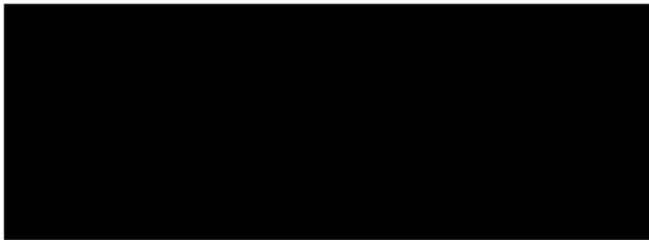




U.S. Citizenship
and Immigration
Services



C1

Date: *DEC 28 2012* Office: CALIFORNIA SERVICE CENTER



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 Administrative Appeals Office (AAO) remanded a subsequent appeal and then dismissed the appeal following the Director's certified denial. The AAO dismissed the petitioner's subsequent motion to reopen. The matter is now before the AAO on a motion to reconsider. The motion 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 pastor. In an August 3, 2009 decision which was certified to the AAO for review, the director denied the petition 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 AAO affirmed the director's decision on December 22, 2010, noting that no response to the certified decision had been received from the petitioner. The AAO agreed with the director's finding and additionally found that the petitioner had not established that the beneficiary was a member of its denomination for the two years immediately preceding the filing of the petition. On January 21, 2011, the petitioner filed a motion to reopen the AAO's decision. The AAO dismissed the motion on June 25, 2012, finding that the petitioner failed to meet the requirements of a motion to reopen.

In its June 25, 2012 decision dismissing the motion to reopen, the AAO noted counsel's argument that she had mailed a brief and additional evidence in response to the certified decision on or around August 28, 2009. However, the AAO found that the petitioner had provided no evidence of the purported submission beyond the assertions of counsel. The unsupported statements of counsel on appeal or in 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). Accordingly, the AAO found the petitioner's evidence on this issue insufficient to warrant a favorable action on the motion to reopen.

Additionally, 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 The AAO noted that much of the evidence submitted on motion was either already in the record or was available and could have been discovered or presented at the time of the prior proceeding and therefore could not be considered "new." The AAO also stated that the remaining evidence submitted on motion did not address the merits of the petition at the time it was filed, but instead related to the beneficiary's current employment by the petitioner. 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. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r

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).

1971). Finally, the AAO considered counsel's claim of ineffective assistance of counsel related to the petitioner's former attorney. However, the AAO found that the petitioner did not meet the requirements for articulating a claim of ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), including the required submission of 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.

In support of the instant motion to reconsider, counsel submits a brief and additional evidence. However, the submissions do not address the AAO's most recently issued decision. Rather, counsel's arguments and the submitted evidence relate to the issues contained in the director's August 3, 2009 certified decision and the AAO's December 22, 2010 dismissal of the petitioner's appeal. Counsel continues to fail to provide evidence to document her claimed response to the certification such as a receipt confirmation from the United States Postal Service or an explanation for the lack of such evidence.

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 June 25, 2012 decision to dismiss the motion to reopen was in error. If the petitioner can demonstrate that the AAO erred by dismissing that motion, then there would be grounds to reconsider 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 dismissal of the previous motion never existed. The petitioner has not claimed or shown that the AAO should not have dismissed the motion to reopen, 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. Furthermore, the AAO notes that, in this motion to reconsider, counsel again claims ineffective assistance of counsel but fails to meet the requirements for articulating such a claim under *Matter of Lozada*.

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.

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 does not argue or establish in this motion to reconsider that the AAO erred in its June 25, 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 motion to reconsider is dismissed, the decision of the AAO dated June 25, 2012 is affirmed, and the petition remains denied.