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

(b)(6)

Date: JUN 10 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 Administrative Appeals Office (AAO) dismissed a subsequent 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 Shul. 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 rabbi of safrut. The director found that the petitioner had not established that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition. The AAO, in its August 9, 2012 decision, agreed with the director's determination.

On motion, the petitioner submits a brief from counsel, copies of memoranda from United States Citizenship and Immigration Services (USCIS) regarding *Ruiz-Diaz v. United States of America*, No. C07-1881RSL (W.D. Wash. June 11, 2009), and copies of payment records from the to the beneficiary during the two years preceding the filing of the petition.

In the decision dismissing the petitioner's original appeal, the AAO specifically and thoroughly discussed the petitioner's evidence and determined that the petitioner had not established that the beneficiary had the requisite two years of continuous qualifying work experience. The petitioner submitted evidence that the beneficiary was employed by the throughout the two years qualifying period immediately preceding the filing of the petition on September 10, 2010, and that he additionally worked as a volunteer rabbi for various other organizations before and during the qualifying period. The beneficiary's R-1 nonimmigrant status expired on August 16, 2008 and, although he held an Employment Authorization Document (EAD) allowing him to work between November 2009 and March of 2010, the AAO found that the beneficiary lacked lawful immigration status and employment authorization for portions of the two-year qualifying period immediately preceding the filing of the petition on September 1, 2010. The AAO noted that any work performed without lawful status and employment authorization is not considered qualifying experience under the regulation at 8 C.F.R. § 204.5(m)(4) and (11). The AAO also found that the beneficiary's volunteer work would not be considered qualifying experience. Additionally, the AAO stated that any work performed for an organization other than while the beneficiary was in R-1 status would constitute unauthorized employment and a failure to maintain lawful status as of the date the work began.

On motion, the petitioner argues that the AAO's finding of unauthorized employment "fails to take into account the case of *Ruiz-Diaz v. United States of America*, No. C07-1881RSL (W.D. Wash. June 11, 2009)." Counsel refers to a case in which the district court invalidated the USCIS regulation at 8 C.F.R. § 245.2(a)(2)(i)(B), which barred religious workers from concurrently filing the Form I-485, Application to Register Permanent Resident or Adjust Status, with the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. On June 11, 2009, the court ordered that the accrual of unlawful presence, unlawful status, and unauthorized employment time against the beneficiaries of pending petitions for special immigrant visas be stayed for 90 days to allow time for

beneficiaries and their families to file adjustment of status applications and/or applications for employment authorization. The court specified that unlawful presence and unauthorized work would be tolled "[f]or purposes of 8 U.S.C. § 1255(c) and § 1182(a)(9)(B)." The former statutory passage relates to adjustment of status and the latter relates to unlawful presence in the context of inadmissibility. On August 20, 2010, the Ninth Circuit Court of Appeals reversed and remanded the district court's decision. *Ruiz-Diaz v. U.S.*, 618 F.3d 1055 (9th Cir. 2010). Nonetheless, in accordance with the district court's decision, USCIS implemented a policy tolling the accrual of unlawful status and unauthorized employment until September 9, 2009. Like the district court's ruling, the USCIS policy waives the accrual of unlawful presence in relation to adjustment of status applications. It does not waive or nullify the regulations at 8 C.F.R. § 204.5(m)(4) and (11), which require an alien's qualifying experience in the United States to have been authorized under United States immigration law. In this case, the beneficiary lacked employment authorization and lawful immigration status during portions of the two-year qualifying period immediately preceding the filing date of the petition.

The petitioner additionally argues on motion 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 out 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.

Finally, the petitioner argues that the AAO was incorrect in finding that the beneficiary's volunteer work constituted a violation of his R-1 status and a failure to maintain such status. As the beneficiary's R-1 status expired prior to the start of the two-year qualifying period, the AAO finds this issue immaterial to the question of whether the beneficiary possesses the requisite two years of qualifying experience.

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). All of the evidence submitted on motion was previously available and could have been provided on appeal. The petitioner's motion is not an opportunity for the petitioner to correct its own defects in the record. The petitioner's arguments on

[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).

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 performed religious work continuously for more than two years. The petitioner additionally argues, as discussed above, that the beneficiary qualifies for protection under the *Ruiz-Diaz* litigation and 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 Services 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 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 its 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 August 9, 2012, is affirmed, and the petition remains denied.