

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



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Date: **DEC 18 2012** 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 the appeal as untimely filed. 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 Buddhist temple. 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 Buddhist monk. The director determined that the petitioner failed to establish that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition and that the petitioner qualifies as a bona fide non-profit religious organization. The director additionally found that the petitioner failed to successfully complete a compliance review site visit.

The director denied the petition on July 20, 2010. The director properly gave notice to the petitioner that it had 33 days to file the appeal and further advised: "Your notice of appeal must be filed with this office at the address at the top of this page." The notice indicated that "[a]ny brief, written statement, or other evidence **not filed with Form I-290B**" must be sent directly to the AAO. (Emphasis added). The notice concluded: "**The appeal may not be filed directly with the AAO. The appeal must be filed at the address at the top of this page.**" (Bold and underline emphasis in original.) Similar instructions are listed on the Form I-290B.

The regulation at 8 C.F.R. § 103.2(a)(1) provides that "[e]very benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions ... and such instructions are incorporated into the regulations requiring its submission."

The record indicates that on August 23, 2010, despite the instructions in the director's notice and on the Form I-290B, the petitioner sent the appeal to the AAO. On August 25, 2010, the AAO returned the appeal as improperly filed. The appeal was received *by the director* on August 31, 2010, or 41 days after the decision was issued.

Accordingly, on April 19, 2012, the AAO rejected the appeal as untimely filed. In its rejection of the appeal, the AAO stated:

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party or the attorney or representative of record must file the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

The AAO noted that neither the Act nor the pertinent regulations grant the AAO authority to extend the time limit for filing an appeal.

Again, however, despite the clear instructions on the Form I-290B that appeals and motions should be filed with the office that made the initial unfavorable decision and not with the AAO, the petitioner sent the motions directly to the AAO. On May 22, 2012, the AAO returned the motions as improperly filed. The motions were properly received by the director on May 25, 2012, or 36 days after the decision was issued. In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the affected party or the attorney or representative of record must file the motion within 30 days of service of the unfavorable decision. If the decision was mailed, it must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of submission, but the date of actual receipt with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i). Accordingly, the motions were untimely filed.

Even if the filing was considered timely, which it is not, the motions do not meet the requirements at 8 C.F.R. 103.5(a). The petitioner bears the burden of establishing that the rejection as untimely was itself in error. On motion, although counsel makes no mention of the form instructions, he asserts that he found the instructions in the July 20, 2010 decision “ambiguous,” based on the statement to send any brief, written statement or other evidence not filed with Form I-290B directly to the AAO. Counsel additionally asserts that the August 25, 2010 letter from the AAO included instructions for resubmitting the appeal to the appropriate office without indicating that the submission would be considered untimely if received more than 33 days after the decision was issued. Counsel argues that “[a]s such, we were led to believe that everything was fine, and that we only needed to send the Appeal to the correct office.” The AAO notes that nothing in the August 25, 2010 letter indicated that a resubmitted appeal would retain a filing date according to the date it was improperly submitted with the AAO. Nor did the letter indicate that the requirement at 8 C.F.R. § 103.3(a)(2)(i) would not apply to the resubmitted appeal. Counsel further argues that subsequent communications from the service center and the AAO made no mention of the untimely filing, which “reinforced our impression that the case was to be adjudicated based on its merits.”

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 submitted on motion reveals no fact that could be considered “new” under 8 C.F.R. § 103.5(a)(2). The petitioner’s motion is not an opportunity for the petitioner to correct its own defects in the record. The petitioner was previously put on notice of the requirements for a properly filed appeal by the regulations, as well as by the instructions in the director’s notice and on the Form I-290B. Therefore, the evidence submitted on motion will not be considered “new” and will not be considered a proper basis for a motion to reopen.

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).

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, 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 argues that “the failure to review this case on its merits and deny it based solely on a somewhat ambiguous procedural issue is unduly prejudicial to my client in that such decision is based on matters that were completely beyond his control.” Counsel has not cited any law or precedent decisions in support of his assertion that the timeliness of filing an appeal is an ambiguous issue. 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 respondent has failed to raise such supported 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 motions are dismissed.