



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

(b)(6)

[Redacted]

Date: **APR 17 2013** 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,

Ron Rosenberg
Acting 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 as well as subsequent 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 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 May 9, 2012, the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision. The AAO dismissed the motions on November 15, 2012, finding that the petitioner failed to meet the requirements of a motion to reopen or reconsider.

In dismissing the motion to reopen, the AAO found that the petitioner had not asserted any new facts or submitted any additional documentary evidence relating to the beneficiary's eligibility for the benefit sought. Accordingly, the AAO found that the petitioner's evidence was not a proper basis for a motion to reopen.

Regarding the motion to reconsider, the AAO discussed counsel's argument that the requirements of lawful status and employment authorization under 8 C.F.R. § 204.5(m)(4) and (11) are contrary to section 245(k) of the Immigration and Nationality Act (the Act) and therefore invalid under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that USCIS and the AAO were incorrect to apply those requirements to the instant case. The AAO disagreed with counsel's assertion that the requirements of lawful status and employment authorization for eligibility as a special immigrant religious worker conflict with section 245(k) of the Act. The AAO stated the following:

[S]ection 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.

Counsel for the petitioner filed the instant Form I-290B, Notice of Motion, on December 14, 2012 along with a brief from counsel. In the brief, counsel again argues that the requirements of lawful status and employment authorization under 8 C.F.R. § 204.5(m)(4) and (11) are invalid under *Chevron* as they conflict with Section 245(k) of the Act. Counsel argues that the AAO's interpretation of Section 245(k) is based on an erroneous view "that an immigrant petition and an immigrant visa are [the] same." Counsel states:

An immigrant visa is different from an immigrant petition (Form I-360). The immigrant petition is a Form I-360 application and the immigrant visa is an application that an alien applies for entry in the USA after and once immigration eligibility has been established by USCIS approval of Form I-360 Petition.

An immigrant visa is a document issued by a U.S. consular officer abroad that allows an alien to travel to the United States to live as a legal permanent resident, which you can apply after eligibility for the immigrant visa has been already established by obtaining an approval of Form I-360 Application by USCIS.

(Bold and underline emphasis in original). As stated above, section 245(k) states that it applies to "[a]n alien who is entitled to receive an immigrant visa." Counsel acknowledges that, for special immigrant religious workers, "eligibility for the immigrant visa [is] established by obtaining an approval of Form I-360 Application by USCIS." The regulations governing eligibility for approval of the Form I-360 petition are found at 8 C.F.R. § 204.5(m). Therefore, it is unclear how counsel's assertion that visas are issued by consular officers upon application by an eligible alien is relevant to the AAO's interpretation that, without an approved petition, the beneficiary is not "entitled to receive an immigrant visa" and section 245(k) does not apply.

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 In the current motion, the petitioner again fails to assert any new facts or submit 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.

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 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 instant motion to reconsider, counsel reiterates previous arguments, namely that USCIS and the AAO were incorrect to apply the requirements of lawful status and employment authorization to the instant case as those requirements are contrary to section 245(k) of the Act, and therefore invalid under *Chevron*. These arguments were already addressed by the AAO in its previous decision. Counsel additionally makes an argument regarding the distinction between an immigrant visa and an immigrant visa petition which, as discussed above, the AAO does not find persuasive.

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. As the petitioner failed to raise such supported allegations, 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 November 15, 2012, is affirmed, and the petition remains denied.