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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

[REDACTED]

C1

DATE: **FEB 15 2012** OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [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:

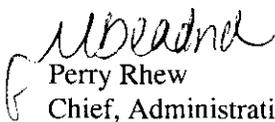
[REDACTED]

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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, California Service Center, (the director) denied the employment-based immigrant visa petition on April 21, 2009. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on January 22, 2010. The matter is now before the AAO on a motion to reopen¹. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

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.

Further, the regulation at 8 C.F.R. § 103.5(a)(2) sets forth that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." 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.²

Initially, counsel mischaracterizes the reason why the appeal was dismissed by the AAO. On motion, counsel contends in her brief that, "It is our assertion that the evidence that has been provided is not being given the proper weight and the Department is focusing too heavily on payment of the monk." With respect to counsel's argument, the AAO notes that its prior decision did not focus on the beneficiary's pay for the two year period. Rather, as the AAO stated in its prior decision, "the petitioner failed to provide sufficient documentation of the beneficiary's work prior to entering the United States." The AAO denied the case because there was no documentation from the beneficiary's prior temple, not because there was no evidence of past payment from the prior temple.

Further, the brief and the documents submitted do not meet the standard of a motion to reopen above. Counsel appears to be using the forum of a motion to reopen as an opportunity to appeal an unfavorable decision issued by the AAO. As demonstrated in the above quote from counsel's brief, counsel used her brief as an opportunity to criticize the AAO's decision. A motion to reopen is not the proper forum to present arguments and evidence that could have been available at the time of the prior proceeding. Rather, the purpose of a motion to reopen is to submit new and previously unavailable evidence and explain why this evidence was previously unavailable and how it will overcome the adverse decision.

¹ On the Form I-290B, counsel indicates that she is filing a motion on the director's April 21, 2009 decision rather than on the AAO's January 22, 2010 decision. Clearly, such a motion would be untimely and therefore dismissed as such pursuant to 8 C.F.R. § 103.5(a)(1)(i). As counsel acknowledges the appeal and the AAO's dismissal, the motion will be considered to be based on that decision.

² 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).

Although counsel describes the new evidence submitted in her brief and how it is probative to her client's case, she does not explain why this evidence could not have been provided previously.

In addition, counsel and the petitioner submitted new evidence along with this motion to reopen. The AAO notes that many documents submitted in this motion are dated prior to the director's denial on April 21, 2009. There are letters from the petitioner that are dated February 10, 2010, after the dismissal of the appeal. At no point does counsel or the petitioner explain why this evidence was previously unavailable and could not have been submitted earlier. Further, counsel and the petitioner have not submitted any affidavits along with this new evidence explaining why these letters are appearing for the first time in a motion to reopen. The petitioner has been afforded at least three different opportunities to submit this evidence: at the time of the original filing of the petition on July 11, 2008, in response to the director's request for additional evidence (RFE) pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) on December 22, 2008, and at the time of the filing of the appeal on May 21, 2009. 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.

There is one piece of evidence in particular that was submitted in the motion to reopen that the AAO wishes to discuss; the petitioner's Internal Revenue Service (IRS) 501(c)(3) federal tax exemption letter, dated February 17, 2005. The AAO notes that the director specifically asked for this information in the RFE dated November 18, 2008. The director wrote: "NOTE: The IRS determination letter for 501(c)(3) exemption must indicate the petitioner's IRS Employer Identification Number. The evidence submitted shows the petitioner is exempt State income tax. You must provide evidence that shows the petitioner is exempt Federal income tax." The AAO notes that it is only in the motion to reopen that this evidence appears for the first time, and that the IRS determination letter is dated prior to the date of the motion to reopen.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the present matter, it will serve as additional grounds for dismissing the motion to reopen. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not even accept evidence offered for the first time on appeal, let alone the motion to reopen. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). As this document establishes basic eligibility, it should have been submitted at filing or subsequently in response to the director's specific request for evidence. Further, under the regulations for a motion to reopen cited above, the petitioner had an additional burden to explain why this evidence was not previously unavailable at the time the director had requested it, yet failed to do so. Therefore, under the circumstances, the AAO need not, and does not, consider the sufficiency of this evidence submitted in the 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.

ORDER: The motion to reopen is dismissed. The AAO’s decision of January 22, 2010 is affirmed. The petition remains denied.