



U.S. Citizenship
and Immigration
Services

[REDACTED]

C1

DATE: **OCT 16 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 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 and dismissed a subsequent motion to reconsider. The self-petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO subsequently remanded the petition to the director for a new decision based on revised regulations. After issuance of a Notice of Intent to Deny (NOID), the director again denied the petition and certified the decision to the AAO. The AAO affirmed the director's decision. The self-petitioner filed a motion to reopen and a motion to reconsider, which are now before the AAO. The motions will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The self-petitioner seeks classification 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 at the [REDACTED]. On February 7, 2008, the self-petitioner filed a Form I-360 petition. On April 15, 2008, the director denied the petition, finding that the self-petitioner had not established that he had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition. The director based her decision on the fact that the self-petitioner was not solely performing religious work, as he submitted evidence indicating that he was working for [REDACTED] during the two-year period preceding the petition's filing date.

On May 19, 2008, the self-petitioner filed a motion to reconsider, which the director dismissed on May 23, 2008. The self-petitioner appealed the decision to the AAO on June 23, 2008. On December 18, 2008, the AAO remanded the matter to the director for consideration based on revised regulations. The director issued a NOID on April 28, 2010, to which the self-petitioner responded on May 28, 2010. The director again denied the petition on June 16, 2010, finding that the self-petitioner engaged in unauthorized employment during 2005 and 2006. The director certified the decision to the AAO.

The AAO affirmed the director's decision on February 22, 2012, finding the self-petitioner did not have the requisite lawful work experience as his work for [REDACTED] was unauthorized and because his R-1 nonimmigrant status expired on November 7, 2007, during the requisite period. Beyond the decision of the director, the AAO found that the self-petitioner failed to establish that his prior employment during the two-year qualifying period was continuous and compensated according to 8 C.F.R. § 204.5(m)(4) and § 204.5(m)(11). The AAO additionally determined that the record contained insufficient evidence to establish the employer's ability to compensate the self-petitioner pursuant to 8 C.F.R. § 204.5(m)(10).

The self-petitioner filed a motion to reopen and a motion to reconsider on March 23, 2012, which is now before the AAO. Counsel asserts that the self-petitioner worked for the [REDACTED] in [REDACTED] as a pastor continuously since 1996, that the self-petitioner submitted tax and other documents reflecting his work for and compensation by the church, that the regulations do not expressly require a full-time compensated position, that the self-petitioner submitted evidence that he worked 35 hours per week or a full-time schedule in many work settings, that the church compensated the self-petitioner adequately for his needs in the United States and his family's needs in Guatemala, that the self-petitioner's funds received from an alternate source have no bearing on the Form I-360 petition, and that the church established its ability to compensate the self-petitioner. The self-petitioner

resubmits copies of documents, including a July 10, 2006 letter of support for the self-petitioner from [REDACTED] a June 1, 2007 signed and notarized affidavit from the self-petitioner regarding his religious activities, the [REDACTED] declaration of faith, a translated and undated letter from the self-petitioner listing his religious work and partial schedule for the [REDACTED] in [REDACTED] undated meeting minutes from the 68th general assembly of the [REDACTED] in Cleveland, Tennessee, the self-petitioner's tax documents from 2004 through 2006, letters regarding the self-petitioner's church's federal tax exemption, the [REDACTED] master directory, a business certificate for the self-petitioner's church in [REDACTED] a May 31, 2007 signed letter of support from [REDACTED] of the self-petitioner's church, and 2007 bank account statements from an unspecified [REDACTED] entity.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) 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." In this case, the self-petitioner failed to submit a statement regarding whether the validity of the decision of the AAO was or is the subject of any judicial proceeding.

Notwithstanding the above, 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). Counsel's legal arguments are not facts and therefore do not meet the requirements of a motion to reopen. 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 Counsel fails to explain why any of the evidence submitted with this motion could not have been discovered or presented in the previous proceeding. An overall review of the evidence that the self-petitioner 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.

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 self-petitioner has not met that burden.

The regulation at 8 C.F.R. § 103.5(a)(3) states that "[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."

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).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. 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 that may not have been addressed by the party. Further, a motion to reconsider is not a process by which a party may generally allege error in the prior decision. Instead, the moving party must specify the factual and legal issues raised that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

Counsel does not support his arguments with any precedent decisions or other legal authority to establish that the AAO’s decision was erroneous based on an incorrect application of law or Service policy. Although counsel cites to case law and prior AAO decisions, all of his citations are to cases that were adjudicated prior to the new regulation. As such, they are not relevant to any of the determinations regarding the self-petitioner’s continuous and lawful work experience or the ability to compensate. Moreover, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. *Precedent decisions must be designated and published in bound volumes or as interim decisions.* 8 C.F.R. § 103.9(a). Regarding the ability to compensate issue, counsel contends that the self-petitioner met the requirements of 8 C.F.R. § 204.5(g)(2) which is not applicable to special immigrant worker petitions. On motion, counsel provides insufficient evidence and arguments to establish that the self-petitioner meets the pertinent requirements regarding ability to compensate at 8 C.F.R §§ 204.5(m)(7)(x)(i), (ii) and (10) as specifically discussed in the AAO’s prior decision.

The regulation at 8 C.F.R. § 103.5(a)(4) states that “[a] motion that does not meet applicable requirements shall be dismissed.”

The burden of proof in visa petition proceedings remains entirely with the self-petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the self-petitioner has not sustained that burden.

ORDER: The motions are dismissed, the decision of the AAO dated February 22, 2012 is affirmed, and the petition remains denied.