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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

Date: MAY 16 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 with the field office or service center that originally decided your case by filing a 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 and a subsequent motion to reopen and motion to reconsider. The matter is now again 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 synagogue. 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 cantor. The director determined that the petitioner had not established that it qualifies as a bona fide non-profit religious organization in the United States or a bona fide organization which is affiliated with the religious denomination and had not established how it intends to compensate the beneficiary. The director additionally determined that the petitioner had not established that the proffered position qualifies as a religious occupation and that the beneficiary has the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition. The AAO, in its June 20, 2012 dismissal, agreed with each of the director's determinations.

On July 20, 2012, the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision. The AAO dismissed the motions on December 19, 2012, finding that the petitioner failed to meet the requirements of a motion to reopen or reconsider. In dismissing the motion to reopen, the AAO found that the petitioner had not submitted any evidence relating to the beneficiary's eligibility for the benefit sought which could be considered "new" under 8 C.F.R. § 103.5(a)(2). Additionally, the AAO noted that the evidence submitted on motion "again fails to establish eligibility for the benefit sought as the evidence submitted fails to satisfy the evidentiary requirements which were thoroughly discussed in the AAO's June 20, 2012 dismissal." In dismissing the motion to reconsider, the AAO thoroughly discussed the petitioner's arguments and found that the petitioner had failed to establish that the director's decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, or that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, the AAO will only consider arguments and evidence relating to the grounds underlying the AAO's most recent decision. In order to establish grounds to reopen or reconsider the instant proceeding, the petitioner bears the burden of establishing that the AAO's December, 2012 dismissal for failure to meet the requirements of a motion to reopen or reconsider was itself in error.

In support of the instant motion to reopen and motion to reconsider, the petitioner submits a brief from counsel, an excerpt from the 8th Edition of the *Immigration Law Sourcebook* by [redacted], a copy of a deed indicating the petitioner's ownership of a property in [redacted] New York, a letter from a licensed real estate broker, and uncertified copies of the beneficiary's tax returns for the years 2008, 2009, and 2010.

The first ground for denial of the August 31, 2009 Form I-360 petition was the petitioner's failure to establish that it qualified as a bona fide non-profit religious organization in the United States. On appeal, the petitioner submitted a March 8, 2012 determination letter from the Internal Revenue Service (IRS) confirming that the petitioner is a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code. The AAO stated the following in its June 20, 2012 dismissal:

> At issue [on appeal] is whether the director erred in determining that the petitioner failed to establish that it was a tax-exempt organization. As previously indicated, at the time the petition was filed, the petitioner submitted no evidence of a currently valid determination letter from the IRS. In response to two Requests for Evidence, the petitioner again failed to submit qualifying documentation of its federal tax-exempt status. 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).
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> Although the petitioner did submit evidence regarding its 501(c)(3) status on appeal, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Based upon the petitioner's failure to submit required initial evidence and the noted inconsistencies between the Employer Identification Number (EIN) listed on the determination letter and the EIN listed by the petitioner on the Form I-360, the AAO found no error on the part of the director in determining that the petitioner failed to establish that it had a valid determination letter from the IRS at the time it filed the petition and therefore that the petitioner failed to establish that it qualified as a bona fide nonprofit religious organization at the time of filing.

In the instant filing, counsel for the petitioner argues that the AAO erred in refusing accept the determination letter on appeal, and was erroneous in its "reliance on the *Matter of Soriano* and *Matter of Obaigbena*." Counsel asserts that, in each of those cases, the Board of Immigration Appeals (BIA) refused to consider evidence when the petitioner had failed to respond to a request for evidence. Counsel argues that, in contrast, the petitioner in this case responded to the director's requests and made a "genuine effort" to comply with the requests. Counsel's argument, however, does not address the AAO's most recently issued decision but instead relates to the June 20, 2012 dismissal of the petitioner's appeal. The filing of a motion does not present a new opportunity as though the dismissal of the previous motion never existed, and the AAO will not, at this late date, entertain the petitioner's untimely arguments regarding the underlying decision

to dismiss the original appeal. Furthermore, the AAO does not find counsel's argument persuasive, as the petitioner was instructed in two separate Requests for Evidence to specifically provide a currently valid determination letter from the IRS confirming its organization is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code, but failed to provide such a letter on both occasions. The submission of the letter on appeal did not demonstrate any error on the part of the director; rather, it served to further demonstrate that the petitioner did not have the required initial documentation at the time of filing.

Counsel also argues in the instant filing that the IRS determination letter should have been considered "new" evidence for the purpose of serving as a proper basis for the petitioner's July 20, 2012 motion to reopen. Counsel asserts that "the petitioner belatedly became aware of the USCIS requirement that it have its own 501(c)(3) determination letter" and therefore did not apply for the letter until after filing the petition. Counsel asserts that the letter was therefore "previously unavailable and could not have been presented to the USCIS." As the determination letter was in fact previously submitted on appeal, it was not new evidence for the purpose of the July 20, 2012 motion to reopen.

