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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

C,

[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, Texas Service Center (TSC), denied the employment-based immigrant visa petition on November 2, 2005. The Director, California Service Center (CSC), reopened the petition and again denied it on October 14, 2009. The Administrative Appeals Office (AAO) dismissed the petitioner's November 13, 2009 appeal on May 10, 2011. The petitioner filed a motion to reopen on June 10, 2011, which the CSC director dismissed on October 13, 2011 and subsequently reopened on October 19, 2011. The matter is now before the AAO on a motion to reopen. The motion 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 an assistant pastor. The AAO, in its May 10, 2011 dismissal, determined that the petitioner had failed to establish that the beneficiary possessed the required two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

Specifically, the AAO noted the beneficiary's pay in 2004 did not reflect full-time employment at or above minimum wage. The AAO found that the beneficiary's work for an organizational unit different from that of the petitioner violated his nonimmigrant status. The AAO also noted the claims of both the petitioner and the beneficiary that the beneficiary had worked as a public school teacher during the qualifying period.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." In this case, the petitioner failed to submit a statement regarding if the validity of the decision of the AAO has been or is subject of any judicial proceeding. The regulation mandates that this shortcoming alone, requires U.S. Citizenship and Immigration Services (USCIS) to dismiss the motion. *See* 8 C.F.R. § 103.5(a)(4).

On motion, the petitioner submits a brief from counsel, an affidavit from the beneficiary, letters from its organization, a copy of its website's materials showing its affiliation with [redacted] in the United States [redacted] and other documentary evidence, some of which it had previously submitted. In counsel's brief, she states that the beneficiary maintained continuous employment during the qualifying period. Counsel asserts that the beneficiary's salary variations during this time period were due to a housing loan that he was then repaying to the petitioner's church. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner provides a similar supplemental letter stating this same information, but the petitioner provides no documentary evidence to this effect. 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)).

Counsel also states that the beneficiary never worked for Mansfield City Schools between 2002 and 2004 and claims that the petitioner may have committed a transcription error when it stated to USCIS that the beneficiary worked for the Mansfield City Schools during that time period but provides no evidence from the petitioner or the beneficiary to support this claim. Counsel also provides no explanation from the petitioner or the beneficiary regarding their earlier claims of the beneficiary's employment with Mansfield City Schools. Statements made in support of a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Moreover, counsel's explanation of a "transcription error" does not adequately explain how such an error could have been made in two separately executed documents.

Although counsel states that the beneficiary was unable to distinguish between his activities for two separate departments of one church and that USCIS should not make that distinction either, in the brief, counsel acknowledges that the beneficiary did receive separate checks for his distinct services for each entity. Counsel contends that the beneficiary sought to serve God through one vehicle, that of the petitioner's ministry. In the beneficiary's affidavit, he similarly acknowledges that his work and payment was split between the petitioner's church and [redacted] during the qualifying period. The beneficiary states that the organizations are interrelated. The petitioner also submits a similar letter to this effect.

Finally, in documentation submitted well after the filing of the motion, counsel alleges that this petition is one of "an entire cluster of cases" that involved "substandard" representation by a former attorney and that the case meets the requirements for ineffective assistance of counsel. However, although counsel submits documents related to a lawsuit and conviction of a former employee who worked at the organization with former counsel, there is no evidence that former counsel was involved in that suit. Moreover, the lawsuit and conviction do not appear to have any relation to the filing of immigration petitions.

While counsel also submits documentation relating to other immigrant petitions to support her claim of ineffective assistance of counsel in this instant case, she submits no documentation as it specifically relates to this case. Notably absent is a detailed affidavit from the petitioner and/or the beneficiary providing the specific details of any agreements made with former counsel regarding what actions were to taken and what representations former counsel did or did not make to the petitioner and the beneficiary.

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] Counsel fails to explain why any of the evidence submitted with this motion could not have been discovered or presented in the previous proceeding. The petitioner has been afforded several opportunities to submit this evidence. Specifically, the TSC director issued a Request for Evidence (RFE) on July 5, 2005, the CSC director issued an RFE on August 15, 2009, and the petitioner also submitted new evidence with the subsequent appeal. A review of the evidence that counsel submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot be considered a proper basis for a motion to reopen. Essentially, the petitioner generally reiterates prior arguments that are based on the same factual record.

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. Accordingly, the AAO will dismiss the motion.

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 is dismissed, the decision of the AAO dated May 10, 2011 is affirmed, and the petition remains denied.

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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).