



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **DEC 03 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The AAO dismissed the petitioner's appeal. The petitioner then filed a motion to reopen and reconsider. The AAO granted the motion to reopen, dismissed the motion to reconsider, and affirmed the previous decision. The matter is now before the AAO on a second motion to reopen and reconsider. The AAO will grant the motion to reopen, dismiss the motion to reconsider, and affirm the denial of the petition.

The petitioner is a *gurdwara* (sometimes spelled *gurudwara*), or Sikh temple. It filed Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, on August 28, 2009, seeking 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). The petitioner claims that the beneficiary will perform services as a *kirtankar*, or devotional hymn singer and priest. The director denied the petition on January 12, 2010, having determined that the petitioner had not established that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing date of the petition. The AAO dismissed the appeal on April 23, 2013, citing the original ground for denial as well as a lack of required evidence regarding the beneficiary's compensation.

The petitioner filed a motion to reopen and reconsider on May 23, 2012. The AAO dismissed the motion to reconsider but granted the motion to reopen, and affirmed the denial of the petition on June 24, 2013.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 USCIS 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion, the petitioner submits a statement co-signed by counsel and by [REDACTED] president of the petitioning entity. They state: "the Petition is approvable in view of the presently clarified evidence that proves the essential requirements of the I-360 petition as supplemented by the attached corroboration." The accompanying evidence includes Internal Revenue Service (IRS) documentation regarding the beneficiary's past earnings; a statement signed by several members of the petitioner's congregation; and documentation relating to the site of the petitioning temple and nearby properties.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States—

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination . . . ; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation continuously for at least the two-year period immediately preceding the filing of the petition. The USCIS regulation at 8 C.F.R. § 204.5(m)(11) reads, in pertinent part:

Evidence relating to the alien's prior employment. . . . If the alien was employed in the United States during the two years immediately preceding the filing of the application and:

(i) Received salaried compensation, the petitioner must submit IRS [Internal Revenue Service] documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns.

(ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.

The USCIS regulation at 8 C.F.R. § 204.5(m)(10) states:

Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. If IRS documentation, such as IRS Form W-2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

Prior AAO decisions provided details about the chronology of the proceeding. The present decision will limit discussion to issues raised or addressed on motion.

The petitioner had originally claimed, on the employer attestation that accompanied the petition, that the beneficiary would receive an “annual salary [of] \$25000 plus free boarding & lodging.” In

contrast, the petitioner's other statements and evidence show that the \$25,000 figure is inclusive, not exclusive, of food and lodging. In the 2010 appeal, [REDACTED] then president of the petitioning entity, claimed that the "organization has fixed [the beneficiary's] salary at \$10,400 per annum from 2009 onwards" although he received a "lesser salary" in earlier years.

The petitioner had previously submitted uncertified copies of the beneficiary's IRS Form 1040 Individual Income Tax Returns for 2007 and 2008, showing that the beneficiary earned \$10,400 in business income in 2007, and \$6,800 in salary in 2008. In 2010, the beneficiary filed amended income tax returns, now showing business income of \$27,150 for 2007 and \$19,810 in business income (plus the originally claimed salary figure) for 2008.

In the April 2012 dismissal notice, the AAO stated that the beneficiary's IRS Form W-2 for 2008 showed a salary "below the petitioner's new stated salary of \$10,000 per year," and that the petitioner had submitted inconsistent evidence regarding the beneficiary's 2007 compensation. The AAO stated that amended tax returns, filed after the director raised concerns about the beneficiary's compensation, have diminished evidentiary weight. The petitioner, on motion from that decision, had asserted that its prior attorney of record, [REDACTED] had failed to procure the required IRS documentation. The petitioner itself, however, would have been responsible for maintaining the relevant records relating to the compensation of its workers.

