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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

C₁



DATE: JUL 25 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center (CSC), denied the employment-based immigrant visa petition. The petitioner appealed the decision, and the Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner is the United States affiliate of SIM, a Christian missionary organization. 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 missionary. The director determined that the petitioner had not submitted requested documentation, or shown that the beneficiary's intended position qualifies as a religious occupation. The AAO, in dismissing the appeal, affirmed the first specified ground and withdrew the second.

In this decision, the term "prior counsel" shall refer to [REDACTED] who represented the petitioner at the time the petitioner filed the petition. The term "counsel" shall refer to the present attorney of record.

Before discussing the merits of the motion, the AAO will begin with the petition's procedural history. As the AAO will discuss in greater detail below, the director denied the petition on October 1, 2009. The petitioner filed a timely appeal to that decision, which the AAO dismissed on May 16, 2011. The petitioner then filed a timely motion to reopen and reconsider the AAO's decision on June 15, 2011.

Remarks by counsel in a letter dated October 25, 2011, indicate that counsel is under the mistaken impression that "the AAO granted the motion on August 10, 2011." This assertion is not correct, as the AAO was not in possession of the record of proceeding in August 2011. The record shows that the CSC Director granted the petitioner's motion on August 3, 2011, and reopened the proceeding. The director, however, had no authority to do so. Under the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.5(a)(1)(ii), the official having jurisdiction over a motion is the official who made the latest decision in the proceeding. In this instance, the official who made the latest decision in the proceeding was the Chief of the AAO, not the Director of the CSC. Therefore, jurisdiction over the motion has always rested exclusively with the AAO. The CSC Director had no authority or jurisdiction to reopen the proceeding, and therefore the director's reopening of the petition on August 3, 2011 is void and without effect.

On or about November 25, 2011, the director certified the motion to the AAO. Correspondence from counsel dated May 24, 2012, again seems to show some confusion as to the recent procedural history. Counsel claims that, following the filing of the motion to reopen, "the AAO then remanded the case back to USCIS." There was no such remand order. Counsel then asserts that, following the issuance of a further request for evidence in August 2011, "USCIS decided not to adjudicate" the petition and transferred the matter to the AAO. In fact, the transfer occurred because CSC officials recognized that they had no authority to act on the petitioner's motion, and that the motion should have gone straight to the AAO at the time of its May 2011 filing. The AAO will review the matter because jurisdiction has rested with the AAO ever since the petitioner properly filed its motion on June 15, 2011. Because the CSC Director had no authority to grant the petitioner's

motion following the AAO's dismissal of the appeal, the proceeding has never properly been reopened.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The AAO hereby incorporates its May 16, 2011 dismissal notice by reference, and will quote from that decision for context as appropriate.

The petitioner filed the Form I-360 petition on October 1, 2008. On November 26, 2008, while the petition was pending, USCIS published new regulations for special immigrant religious worker petitions. 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. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). The revised regulation at 8 C.F.R. § 204.5(m)(7)(iii) requires the intending employer to attest to "[t]he number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees." That same regulation states: "USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion."

On May 9, 2009, the director issued a notice of intent to deny the petition (NOID), stating that the director would deny the petition unless the petitioner submitted the newly required evidence, including the required employer attestation and "a list of the current number of paid individuals within the petitioner's denomination or religious organization including full name(s), position title(s) and description(s), amount of salary, and date(s) of hire."

The petitioner's response included an employer attestation indicating that the petitioner has 444 employees worldwide, 210 in the United States, and six "at the same location where the beneficiary will be employed." The attestation indicated that the other workers at the same location were "Regional Directors" and "Missionaries." A separate statement provided the names of two regional directors and two missionaries, thus identifying some but not all of the six claimed employees at the beneficiary's intended work location.

A statement jointly signed by counsel and by Mr. [REDACTED] indicated that the petitioner "has 210 employees in the US and 444 employees overseas. Because of privacy reasons and due to the sensitiveness of such information, [the petitioner] is not allowed to give out [the specific] information" requested in the NOID.