Counsel's arguments in support of the instant motion are not new facts and the petitioner does not submit any additional evidence on this issue to serve as a basis for the instant motion to reopen. Further, as discussed above, the AAO is not persuaded by counsel's arguments on this issue in support of the instant motion to reconsider, and does not find that the petitioner has demonstrated error in the AAO's findings on this issue in its June 20, 2012 decision.

The second ground for the denial of the petition was the petitioner's failure to establish how it intends to compensate the beneficiary. In its June 20, 2012 decision dismissing the original appeal, the AAO found that, although counsel asserted on appeal that the beneficiary's position would be compensated in the future and that members of the congregation were willing to support the beneficiary, the petitioner had provided no documentary evidence in support of these assertions or in support of its ability or intent to compensate the beneficiary. The AAO specifically noted that the petitioner had not provided IRS documentation or comparable verifiable documentation relating to its ability to compensate the beneficiary as required under 8 C.F.R. § 204.5(m)(10). In support of its July 20, 2012 motion, the petitioner asserted that the evidence in the record was sufficient and additionally submitted a letter from the trustees of the petitioning congregation attesting to the financial soundness of the organization and the willingness of the trustees to personally pay the beneficiary's salary in the event that the petitioner is unable to pay. The petitioner also submitted unsigned, uncertified copies of the beneficiary's tax returns for the years 2008 and 2009. In its June 20, 2012 decision dismissing the motions, the AAO found that the evidence submitted on motion was not new, and that it failed to address the deficiencies specified in the previous decision to dismiss the appeal.

In the instant motion, counsel argues that "the AAO's erroneous utilization and reliance on [*Matter of Soriano* and *Matter of Obaigbena*] essentially and fundamentally eviscerated the petitioner and beneficiary's submission of new evidence and rebuttal documentation" in its July 20, 2012 motion to reopen. Although the AAO cited these cases in its refusal to consider the petitioner's IRS

determination letter on appeal, as discussed above, the AAO's finding that the petitioner failed to meet the requirements of a motion to reopen was not based on these cases. Instead, the AAO found that the petitioner's evidence was not new evidence under 8 C.F.R. § 103.5(a)(2) based on the plain meaning of "new," which indicates that the evidence was not available and could not have been discovered or presented in the previous proceeding. [1] The AAO's citation of *Matter of Soriano* in its discussion of the petitioner's failure to meet the requirements of a motion only related to its finding that the petitioner had been put on notice of the requirements for eligibility, as that case held that a petitioner may be put on notice of evidentiary requirements by regulations, written notice such as a request for additional documentation or a notice of intent to deny, or an oral request at an interview. Accordingly, the AAO is not persuaded by counsel's argument, and counsel does not cite any relevant authority to establish that the AAO erred in its analysis of what constitutes "new" evidence for the purpose of serving as a proper basis for a motion to reopen.

Regarding the petitioner's ability to compensate the beneficiary, counsel asserts that "the petitioner did supply information about the petitioner's board members who are willing to assume financial obligations of paying the beneficiary," and that the AAO erroneously rejected that evidence. Counsel does not argue or establish that the letter from the trustees, submitted for the first time on motion, was previously unavailable and could not have been presented previously. Accordingly, counsel has not established that the AAO was incorrect in finding that the letter was not new evidence under 8 C.F.R. § 103.5(a)(2). Further, the letter submitted on motion did not specify the beneficiary's intended salary, and the tax returns submitted on motion were uncertified. Therefore, the AAO found that the evidence submitted on motion failed to establish how the petitioner intends to compensate the beneficiary under the requirements of 8 C.F.R. § 204.5(m)(10). The petitioner has not demonstrated in the instant motion to reconsider that the AAO's determination on this issue was incorrect.

In support of the instant motion to reopen, the petitioner submits additional evidence on the issue of compensation including a deed showing its ownership of a property in Brooklyn, New York, and a letter from a licensed real estate broker estimating the value of the property at $750,000 to $800,000. The petitioner also submits signed but uncertified copies of the beneficiary's Form 1040 tax returns for the years 2008 to 2010 which include photocopies of Forms W-2 for those years, each listing compensation of $12,000 parsonage from the petitioner. The AAO notes that the photocopied Forms W-2 were not included on the corresponding pages of the previously submitted tax returns for 2008 and 2009. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The evidence submitted on this issue in support of the instant motion was previously available and could have been provided previously. Therefore, it will not be considered a proper basis for a motion to reopen. Additionally, although former counsel indicated on appeal that the

[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).

beneficiary's position would be salaried, the petitioner has still not provided any indication as to the amount of the intended salary. Further, as the submitted tax returns are again uncertified, the petitioner has not complied with the requirement under 8 C.F.R. § 204.5(m)(10) that it provide IRS documentation of its ability to compensate the beneficiary or an explanation of its absence.

