

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: **NOV 15 2012** Office: CALIFORNIA SERVICE CENTER [Redacted]

IN RE: [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 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, denied the employment-based immigrant visa petition on June 1, 2010. The petitioner filed a motion to reopen/reconsider on June 28, 2010, which the director denied on July 26, 2010. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now 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 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 director of religious education. The AAO, in its April 10, 2012 dismissal, agreed with the director's 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 of the petition.

On motion, the petitioner submits a brief from counsel, a copy of the decision in *Shia Association of Bay Area v. United States*, No. 11-1369 SC (N.D. Cal. Feb. 1, 2012), and a copy of the AAO's April 10, 2012 dismissal.

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.

Notwithstanding the above, in the decision dismissing the petitioner's original appeal, the AAO specifically and thoroughly discussed the petitioner's evidence and determined that the petitioner failed to establish that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition. Specifically, the AAO found that the beneficiary lacked lawful immigration status and employment authorization for a portion of the qualifying period, as his R-1 nonimmigrant status expired on June 15, 2009, and the petition was filed on December 4, 2009. The AAO discussed counsel's argument that the beneficiary should be granted discretionary relief under section 245(k) of Immigration and Nationality Act (the Act), which provides that a person who is adjusting status in an employment-based category may adjust status even if he or she has been out of status or worked without authorization for less than 180 days. Section 245(k) applies at the adjustment stage and is applicable only to an alien "who is eligible to receive an immigrant visa." The AAO noted that any discussion of eligibility for adjustment of status would be premature as the beneficiary has no approved petition and is not eligible to receive an immigrant visa. Rather, the AAO pointed out that the issue in the proceeding was whether the beneficiary meets the requirements of 8 C.F.R. § 204.5(m), which requires two years of lawful, continuous employment.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other

documentary evidence. 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

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). The petitioner has not asserted any new facts or submitted any additional documentary evidence relating to the beneficiary’s eligibility for the benefit sought. Therefore, the evidence submitted on motion will not be considered “new” and will not be considered a proper basis for a 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.

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 U.S. Citizenship and Immigration Services (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.

In the motion to reconsider, counsel asserts that USCIS and the AAO were incorrect to apply the requirements of lawful status and employment authorization to the instant case, arguing that those requirements are contrary to section 245(k) of the Act, and therefore invalid. In support of this assertion, counsel cites [REDACTED], which sets forth a two-part test for judicial review of an agency’s interpretation of federal law. In the first part of the test, the court looks at whether Congress has specifically addressed the issue in question or whether it has “explicitly left a gap for the agency

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).

to fill.” In the second part of the test, if a gap has been left, the court considers whether the regulation is a reasonable and permissible interpretation of the statute. Counsel argues as follows:

Under *Chevron* step one, 8 C.F.R. § 204.5(m)(4), (11) does not pass muster because it is a clear intention of Congress to allow alien, who has NOT stayed in the U.S. in lawful status or has engaged in unauthorized employment for an aggregate period of more than 180 days, **to receive immigrant visa** and adjust status. See INA Section 245(k). Even under *Chevron* step two, Court should decline to defer the agency’s application of the 2008 amendments to regulations because the regulations are inconsistent with the prevailing INA statutory scheme. INA §245(k) provides that an alien may be eligible for an adjustment of status, even if the alien has engaged in unauthorized employment, so long as the alien has not engaged in unauthorized employment for more than an aggregate period exceeding 180 days. The status conflicts with 8 C.F.R. § 204.5(m)(4), (11), which prohibits even a single day of unauthorized work in the two-year period immediately preceding a special immigrant worker visa petition. 8 C.F.R. § 204.5(m)(4), (11) is not considered reasonable because it is contrary to Congress’s explicit mandate in INA §245(k).

(Bold emphasis added. Underline emphasis in original.) Counsel erroneously argues that section 245(k) expresses Congress’ intent to allow aliens who have been out of status or worked without authorization for less than 180 days “to receive [an] immigrant visa.” As stated above, section 245(k) explicitly states that it applies to “[a]n alien who is entitled to receive an immigrant visa.” Section 245(k) does not address the eligibility requirements for receiving an immigrant visa, only for adjusting status once eligibility for the immigrant visa has been established. The pertinent section of the Act is section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which describes qualified special immigrant religious workers. That section does not specifically address the issue of whether the beneficiary must have held lawful immigration status and employment authorization during the two-year qualifying period. Further, USCIS revised its special immigrant religious worker regulations effective November 26, 2008 based on instructions from Congress. The wording of the relevant legislation demonstrates Congress’ interest in USCIS regulations and the agency’s commitment to combating immigration fraud in the religious worker context. Section 2(b) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391 (Oct. 10, 2008) reads, in pertinent part:

Regulations – Not later than 30 days after the date of the enactment of this Act, the Secretary of Homeland Security shall –

- (1) issue final regulations to eliminate or reduce fraud related to the granting of special immigrant status for special immigrants described in subclause (II) or (III) of section 101(a)(27)(C)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(C)(ii))

In proposing the requirement that all prior qualifying employment have been authorized and “in conformity with all other laws of the United States” such as the Fair Labor Standards Act of 1938 and “tax laws,” USCIS explained that “[a]llowing periods of unauthorized, unreported employment to qualify an alien toward permanent immigration undermines the integrity of the United States immigration system.” 72 Fed. Reg. 20442, 20447-48, (April 25, 2007). Accordingly, the adoption of the final rule requiring that all prior qualifying employment have been lawful clearly comports with the explicit instructions from Congress to “eliminate or reduce fraud.”

The October 2008 legislation extended the special immigrant nonminister religious program only until March 5, 2009. From the wording of the statute, it is clear that this extension was so short precisely because Congress sought to learn the effect of the new regulations before granting a longer extension. Congress has since extended the life of the program four times.^[1] On any of those occasions, Congress could have made substantive changes in response to the regulations they ordered USCIS to promulgate, but Congress did not do so. Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). The AAO may therefore presume that Congress has no objection to the new regulations as published, or to USCIS’ interpretation and application of those regulations.

On motion, counsel also cites *Shia Association of Bay Area v. United States*, No. 11-1369 SC (N.D. Cal. Feb. 1, 2012), in which the United States District Court for the Northern District of California found that 2008 amendments to 8 C.F.R. §204.5(m)(4) are ultra vires to the Immigration and Nationality Act. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Accordingly, the cited decision is not a relevant precedent decision.

As noted above, 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. Although the motion to reconsider was supported by legal authority, the cited cases are not binding and did not establish any error on the part of the AAO in its prior decision. Accordingly, the motion to reconsider is dismissed.

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 reopen and the motion to reconsider are dismissed, the decision of the AAO dated April 10, 2012, is affirmed, and the petition remains denied.

^[1] P.L. No. 111-9 § 1 (March 20, 2009) extended the program to September 29, 2009. Pub. L. No. 111-68 § 133 (October 1, 2009) extended the program to October 30, 2009. Pub. L. No. 111-83 § 568(a)(1) (October 28, 2009) extended the program to September 29, 2012. Pub. L. No. 112-176 § 3245 (September 28, 2012) extended the program to September 30, 2015.