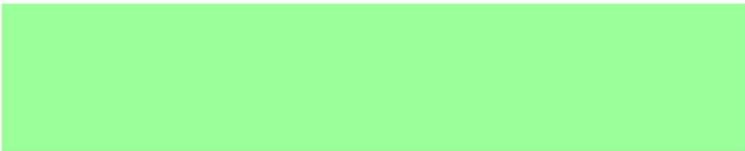




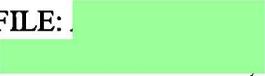
**U.S. Citizenship
and Immigration
Services**

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Date: **APR 02 2013**

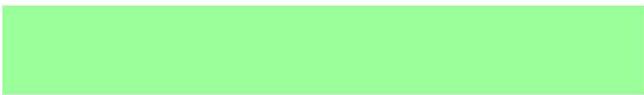
Office: CALIFORNIA SERVICE CENTER

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,

Ron Rosenberg
Acting 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 and motions to reopen and reconsider. The matter is now again 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 pastor. The director determined that the petitioner failed to establish that the petitioner qualifies as a bona fide non-profit religious organization and that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition. The director additionally found that the petitioner failed to establish how it intends to compensate the beneficiary. The AAO, in its March 5, 2012 dismissal, agreed with the director's determinations regarding the petitioner's status and the beneficiary's qualifying experience, but withdrew the director's finding with regard to the petitioner's ability to compensate the beneficiary. The AAO gave notice to the petitioner that it had 30 days in which to file a motion to reopen or reconsider.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the affected party or the attorney or representative of record must file the motion within 30 days of service of the unfavorable decision. If the decision was mailed, it must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of submission, but the date of actual receipt at the location designated for filing with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i).

The petitioner filed motions to reopen and reconsider the appeal on May 25, 2012, or 86 days after the AAO issued its decision. On September 27, 2012, the AAO dismissed the motions as untimely filed. The AAO noted that the regulation at 8 C.F.R. § 103.5(a) allows USCIS, in its discretion, to accept an untimely motion to reopen if the petitioner demonstrates that the delay was reasonable or beyond his or her control. However, the AAO found that the petitioner did not allege or submit evidence to establish that its failure to file a motion within the prescribed time was beyond its control.

The record indicates that on October 26, 2012, despite the instructions on the Form I-290B, the petitioner sent new motions to reopen and reconsider directly to the AAO. The regulation at 8 C.F.R. § 103.2(a)(1) provides that "[e]very application, petition, appeal, motion, request, or other document submitted on any form prescribed by this chapter I, ... must be filed with the location and executed in accordance with the instructions on the form, such instructions being hereby incorporated into the particular section of the regulations in this chapter I requiring its submission." On October 31, 2012, the AAO returned the motions as improperly filed. The motions were received at the location designated for filing on November 6, 2012, or 40 days after the decision was issued. Accordingly, the motions were untimely filed.

Notwithstanding the motions' improper filing, the petitioner also claims ineffective assistance of counsel related to the former attorney for the petitioner, [REDACTED]. Specifically, counsel argues

that the untimely filing of the May 25, 2012 motions was beyond the control of the petitioner because [REDACTED] failed to inform the petitioner of the March 5, 2012 decision until April 12, 2012. When a motion to reopen is based on a claim of ineffective assistance of counsel, it requires the alien claiming such ineffectiveness to comply with the requirements set forth by the BIA in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The *Lozada* decision requires the submission of:

1. An affidavit setting forth in detail the agreement with former counsel concerning what action would be taken and what counsel did or did not represent in that regard;
2. Proof that the alien notified former counsel of the allegations in the ineffective assistance of counsel claim and allowed counsel an opportunity to respond; and
3. If a violation of ethical or legal responsibilities is claimed, a statement as to whether the alien has filed a complaint with the disciplinary authority regarding counsel's conduct or, if a complaint was not filed, an explanation for not doing so.

Matter of Lozada, 19 I&N at 639. In support of the claim of ineffective assistance, the petitioner submits an affidavit from [REDACTED] administrator for the petitioning church, who asserts that "[i]f prior attorney informed us the denial timely, we could file the motion in time." The affidavit does not provide details of the agreement with [REDACTED] nor does the petitioner submit evidence to demonstrate that [REDACTED] has been notified of the allegations against her, or make any statement as to whether a complaint was filed with the relevant disciplinary authority. Further, the AAO notes that a copy of the AAO's March 5, 2012 decision was mailed directly to the petitioning church at its address of record. Accordingly, it is not clear how the petitioner was prejudiced by [REDACTED] alleged failure to notify the petitioner of the dismissal.

For the reasons discussed above, the AAO finds that counsel has not complied with *Matter of Lozada* or demonstrated any prejudice based upon the actions of the petitioner's former counsel in support of the motion to reopen.

Regardless, although current counsel filed the prior motion, he made no claim at that time regarding the reasons for the late filing.

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 (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 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

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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.

As previously noted, 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. Counsel makes no argument on motion that the AAO erred in its September 27, 2012 dismissal based on the previous factual record, nor does counsel cite any authorities to demonstrate error in the AAO's decision. Accordingly, the AAO will dismiss the motion to reconsider.

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 to reopen and reconsider are dismissed, the decision of the AAO dated September 27, 2012 is affirmed, and the petition remains denied.