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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: **SEP 18 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. 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 Bible teacher. On June 9, 2004, the petitioner filed a Form I-360 petition. On November 24, 2009, the director denied the petition, finding that the petitioner had failed to establish that the position was a religious occupation with duties relating to a traditional religious function, that the beneficiary was solely dependent on the compensation paid by the petitioner, and that the beneficiary would be working full-time as a Bible teacher.

On December 24, 2009, the petitioner timely filed an appeal to the AAO. On December 8, 2011, the AAO dismissed the appeal, finding that the petitioner submitted insufficient documentation to establish that the proffered position is a religious occupation within the meaning of the regulation at 8 C.F.R. § 204.5(m)(5). Further, the AAO found that the petitioner failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for the two-year period immediately preceding the filing of the visa petition. Because the petitioner did not contest the director's finding that it had not established its offer of full-time employment to the beneficiary, the AAO considered the issue to be abandoned. As an additional matter, the AAO found that the petitioner did not submit a detailed employer attestation, as required by the regulation at 8 C.F.R. § 204.5(m)(7).

On January 10, 2012, the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision. Counsel asserts that U.S. Citizenship and Immigration Services (USCIS) denied the Form I-360 petition in error because USCIS erroneously added the word "continuously" in determining whether the petitioner had established that the beneficiary came to the United States to work in a full-time position and that the regulation at 8 C.F.R. § 204.5(m)(2) does not contain the word "continuously." Counsel contends that, pursuant to that regulation, the petitioner had established that the beneficiary came to work for its church in a full-time compensated position in a religious occupation as a Bible teacher. Counsel asserts that, pursuant to the regulation at 8 C.F.R. § 204.5(m)(4), the petitioner established that the beneficiary had been working continuously as a Bible teacher for the two-year period immediately preceding the filing of this petition.

Counsel notes that the beneficiary's degree from the [REDACTED] Seminary in June of 2003 was an online degree, thus not hindering his continuous employment. Counsel also states that the petitioner's offer for the beneficiary to work permanently for its church as a Bible teacher still exists.

In order to file a motion properly, 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 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, 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 Counsel fails to explain why any of the evidence submitted with this motion could not have been discovered or presented in the previous proceeding. 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.

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 present motion does not raise new facts or demonstrate any error on the part of the AAO, rather, counsel makes the same general arguments based on the same factual record that have already been addressed. Accordingly, the AAO will dismiss the motion to reopen.

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.”

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 in its decision 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 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. See *Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

Counsel’s assertion regarding the beneficiary’s full-time employment pursuant to 8 C.F.R. § 204.5(m)(2) appears for the first time in the motion to reconsider. The director initially found that the petitioner had not established that it offered the beneficiary full-time employment. The AAO determined that, on appeal, the petitioner did not contest the director’s findings for this issue or offer additional arguments. The AAO considered the issue to be abandoned. Because the petitioner failed to assert this argument on appeal, counsel is precluded from raising it in the motion to reconsider.

Even if the AAO were to consider this issue, the AAO is not persuaded that counsel’s assertions that the director misinterpreted the regulation at 8 C.F.R. § 204.5(m)(2) met the standards of a motion to

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).

reconsider. Counsel does not support his arguments with any precedent decisions to establish that the decision was incorrect based on an incorrect application of law or Service policy. Counsel also does not elaborate where or how the director used the word “continuously” in reference to the regulation at 8 C.F.R. § 204.5(m)(2).

Counsel’s assertion that the petitioner established that the beneficiary worked continuously for the two-year period and satisfied the regulation at 8 C.F.R. § 204.5(m)(4) also fail to meet the requirements of a motion to reconsider. Counsel never establishes that this part of the decision was based on an incorrect application of law or Service policy. Rather, counsel explains that the beneficiary’s degree from the [REDACTED] in June of 2003 was an online degree, thus not hindering his continuous employment. Counsel also states that the petitioner’s offer for the beneficiary to work permanently for its church as a Bible teacher still exists. A motion to reconsider is not the proper forum to raise an argument that could have been raised earlier. Accordingly, the AAO will dismiss the motion to reconsider.

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 petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The motions are dismissed, the decision of the AAO dated December 8, 2011 is affirmed, and the petition remains denied.