The third basis for the denial of the petition was the petitioner's failure to establish that the proffered position qualifies as a religious occupation. The current regulations defining "religious worker" and "religious occupation" require the petitioner to submit evidence to establish, among other things, that the position is recognized as a religious occupation within the denomination and that the beneficiary is qualified for the position according to the denomination's standards. 8 C.F.R. § 204.5(m)(5). In dismissing the petitioner's original appeal, the AAO found that "although the beneficiary's duties are religious in nature, the petitioner has not established that the beneficiary will be employed in a religious occupation recognized as such by the denomination rather than acting as a volunteer leading the prayer service as a member of the community." The AAO noted that the only documentary evidence submitted regarding the denomination's recognition of the position of cantor as a religious occupation was a website printout about Judaism which indicated that many synagogues use volunteer cantors from within the congregation. While the document provided that "larger congregations usually hire a professional chazzan [cantor]," it went on to state that "[p]rofessional chazzans are ordained clergy" who have "both musical skills and training as a religious leader and educator." The AAO noted that the petitioner did not submit any documentary evidence beyond the assertions of counsel regarding the beneficiary's qualifications and therefore failed to establish that the beneficiary is a professional cantor according to the description contained in the petitioner's own evidence.

In the July 20, 2012 filing, the petitioner resubmitted a copy of the website printout about Judaism, argued that the proffered position meets the requirements of a religious occupation, and repeated unsupported assertions regarding the beneficiary's training and qualifications.

In the instant filing, counsel for the petitioner again argues that the petitioner has established that the proffered position qualifies as a religious occupation. In support of this assertion, counsel notes that the previous regulations for special immigrant religious workers included "cantor" as one of the listed examples of religious occupations, and that "Immigration Sourcebooks recognized as authoritative" concur that a cantor is a religious occupation in the Jewish religion. Counsel cites to *Perez v. Ashcroft,* 236 F.Supp.2d 899 (N.D. Ill. 2002), a case that precedes the current regulations, and asserts that the AAO erroneously found "that the profession of Cantor is not to be considered a religious occupation in the Jewish religion," and that a non-minister religious worker must have "specified prescribed religious training." The AAO disagrees with counsel's characterization of its findings. In its June 20, 2012 decision, the AAO stated:

> The AAO does not find that a cantor position could never meet the eligibility requirements of a religious occupation, only that the petitioner has not demonstrated that the beneficiary's role in its organization qualifies as a religious occupation.

Unlike the previous regulations, the current regulations do not include a list of examples of qualifying religious occupations. In the preamble to the final rule, USCIS noted that it had removed the examples from the definition, instead requiring the petitioner to "submit evidence identifying religious occupations that are specific to that denomination." *See* 73 Fed. Reg. 72276, 72279 (November 26, 2008). As mentioned above, the evidence submitted by the petitioner indicated that professional cantors are ordained and possess "training as a religious leader and educator." Contrary to counsel's assertion, the AAO did not set forth its own finding regarding the requirements for the proffered position. Rather, the AAO found that the petitioner failed to submit evidence that the beneficiary met the qualifications described in the petitioner's submitted evidence.

Regarding counsel's assertion on motion that the regulations only require that the petitioner "attest" that the beneficiary is qualified for the proffered position, the AAO disagrees with this interpretation. While the petitioner is required to attest to the beneficiary's qualifications under 8 C.F.R. § 204.5(m)(7)(ix), that requirement does not negate the requirement that the petitioner must submit evidence to establish eligibility for the benefit sought. In the instant filing, the petitioner again fails to submit any documentary evidence in support of the assertions regarding the beneficiary's purported training and qualifications and whether it meets the petitioner's stated requirements. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Again, the evidence submitted on this issue is not "new" evidence for the purpose of the instant motion to reopen, and the petitioner has not established error in the AAO's previous findings on this issue for the purpose of a motion to reconsider.

The final ground for denial of the petition was the petitioner's failure to demonstrate that the beneficiary has the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition. In its dismissal of the petitioner's appeal, the AAO found the petitioner's evidence insufficient to establish both the continuity and the qualifying nature of the beneficiary's work during the qualifying period. The AAO also found that the petitioner failed to submit documentary evidence that the beneficiary's work was compensated, as required under 8 C.F.R. § 204.5(m)(11). Additionally, the AAO found that the petitioner failed to establish that the beneficiary's work during the qualifying period was authorized under immigration law. In support of its July 20, 2012 motions, the petitioner submitted unsigned, uncertified copies of the beneficiary's Form 1040 tax returns from 2008 and 2009, which the AAO found neither new, nor sufficient to overcome the deficiencies in the evidence as discussed on appeal.

In support of the instant motions, the petitioner submits signed copies of the beneficiary's tax returns (but no evidence of actual filing with the IRS) as additional evidence relating to the beneficiary's compensation during the qualifying period. Counsel does not address the AAO's

findings regarding the petitioner's failure to demonstrate that the beneficiary's work was qualifying experience and was authorized under immigration law. Counsel also again refers to the beneficiary's volunteer services with the petitioning organization. As indicated in the AAO June 20, 2012 decision, the beneficiary's self-support and voluntary service does not establish qualifying work.

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.

As discussed above, 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). Counsel's arguments are not new facts and the evidence submitted 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.

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 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 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, counsel for the petitioner makes unsupported arguments which, for the reasons discussed above, the AAO finds unpersuasive. 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 December 19, 2012, is affirmed, and the petition remains denied.