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

(b)(6)

U.S. Citizenship and Immigration Services

Date: APR 0 9 2013 Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The petitioner filed a subsequent appeal. The Administrative Appeals Office (AAO) rejected, and in the alternative, dismissed the appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a church. It seeks to classify 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 pastor. The director determined that the evidence did not establish that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition. In its July 26, 2012 decision, the AAO determined that the petition was not properly filed as the petition was not signed. The AAO therefore found that there was no valid proceeding upon which to base an appeal and accordingly rejected the appeal. In the alternative, the AAO dismissed the appeal for failure to establish eligibility for the benefit sought. The AAO agreed with the director's determination that the evidence was insufficient to demonstrate two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition, and additionally found the evidence insufficient to establish the prospective employer's ability to compensate the beneficiary.

On motion, the petitioner submits two letters from the petitioning church, copies of Forms W-2 from 2010 and 2011, photocopies of checks addressed to the beneficiary, copies of the petitioner's monthly "Revenue-Expense" statements from June to October of 2010, a letter from [redacted] signatures and comments in support of the beneficiary from members of the petitioning church, a newly completed and signed Form I-360 petition, and photographs.

In rejecting the appeal, the AAO noted that the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.2(a)(2) states: "An applicant or petitioner must sign his or her application or petition." That same regulation generally requires a handwritten signature unless the petition is filed electronically. The regulation at 8 C.F.R. § 204.5(a)(1) requires that employment-based immigrant petitions must be accepted for processing under the provisions of 8 C.F.R. § 103. In alternately dismissing the appeal, the AAO thoroughly and specifically discussed the petitioner's evidence and found that, even if the petition had been properly filed, the petitioner failed to establish eligibility for the benefit sought.

The AAO agreed with the director's finding that the beneficiary lacked lawful immigration status and employment authorization during a portion of the two-year qualifying period immediately preceding the filing of the petition. The petitioner argued on appeal that, although the beneficiary failed to maintain lawful status as required by the regulations, such requirement is "inconsistent with Congress' intent under the Immigration and Nationality Act" and "exceeds the Department of Homeland Security's Statutory Authority." The AAO explained its reasoning for finding this argument unpersuasive. The AAO additionally found that the petitioner had failed to submit documentary evidence that the beneficiary received compensation from the petitioner during his period of employment there as required by the regulation at 8 C.F.R. § 204.5(m)(11).

The AAO also found that the petitioner failed to submit Internal Revenue Service (IRS) documentation of its ability to compensate the beneficiary or an explanation for its absence along with comparable verifiable documentation as required by 8 C.F.R. § 204.5(m)(10).

On motion, the petitioner asserts in a letter that the lack of a signature on the Form I-360 petition was unintentional. The petitioner submits a new, signed Form I-360 petition. The AAO notes that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, the regulations requiring a signature, cited above, provide no exception for unintentional error.

Regarding the beneficiary's qualifying experience, the petitioner asserts that the beneficiary has worked continuously as a minister for more than the two years immediately preceding the filing of the petition. The petitioner submits copies of paychecks and "Revenue-Expense" statements as evidence of the beneficiary's compensation from the petitioner during his employment at the petitioning church. With regard to the beneficiary's lack of lawful status for a portion of the qualifying period, the petitioner does not argue that the beneficiary maintained lawful status, but instead provides an explanation for the unintentional gap in the beneficiary's immigration status and employment authorization. The petitioner additionally argues that the beneficiary qualifies for protection under section 245(k) of the Act. Although section § 245(k) of the Act does enable a person who is adjusting status in an employment-based category to adjust even if he or she has been our of status or worked without authorization for less than 180 days, at issue for this proceeding is whether the beneficiary is eligible for approval of the special immigrant petition. Here, the beneficiary has no approved petition, is not eligible to receive an immigrant visa, and therefore is not eligible to adjust status. The petitioner must establish that the beneficiary meets all of the requirements for 8 C.F.R. § 204.5(m), which, as cited above, requires two years of lawful continuous employment.

The AAO additionally notes that the regulation at 8 C.F.R. § 204.5(m)(4) requires that the alien has been working as a minister or in a qualifying religious occupation or vocation during the qualifying period, and the regulation at 8 C.F.R. § 204.5(m)(5) defines "minister" as one who "[w]orks solely as a minister." The petitioner has consistently indicated that the beneficiary was working as a minister during the qualifying period, and the Form I-360 petition stated, in Part 2. Classification Requested, that the beneficiary's position is ministerial. However, in its July 26, 2012 decision, the AAO noted that the beneficiary's Social Security Administration record listed earnings from self-employment during the qualifying period in addition to his earnings from , his authorized R-1 employer. The petitioner did not submit evidence to identify the source of these additional earnings. Accordingly, the beneficiary's purported work as a minister cannot be considered qualifying experience as the petitioner has not established that he was not working "solely as a minister" during the qualifying period as required by the regulations. *See Matter of Faith Assembly Church,* 19 I&N 391, 393 (Comm'r. 1986). The Ninth Circuit Court of Appeals, whose jurisdiction includes the California Service Center, has upheld the AAO's interpretation of the two-year experience requirement. *See Hawaii Saeronam Presbyterian Church v. Ziglar,* 243 Fed. Appx. 224, 226 (9th Cir. 2007).

As evidence of its ability to compensate the beneficiary, on motion the petitioner submits copies of the beneficiary's Forms W-2 from the petitioner for the years 2010 and 2011.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). Much of the evidence submitted on motion, including the 2010 Form W-2, was previously available and could have been provided on appeal. As the Form I-360 petition was filed on October 8, 2010, the 2011 Form W-2 submitted on motion is not relevant to the petitioner's ability to compensate the beneficiary as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. at 49. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The petitioner's motion is not an opportunity for the petitioner to correct its own defects in the record. The petitioner's arguments on motion are not new facts and the evidence submitted on motion is not "new" and, therefore will not be considered a proper basis for a motion to reopen.

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*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the petitioner has not met that burden. The motion to reopen will be dismissed.

In the motion to reconsider, the petitioner reiterates a prior argument, namely that the beneficiary has worked continuously as a minister for more than two years, and attempts to provide explanations for the lack of signature on the Form I-360 petition and for the beneficiary's lack of lawful status during a portion of the qualifying period. The petitioner additionally makes an argument, discussed above, regarding section 245(k) of the Act. 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).

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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).

A motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). 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. *Id.* at 60.

The motion to reconsider does not allege that the issues, as raised on appeal, involved the application of precedent to a novel situation, or that there is new precedent or a change in law that affects the AAO's prior decision. Instead, the petitioner generally reiterates prior arguments and makes new, unsupported arguments. As noted above, a motion to reconsider must include specific allegations as to how the AAO erred as a matter of fact or law in its prior decision, and it must be supported by pertinent legal authority. Because the petitioner has failed to raise such allegations of error in his motion to reconsider, the AAO will dismiss the motion to reconsider.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The motion to reopen and the motion to reconsider are dismissed, the decision of the AAO dated July 26, 2012, is affirmed, and the petition remains denied.