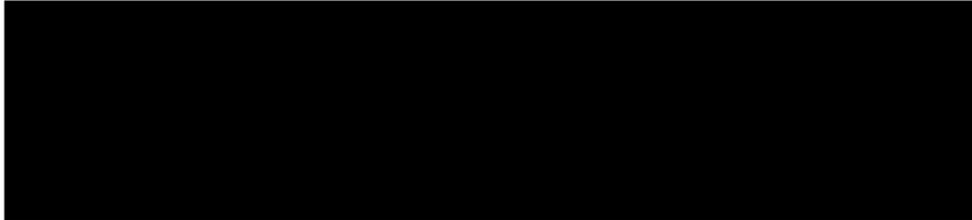




U.S. Citizenship
and Immigration
Services



C1

DATE: **DEC 27 2012** Office: CALIFORNIA SERVICE CENTER FILE

IN RE:

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:

SELF-REPRESENTED

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 and a 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 an association of churches. 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 pastor. The AAO, in its March 9, 2011 dismissal of the petitioner's appeal, determined that the petitioner had not established that the beneficiary had the required two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition. In its May 11, 2012 decision, the AAO found that the petitioner had not met the requirements of a motion to reconsider.

8 C.F.R. § 103.3(a)(1)(iii)(B) states that, for purposes of appeals, certifications, and reopening or reconsideration, "affected party" (in addition to U.S. Citizenship and Immigration Services (USCIS)) means the person or entity with legal standing in a proceeding. The USCIS regulation at 8 C.F.R. § 103.5(a)(1)(iii)(A) requires that a motion be signed by an affected party or the attorney or representative of record, and 8 C.F.R. § 103.5(a)(4) states that a motion that does not meet applicable requirements shall be dismissed.

Here, the party that signed the Form I-290B was not the petitioner, but rather an attorney, [REDACTED] who represents the beneficiary, [REDACTED] and indicates that she is filing the motion on his behalf. Because the beneficiary did not file the petition, he is not an affected party, and therefore his attorney has no standing to file a motion on the petitioner's behalf. Accordingly, the motion does not meet the filing requirement at 8 C.F.R. § 103.5(a)(1)(iii)(A).

Notwithstanding the motion's improper filing, counsel also claims ineffective assistance of counsel related to the former attorney for the petitioner and beneficiary, [REDACTED]. When a motion to reopen is based on a claim of ineffective assistance of counsel, it requires the alien claiming such ineffectiveness to comply with the requirements set forth by the BIA in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The *Lozada* decision requires the submission of:

1. An affidavit setting forth in detail the agreement with former counsel concerning what action would be taken and what counsel did or did not represent in that regard;
2. Proof that the alien notified former counsel of the allegations in the ineffective assistance of counsel claim and allowed counsel an opportunity to respond; and
3. If a violation of ethical or legal responsibilities is claimed, a statement as to whether the alien has filed a complaint with the disciplinary authority regarding counsel's conduct or, if a complaint was not filed, an explanation for not doing so.

Matter of Lozada, 19 I&N at 639.

Counsel failed to establish that the petitioner has met *Matter of Lozada's* first requirement noted above. Counsel submits a letter she received from the beneficiary which references his realization that [REDACTED] "did not do a good representation of my case." Additionally, counsel submits a notarized letter from [REDACTED] of Hillcrest Baptist Church in which he asserts that [REDACTED] "missed the window of eligibility for [REDACTED] under [REDACTED], United States, No. [REDACTED]." However, none of the evidence submitted on motion sets forth the details of the petitioner's agreement with former counsel and how he failed to uphold his portion of the agreement. Further, although counsel submits a photocopy of a contract between [REDACTED] and the beneficiary, the document is written in Spanish. Because the petitioner failed to submit certified translations of the document, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. As a result, the petitioner has failed to comply with *Matter of Lozada's* first requirement.

Counsel also failed to comply with *Matter of Lozada's* second requirement. No assertion has been made and no evidence provided that [REDACTED] has been notified of the allegations against him and has been provided an opportunity to respond to the allegations.

Additionally, *Matter of Lozada's* third requirement has not been met. No statement has been made as to whether the petitioner or beneficiary filed a complaint with the relevant disciplinary authority regarding counsel's conduct, nor has an explanation been provided regarding why such a complaint was not filed.

Finally, it is not clear that the outcome of the instant matter was affected by [REDACTED] alleged misconduct. Counsel asserts that [REDACTED] was retained in March of 2008 but did not file the Form I-360 petition on the beneficiary's behalf until May of 2009, after the issuance of new regulations relating to special immigrant religious workers on November 26, 2008. Counsel argues that, had [REDACTED] filed the petition in March 2008 when he was first retained, it would have been approved under the old regulations which did not require the beneficiary to hold lawful immigration status and employment authorization during the two-year qualifying period immediately preceding the filing of the petition. The AAO first notes that, according to evidence submitted on motion which includes communications between [REDACTED] and the petitioner and beneficiary, it appears the parties were still in the process of gathering initial evidence in support of the petition in April and May of 2008. Therefore, it is not clear that [REDACTED] could have filed the petition in March of 2008 as asserted by counsel. 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). Further, even if filed in March 2008, it is not certain that the petition would have been adjudicated prior to the issuance of the new regulations, in which case the new regulations would have been

applied to the pending petition. Supplementary information published with the new rule specified: "All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule." 73 Fed. Reg. 72276 (Nov. 26, 2008).

Alternately, counsel asserts on motion that Mr. Sanchez received a letter from USCIS regarding the beneficiary's eligibility to file a Form I-485, Application to Register Permanent Residence or Adjust Status, and/or a Form I-765, Application for Employment Authorization, pursuant to the court order in *Ruiz-Diaz v. United States of America*, No. [REDACTED] (W.D. Wash. June 11, 2009). Counsel argues that [REDACTED] failed to file such applications on the beneficiary's behalf within the relevant time period, therefore depriving him of protection from the accrual of unlawful status and unauthorized employment under the *Ruiz-Diaz* litigation. The AAO first notes that no evidence has been submitted to show that [REDACTED] was obligated by any agreement with the petitioner to file such applications. Regardless, the filing of such applications on the beneficiary's behalf would not have affected the outcome of the instant Form I-360 petition. In *Ruiz-Diaz*, 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. The AAO notes that on August 20, 2010, the Ninth Circuit 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 applications. It does not waive or nullify the regulations at 8 C.F.R.(m)(4) and (11), which require an alien's qualifying experience in the United States to have been authorized under United States immigration law.

For the reasons discussed above, the AAO finds that counsel has not complied with *Matter of Lozada* or demonstrated any prejudice based upon the actions of the petitioner's former counsel in support of the motion to reopen.

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.

The decisions cited by counsel on motion relate to counsel’s request for equitable relief based on the claim of ineffective assistance of counsel, discussed above.

As previously noted, 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. Counsel makes no argument on motion that the AAO erred in its May 11, 2012 decision based on the previous factual record, nor do the authorities cited by counsel 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 motions to reopen and reconsider are dismissed, the decision of the AAO dated May 11, 2012 is affirmed, and the petition remains denied.