The director denied the petition on October 1, 2009, in part because the petitioner did not provide the requested employee list. The director cited the USCIS regulation at 8 C.F.R. § 103.2(b)(14), which states in part that failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition.

The petitioner appealed the decision on October 30, 2009. [REDACTED] the petitioner's director of discipleship and personnel, stated: "The sole reason Petitioner did not provide personal employee information as requested by the USCIS is that it is against the organization's policy to divulge such information to outside entities."

In dismissing the appeal, the AAO stated:

[T]he USCIS regulation at 8 C.F.R. § 204.5(m)(7)(iii) gives the director discretion to request a list of employees and information about their positions. When Mr. Ernst signed the petition as an official of the petitioning entity, he consented to the release of such records as USCIS may require for the adjudication of the petition. The petitioner refused to honor this agreement, and the director correctly cited the regulation at 8 C.F.R. § 103.2(b)(14), quoted above. It is within the director's discretion whether or not to request detailed employee information; it is not within the petitioner's discretion whether or not to comply with that request. In the absence of any factual dispute on this matter, the AAO must agree with the director's finding that the petitioner failed to submit material information on request.

On motion, counsel asserts:

The Director's denial was heavily reliant upon derogatory information gathered from an Investigation site visit. The Notice of Intent to Deny issued May 9, 2009 referred to reliance on derogatory information in the record but did not comply with 8 CFR § 103.2(b)(16)(i), which states that the Service "shall" advise of the derogatory information. No such information was provided with the NOID and the limited excerpt cited in the NOID does not constitute sufficient notice under this regulation.

While the May 2009 NOID mentioned derogatory information (relating to the source of the beneficiary's salary), the denial was not "heavily reliant upon" that information. The director mentioned the derogatory information only once in the denial notice, noting that the director had issued the NOID based in part on that information, and in part on the revisions to the regulations. The director did not cite the derogatory information as a basis for denial.

Furthermore, the cited regulation at 8 C.F.R. § 103.2(b)(16)(i) does not require USCIS to provide the full investigative record or site visit report. Rather, it requires USCIS to advise the petitioner of derogatory information. The director advised the petitioner of that information in the NOID.

Counsel protests that the director did not allow more time for the petitioner to respond to the NOID. Counsel acknowledges 8 C.F.R. § 103.2(b)(8)(iv), which states: "the maximum response time provided in a notice of intent to deny [shall not] exceed thirty days. Additional time to respond to a .

. . . notice of intent to deny may not be granted.” Nevertheless, counsel maintains that the director should have allowed additional time anyway. Counsel states:

The Yates Memo issued February 16, 2005 indicates the following USCIS policy on RFE/NOID responses: “where the regulatory requirement to issue a NOID does not prescribe a response time, the amount of time within which the petitioner or applicant must reply can be established case-by-case but should *always afford the applicant or petitioner a reasonable amount of time* to respond under the circumstances, *which very rarely should be less than 30 days and often should be longer.*”

(Counsel’s emphasis.) At the time of the quoted 2005 memorandum, “the regulatory requirement to issue a NOID [did] not prescribe a response time.” Subsequently, however, revisions to the regulations set the 30-day maximum response period that counsel acknowledged. *See* 72 Fed. Reg. 19100 (April 17, 2007). The regulations mentioned in the 2005 memorandum were replaced two years later, and were long obsolete when the director issued the NOID in 2009. Ever since April 2007, the regulations have unequivocally established 30 days as the non-extendable maximum response time for an NOID. The AAO will not reopen a proceeding based on the director’s correct adherence to binding regulations.

Also, the petitioner did not submit an incomplete response to the NOID because it ran out of time. Rather, the petitioner took exception to the request for an employee list and declared its intention not to comply. Counsel admits as much on motion, stating that the petitioner gathered all the other requested evidence within the time allotted and cited privacy concerns to explain its refusal to identify its employees. The length of the response period is, therefore, entirely irrelevant.