Counsel and Mr. [REDACTED] assert that the petitioner "directed the Beneficiary [to] receive additional remuneration by donations directly from its congregants" rather than through the petitioner, so that, for tax purposes, the beneficiary could declare the additional income as business income rather than as salary paid through the petitioner. The regulation at 8 C.F.R. § 204.5(m)(7)(xii) requires the intending employer to attest to its "ability and intention to compensate the alien," and the regulation at 8 C.F.R. § 204.5(m)(10) requires the petitioner to submit "verifiable evidence of how the petitioner intends to compensate the alien." These regulations show that the compensation must come from the petitioning employer, not from third parties (such as members of the congregation) who have made no binding commitment to support the beneficiary, and who have not made their financial information available for USCIS to review.

Counsel and Mr. [REDACTED] assert that the variations in the petitioner's compensation are "not a legal basis for denying the Petition, as the Beneficiary has clearly been paid . . . as required by regulation." The amounts originally reported as the beneficiary's compensation were contradictory, and fell short of the claimed annual amount. This discrepancy raises legitimate questions about the extent of the beneficiary's past work and the petitioner's intent and ability to compensate him. As explained in the AAO's April 2012 decision, the petitioner cannot overcome this issue by amending the beneficiary's income tax returns after the fact. The petitioner provided no verifiable, contemporaneous evidence to show that the figures on the amended returns are more reliable than the original numbers.

The petitioner's latest submission on motion does not establish any error of fact or law in the AAO's prior decision of June 2013, with respect to the petitioner's prior compensation.

The purpose of a motion to reconsider is to contest the correctness of the original decision based on the previously established factual record. A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied. *See Matter of Medrano*, 20 I&N Dec. 216, 219-20 (BIA 1990, 1991). The “reasons for reconsideration” that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached by the AAO in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). 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. *Id.* at 58. 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.

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).

Newly printed IRS transcripts of the beneficiary’s amended 2007-2009 income tax returns introduce no new facts into the proceeding, except to support the uncertified copies submitted earlier. With respect to the beneficiary’s prior compensation, the petitioner’s latest submission does not meet the requirements of a motion to reopen or a motion to reconsider.

The petitioner submits a statement jointly signed by 45 members of its congregation, attesting to “the religious duties of [the beneficiary as a] full time Granthi/Priest . . . since February 2004.” (In previous correspondence, Tehal Singh had stated that the petitioner hired the beneficiary in April 2003 and in April 2004.) The signers attested to making additional donations beyond the beneficiary’s base salary. USCIS has not disputed the beneficiary’s involvement with the petitioner in some capacity; the dispute concerns the extent of that involvement. The statement does not establish that members of the congregation were or are in a position to have personal knowledge that the beneficiary’s employment has been and continues to be full-time.

The petitioner’s first motion included the beneficiary’s IRS Forms W-2 from 2008, 2009 and 2011. The AAO, in its June 2013 decision, noted that copies of the Forms W-2 for 2008 and 2009 were already in the record, and that “[t]he petitioner still has not submitted the 2007 IRS Form W-2, which the director specifically requested before denying the petition.” The AAO added that, because the director had already specifically requested the 2007 Form W-2,

[f]uture submission of the 2007 Form W-2 would not overcome the denial of the petition. *Cf. Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988) (if the petitioner fails to submit specifically requested evidence in response to a request from the director, USCIS will not accept that evidence if submitted later on appeal).

An “Index of Exhibits” submitted with the current motion indicates that the motion includes copies of the beneficiary’s “W-2 Forms for 2007, 2008 and 2009.” The motion includes only the forms for 2008 and 2009, both submitted previously.

The AAO had previously found that the petitioner had not provided verifiable documentation that it has provided, or will provide, room and board to the beneficiary (such as documentary evidence that it owns the property where the beneficiary resides). As described in previous AAO decisions, at various times the petitioner and/or the beneficiary have indicated that the beneficiary resides within the temple itself at [REDACTED]

Concerning the discrepancies in the beneficiary's residential address, counsel and Mr. Kang state:

The denial cites that the Beneficiary's 2007 and 2008 income tax returns show his address as [REDACTED] (owned by the Petitioner as evidenced by the attached copy of the deed); and that his 2009 return shows an address of [REDACTED] (leased by the petitioner as evidenced by the attached copy of the lease for the said premises), the same address as on the Beneficiary's Form W-2. This is fully consistent with the Beneficiary's having been provided free room and board by the Petitioner, as is corroborated by its attached September 1, 2008 to August 31, 2010 rental agreement specifically identifying the Beneficiary as the occupant in his function of "Priest."

