



U.S. Citizenship
and Immigration
Services



C1

Date: DEC 19 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) summarily 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 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 nun. The director denied the petition on February 2, 2009, finding 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 petitioner filed a Form I-290B, Notice of Appeal, on September 23, 2010. On March 29, 2012, the AAO summarily dismissed the petitioner's appeal, finding that the petitioner failed to specifically identify an erroneous conclusion of law or a statement of fact in the director's decision as a basis for the appeal. The petitioner has now filed a motion to reopen and a motion to reconsider.

In support of the motion, counsel submits a brief. However, the brief does not address the AAO's most recently issued decision. Rather, the brief focuses on the issues contained in the director's decision. On motion, the AAO will only consider arguments and evidence relating to the grounds underlying the AAO's most recent decision. The petitioner bears the burden of establishing that the AAO's summary dismissal of the petitioner's appeal for failure to identify a basis for the appeal was itself in error. If the petitioner can demonstrate that the AAO erred by summarily dismissing that appeal, then there would be grounds to reopen the proceeding. The petitioner has not done so in this proceeding. The filing of a motion does not present a new opportunity as though the summary dismissal never existed. The petitioner has not claimed or shown that the AAO should not have summarily dismissed the appeal, and the AAO will not, at this late date, entertain the petitioner's untimely arguments regarding the underlying decisions to deny the petition and to dismiss the original appeal.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. *See* 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 argues in her brief that, based on a United States Citizenship and Immigration Services (USCIS) Memorandum issued after the petitioner's appeal was filed, the beneficiary is entitled to tolling of unlawful presence and unauthorized employment pursuant to the district court's order in *Ruiz-Diaz v. United States of America*, No. C07-1881RSL (W.D. Wash. June 11, 2009). However, counsel does not argue or provide any documentary evidence to demonstrate that the petitioner properly identified an error in the director's decision in its September 23, 2010 appeal, or that the AAO erroneously summarily dismissed that appeal. A review of counsel's brief on motion reveals no fact that could be

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).

considered “new” under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot 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 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 cannot be used to raise a legal argument that could have been raised earlier in the proceedings. See *Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the “additional legal arguments” that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. Further, 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.

In this case, counsel submits a copy of a June 25, 2009 USCIS Memorandum entitled “Implementation of the District Court’s Order in *Ruiz-Diaz v. United States*, No. C07-1881RSL (W.D. Wash. June 11, 2009).” Counsel asserts that this memorandum constitutes “changes in the law” which establish the beneficiary’s eligibility for the tolling of her unlawful presence and unauthorized employment. However, counsel does not argue or establish that the USCIS policy set forth in the memorandum is relevant to the AAO’s application of the regulation at 8 C.F.R. § 103.3(a)(1)(v), which provides that “[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.”

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. The authority cited by counsel does not demonstrate error in the AAO’s decision. Accordingly, 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 March 29, 2012 is affirmed, and the petition remains denied.