Counsel asserts that the director’s May 2009 NOID “was beyond what is contemplated under 8 C.F.R. § 204.5(m)(7)(iii)” because the director asked for information about the salaries and hiring dates of the petitioner’s employees. Counsel does not explain why this claimed overreach by the director should have excused the petitioner from providing a list of employees and their duties, both of which are specified in the cited regulation. Counsel states that the director’s request for private salary information “put the Petitioner on the defensive,” but this does not justify a failure to submit required information upon request.

The petitioner’s June 2011 motion includes a list of 44 individuals described as “Missionaries Assigned to the U.S. with Positions similar to [the beneficiary],” along with worldwide payroll documentation providing numbers of employees, job titles, and aggregate salaries, but not names. Counsel, on motion, states: “the Petitioner has now provided additional information of existing personnel both in the US and abroad that should more than meet the purpose of the regulation.”

The petitioner’s opportunity to submit the requested evidence and perfect the record was in response to the NOID in 2009. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence 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).

Where, as here, 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 accept evidence offered for the first time on appeal, let alone on motion following the dismissal of that appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's NOID. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on motion.

When responding to a NOID, all requested materials must be submitted together at one time. Submission of only some of the requested evidence will be considered a request for a decision on the record. 8 C.F.R. § 103.2(b)(11). Therefore, once the director has requested specific evidence and the petitioner has failed to comply with that request, the petitioner's untimely submission of the requested materials cannot form the basis for a successful appeal or motion. As noted previously, a motion to reconsider a decision on an application or petition must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Materials newly submitted on motion were not in the record at the time of the initial decision.

The USCIS regulation at 8 C.F.R. § 103.5(a)(2) requires that a motion to reopen must state the new facts to be provided in the reopened proceeding. Based on the plain meaning of "new," a new fact relies on evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. The motion relies on evidence that the director originally requested in the 2009 NOID. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

The petitioner's belated decision to submit evidence that the petitioner had previously refused to submit is not a new fact, and the petitioner has not shown that it only recently became able to identify its employees. In response to the 2009 NOID, the petitioner did not claim to be unable to provide the requested employee list. Rather, the petitioner simply refused to provide it. The petitioner's change of heart over its initial conscious refusal to comply with the NOID is not a new fact that warrants reopening the proceeding.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as 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

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).

proceeding bears a “heavy burden.” *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden, and the AAO will dismiss the motion.

Jurisdiction over the motion has always resided with the AAO ever since the petitioner filed it in June 2011. Therefore, the director had no authority to grant the petitioner’s motion to reopen and reconsider the proceeding on August 10, 2011, and the director’s notice of that date is without effect. Nevertheless, the director solicited additional evidence on that date and the petitioner submitted a response. The AAO acknowledges the petitioner’s submission and will briefly describe it below, but these materials cannot affect the AAO’s basic decision that the petitioner’s first motion, filed in June 2011, did not meet the applicable requirements of a motion to reopen or to reconsider.

In a request for evidence dated August 10, 2011, issued simultaneously with the director’s erroneous notice of reopening, the director requested evidence to establish the beneficiary’s intended work locations and to establish the existence of a *bona fide* missionary program. The director requested evidence of the beneficiary’s past compensation and his work schedule. The director also stated that the beneficiary appeared to engage in fundraising to cover his own salary.

In response to that notice, the petitioner indicated that the beneficiary travels widely, with no fixed schedule. The petitioner identified three Colorado churches where the beneficiary “is currently working most of the time.” The petitioner submitted various financial documents showing prior salary payments to the beneficiary, and several witness letters attesting to the beneficiary’s missionary work and the petitioner’s organizational activities. One such letter was from [REDACTED] the Evangelical Council for Financial Accountability, who stated: “We certainly have not seen any indication that there is impropriety with [the petitioner’s] hiring practices or that they serve as some type of sham to bring foreign nationals to the United States.”

ORDER: The motion is dismissed. The AAO’s decision of May 16, 2011, is undisturbed.