The petitioner is a Buddhist temple. 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 perform services as a preacher. The AAO affirmed the director's decision that the petitioner had not established that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the petition.

Counsel asserts on motion that "the AAO errs where its application of 8 C.F.R. 204.5 directly conflicts with the intent behind INA § 245(i)." Counsel submits a brief in support of the motion.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that may not have been addressed by the party. A motion to reconsider is not a process by which a party may submit, for example, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

On motion, counsel renews the issues raised on appeal, arguing that:

> The only regulation that defines "lawful immigration status" for a nonimmigrant makes no mention of unauthorized employment, but rather, is limited only to status that "has not expired." See 8 C.F.R. 245.1(d)(1)(ii). Based upon this statutory construction, it is clear that unauthorized employment is a violation separate from, and different than, a failure to maintain "lawful status."

> Additionally, on or about April 27, 2001, [redacted] filed a labor certification application on behalf of Beneficiary. The application was approved on or about February 13, 2004. Pursuant to Section 245(i) of the INA, a qualifying alien with an approved immigrant visa petition is eligible to adjust status and become a lawful permanent resident. Thus the Service's retroactive application of 8 C.F.R. 204.5(m)(11) frustrates the purpose behind Section 245(i) of the INA where it prevents an eligible individual from obtaining the underlying immigrant visa petition necessary for adjustment of status. INA § 245(i) explicitly provides an exception for individuals who have failed to maintain lawful status or have engaged in unlawful employment in the U.S. Thus, the AAO errs where its application of 8 C.F.R. 204.5 directly conflicts with the intent behind INA § 245(i).

Counsel continues to confuse the provisions of section 245(i) of the Act, 8 U.S.C. § 1255(i), which apply to the adjustment stage, with the provisions of section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which are applicable to the petition stage of the immigration process. Section 245(i) of the Act provides:

> (i) Adjustment in status of certain aliens physically present in United States
>
> (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States –
>
> (A) who –
>
> (i) entered the United States without inspection; or
>
> (ii) is within one of the classes enumerated in subsection (c) of this section;
>
> (B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of –
>
> (i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or
>
> (ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and
>
> (C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

> may apply to the Attorney General [now the Secretary of Homeland Security] for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

Section 245(i) of the Act permits certain aliens to adjust status in the United States, despite the otherwise disqualifying unlawful presence. The present proceeding is not an adjustment proceeding. Section 245(i)(2)(A) of the Act requires that an alien seeking section 245(i) relief must be "eligible to receive an immigrant visa;" that is, the alien must be the beneficiary of an approved immigrant visa petition. The law does not require USCIS to approve every petition filed on behalf of aliens who seek section 245(i) relief. Rather, such relief presupposes an already-approved petition. Without an approved petition, the beneficiary has no basis for adjustment of status, and therefore section 245(i) relief never comes into play. Thus, even if section 245(i) relief did apply to the adjudication of a Form I-360 petition, there is no evidence that the beneficiary's approved labor certification qualifies him for such relief. As noted in the AAO's previous decision, the beneficiary did not accept the position for which the labor certification was approved.

Counsel, again citing to the regulations governing adjustment proceedings, asserts that there is a "statutory construction" that permits certain aliens to engage in unauthorized employment and still be eligible for immigration benefits regardless of the visa classification for which he or she may be applying. Counsel cites to no precedent decisions to support this argument. The AAO notes that section 245(i) of the Act limits relief only to those who fall within the provisions of section 245(a) and (c) of the Act. Thus, if there is a statutory construction as counsel alleges, the beneficiary would not fall within its parameters.

The petitioner failed to support its motion with any new legal argument or precedent decisions to establish that the AAO decision was based on an incorrect application of law or USCIS policy. The motion to reconsider will therefore be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed. The AAO's decision of December 14, 2011 is affirmed and the petition remained denied.