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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: OFFICE: CALIFORNIA SERVICE CENTER

JUN 25 2012

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, (“the EAC director”) denied the employment-based immigrant visa petition. The petitioner timely filed an appeal to the denied petition. The Administrative Appeals Office (“AAO”) initially remanded the matter to the director. The director, California Service Center (“the director”) denied the petition and certified the decision to the AAO. The AAO affirmed the denial. The matter is currently before the AAO on a motion to reopen. The motion to reopen will be dismissed. The petition remains denied.

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. On July 19, 2005, the petitioner filed the Form I-360 petition. On April 24, 2006, the EAC director denied the petition. The petitioner timely filed an appeal to the AAO. On December 18, 2008, the AAO remanded the decision to the director to issue a new decision based on the new regulations. On February 4, 2009, the director issued a Notice of Intent to Deny, to which the petitioner timely responded. On August 3, 2009, the director denied the petition and certified the matter to the AAO. The director found that the petitioner had not established that the beneficiary had the required two years of continuous, lawful work experience immediately preceding the filing date of the petition. The director also instructed the petitioner that it had thirty days to submit a brief of a statement to the AAO. On December 22, 2010, the AAO affirmed the director’s denial. The AAO noted that the record contained no response to the certified denial notice, and considered the record to be complete as it stood. The AAO additionally found that the petitioner had not shown that the beneficiary was a member of its denomination for the two years immediately preceding the filing of the Form I-360 petition.

Subsequent to the AAO’s affirmation, on January 7, 2011, counsel sent a letter to the AAO explaining that she was retained by the petitioner to respond to a certification of the decision to the AAO and that she had sent the response to the AAO in a timely matter. Counsel stated that she did not hear anything further from the AAO until the petitioner faxed her a copy of the denial notice and told her that the previous attorney was still mentioned as the attorney of record. Counsel also sent a new Form G-28 that was *contemporaneously dated with this letter*. On January 11, 2011, counsel submitted a second letter to the AAO. Counsel stated that she was unaware as to exactly why her response to the certification was not considered. Counsel further stated in this letter that, “at this time, rather than file a motion to reopen, I would request that you rescind your decision entered on December 22, 2010 to take into consideration the extensive response that was filed by us and apparently mislaid.” Counsel also offered to resubmit the response to the certification notice if the AAO did not have it in the record.

On February 8, 2011, the AAO mailed a response to counsel. The AAO declined the petitioner’s request to rescind the decision, stating that:

A review of the information you submitted in support of your request, as well as a review of USCIS records, reveals that the AAO’s decision in this matter was proper and based on the record of proceeding.

The AAO further stated:

You claim that the petitioner submitted a response on August 31, 2009; however, you have not submitted a copy of the claimed response or any evidence, such as a U.S. Postal Service return receipt, establishing that a response was timely submitted. We have reviewed the record of proceeding in this matter in response to your letters and confirmed that *the record does not contain a filing from the petitioner in response to the certified decision.* As an additional matter, we note that the only evidence that you have ever represented the petitioner in this matter is the Form G-28 dated January 7, 2011, which post-dates our December 22, 2010 decision.

On January 21, 2011, the petitioner through counsel timely filed a motion to reopen the AAO's decision. The petitioner contends that the basis of this motion to reopen is that "as a result of a postal error and/or some other causes unknown to us at this time our response to the USCIS Notice of Certification was not received by the AAO and, therefore, our appeal was denied." The petitioner submitted an affidavit by counsel adjuring that she had mailed the response on certification, a brief, a copy of the petitioner's response to the director's notice of certification, and further evidence.

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.¹

With the motion to reopen, counsel submitted an affidavit dated January 20, 2011, stating:

I, [REDACTED] hereby state and affirm that on or around August 28, 2009, I caused to be mailed [sic] a brief and supporting documentation to the address set forth below in response to the USCIS notice of denial dated August 3, 2009, in the above captioned matter. Said notice of denial required that a brief must be filed within thirty days of the date of the notice. Our brief was timely mailed to:

U.S.C.I.S.
Administrative Appeals Office
MS 2090
Washington, DC 20529-2090

No further information is known about the whereabouts of the aforementioned brief and supporting documentation.

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).

The AAO is not persuaded by counsel's affidavit. As explained in the correspondence dated February 8, 2011, the AAO advised the petitioner's counsel that she should submit a copy of the claimed response and evidence, such as a U.S. Postal Service return receipt, establishing that a response was timely submitted. Counsel submitted only the petitioner's purported response to the notice of certification. However, counsel never submitted evidence establishing that the response was actually timely submitted to the AAO. Counsel's affidavit by itself is insufficient to establish that a response was timely submitted. *The assertions of counsel do not constitute evidence. Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the affidavit submitted is insufficient to warrant a favorable action on the motion to reopen.

With the motion to reopen, counsel submitted additional evidence. These documents are:

1. A second letter from [REDACTED] dated June 2, 2005;
2. A notarized letter dated July 1, 2009, from [REDACTED] duties at [REDACTED];
3. Additional pay stubs as evidence of [REDACTED];
4. 2009 and 2010 W-2 Forms for Rev. [REDACTED];
5. 2009 joint tax return for Rev. [REDACTED];
6. [REDACTED] Church financial statements, 2004-2005; 2006-2007; and 2010-2011; and
7. A resolution of the Board of Directors of the [REDACTED] Pentecostal Independent Church approving the merger of [REDACTED] dated December 4, 2004;

The petitioner's additional documents fail to meet the requirements of a motion to reopen. Some of the additional documents, such as the second letter from Pastor [REDACTED] Church financial statement from 2004 were already in the record, so they are not new. Some of the other additional documents, although not in the record prior to the appeal, predate the AAO's December 22, 2010 decision. As these documents were available and could have been discovered or presented at the time of the prior proceeding, they cannot be considered to be "new facts to be provided in the reopened proceeding." Further, under the regulations for a motion to reopen cited above, the petitioner had an additional burden to explain why this evidence was previously unavailable, yet failed to do so. Therefore, under the circumstances, the AAO need not, and will not, consider the sufficiency of this evidence submitted in the motion to reopen.

The petitioner also submitted financial documents and statements which postdate the AAO's December 22, 2010 decision. However, these documents are not relevant to the adjudication of this case. In counsel's brief, she explained the petitioner submitted these documents to show the AAO that the beneficiary is still employed by the petitioner, and therefore that the petition is legitimate. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, these documents do not address the merits of the petition at the time the petition was filed. As a result, the AAO will not consider them.

Finally, counsel submitted a brief arguing that the director's decision and the AAO's subsequent dismissal were incorrect. A motion to reopen is not the proper forum to present arguments and evidence that could have been raised 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. Here, counsel in her brief did not use new and previously unavailable evidence to overcome the adverse decision.

In one section of the brief counsel requests that the AAO overlook a period of unauthorized employment and grant the Form I-360 petition due to ineffective assistance of counsel on the part of a prior attorney. Although counsel claims that the petitioner and the beneficiary relied on the advice of prior counsel not to file a new Form I-129 petition after [REDACTED] merged with [REDACTED] in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel, and the AAO will not reopen the proceedings on this basis.

In sum, the affidavit, the brief, and the supporting evidence submitted by counsel on behalf of the petitioner do not meet the requirements of a motion to reopen, and therefore do not merit a reopening of these proceedings.

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 petition remains denied.