The joint statement also contends that the petitioner rented the [REDACTED] property in anticipation of the arrival of the beneficiary's family in September 2008. The petitioner documents the arrival date on motion.

Because the present motion is the petitioner's first opportunity to address the AAO's stated concerns regarding [REDACTED] documentation of the petitioner's ownership of that property establishes a new fact. The documentation demonstrates that the petitioner has owned the property since 2003, but it is silent as to whether the beneficiary lived there. Unresolved concerns remain on this point, to be explained below.

The petitioner submits a copy of a lease agreement between the petitioner, as tenant, and [REDACTED] as landlord, indicating that the beneficiary would be the occupant at [REDACTED] beginning September 1, 2008. This document contradicts previous claims by the petitioner and by the beneficiary. As noted in prior AAO decisions, the beneficiary executed Form G-325A, Biographic Information, in conjunction with a Form I-485 Application to Register Permanent Residence or Adjust Status that he filed in 2009. On that form, the beneficiary indicated that he had resided at [REDACTED] since August 2004, more than four years before the September 1, 2008 date shown on the newly submitted lease agreement.

The petitioner's first motion to reopen and reconsider included affidavits from [REDACTED] and from the beneficiary, both dated May 20, 2012. Neither affidavit referred to an apartment across the street from the temple, leased from [REDACTED] stated: "The Beneficiary is provided living accommodations at our Temple as part of his compensation. Photographs of the living accommodations are attached." The petitioner submitted several color photographs with the handwritten annotation "Beneficiary's apartment in temple."

In his affidavit submitted with the first motion, the beneficiary stated:

I have lived at an apartment located in the Temple since I began working for the Society. The temple is located at [REDACTED] I was told that USCIS stated that I claimed on a biographic data form to live at 95-30 117th Street. I do not know if USCIS made an error in stating that in its decision, if my attorney erroneously completed the form, or if I made an error in providing the address to my attorney. It is obvious from being only one street number off that a typographical error occurred somewhere. I have always lived at the Temple since I entered the United States.

In the present motion, the petitioner has abandoned the claim that the beneficiary resided “in the Temple” and “that a typographical error occurred somewhere,” and made the new claim that, beginning in September 2008, the petitioner leased an apartment at [REDACTED] for the beneficiary’s use. These conflicting assertions cast doubt on the petitioner’s claims and on the authenticity of the newly submitted lease agreement. Doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 582, 591-92.

The petitioner has submitted independent, objective evidence regarding its control of various residential properties, but the petitioner has made conflicting claims regarding the beneficiary’s use of those properties. Both the beneficiary and the president of the petitioning entity previously asserted, in sworn affidavits, that the beneficiary resided “in the Temple” or “at [the] Temple,” with the beneficiary disclaiming the [REDACTED] address as “a typographical error” while other materials give divergent dates as to when the beneficiary moved in to the [REDACTED]. As housing is an essential part of the petitioner’s stated compensation provided to the beneficiary, these discrepancies preclude a finding that the petitioner has met its burden of proof and established the beneficiary’s eligibility for the benefit sought. The petitioner has not overcome the AAO’s earlier finding that “[t]he petitioner’s assertions regarding the beneficiary’s compensation have been inconsistent and contradictory, and therefore lack credibility.” The petitioner has not submitted verifiable documentary evidence of its intent and ability to compensate the beneficiary.

The AAO will affirm the denial of the petition for the above stated reasons. In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The AAO’s decision dated June 24, 2013, is affirmed. The petition remains denied.