



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **MAY 14 2013** Office: CALIFORNIA SERVICE CENTER

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:

SELF-REPRESENTED

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) rejected a subsequent appeal as improperly filed and dismissed a subsequent motion to reopen and to reconsider. The petitioner has now submitted an appeal on the AAO's decision. The appeal will be rejected.

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 church business administrator. The director denied the petition on April 2, 2010, finding that the petitioner had not established that the beneficiary has the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition. On May 3, 2010, the beneficiary filed a Form I-290B, Notice of Appeal. The AAO found that the beneficiary was not an affected party under 8 C.F.R. § 103.3(a)(1)(iii), and therefore lacked standing to file an appeal. Accordingly, the AAO rejected the appeal as improperly filed in accordance with 8 C.F.R. § 103.3(a)(2)(v)(A)(1) on January 24, 2012.

On February 27, 2012, the petitioner filed a motion to reopen and a motion to reconsider. The AAO dismissed the motions on December 24, 2012, finding that the petitioner failed to meet the requirements of a motion to reopen or a motion to reconsider. The AAO stated:

The petitioner's motion, filed on February 27, 2012, does not address or contest the rejection of the previous appeal. The petitioner submits no new facts or evidence to show that the appeal was properly filed. Therefore, the motion does not qualify as a motion to reopen. Likewise, the petitioner has not claimed or demonstrated that the rejection of the appeal was based on an incorrect application of law or USCIS policy, or that the rejection was incorrect based on the evidence of record at the time the AAO issued the rejection notice. Therefore, the motion does not qualify as a motion to reconsider.

The only issue that [the] petitioner addresses on motion is the basis for the director's denial of the underlying petition. The AAO, however, cannot and will not consider the petitioner's assertions and evidence in that regard without a showing that the AAO improperly rejected the appeal. The filing of a motion does not entitle the petitioner to a readjudication of the petition as though the improperly filed appeal had never happened.

The AAO advised the petitioner of the right to file a motion to reopen or reconsider the AAO's decision. The AAO did not indicate that the petitioner had the right to appeal the decision.

On January 23, 2013, the petitioner filed Form I-290B, Notice of Appeal or Motion. That form instructs the party filing the form to check one of six boxes. Three of the boxes describe various options for appeals; the other three describe types of motions. The petitioner checked the box "I am filing an appeal. My brief and/or additional evidence is attached."

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) under the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with two exceptions - petitions for approval of schools under § 214.3 are now the responsibility of Immigration and Customs Enforcement, and applications for S nonimmigrant status under § 214.2(t) are now the responsibility of the Fraud Detection and National Security office of U.S. Citizenship and Immigration Services (USCIS). That regulation did not give the AAO appellate jurisdiction over its own prior decisions.

In its last decision in this proceeding, on December 24, 2012, the AAO indicated that the petitioner “may file a motion to reconsider or a motion to reopen,” but the AAO did not state or imply that the petitioner could appeal that decision. The USCIS regulation at 8 C.F.R. § 103.5(a) permits the petitioner to file a motion based on an AAO decision, but the petitioner filed an appeal, not a motion. There is no comparable provision to allow an appeal.

Because no statutory or regulatory provision exists to allow the petitioner to appeal an AAO decision to the AAO, the AAO must reject the appeal.

Even if considered as a motion, the motion would be dismissed. In support of the instant filing, the petitioner submits copies of previously submitted documents. However, the evidence submitted does not address the AAO’s most recently issued decision. Rather, it focuses on the issues contained in the director’s April 2, 2010 decision. As stated in the AAO’s December 24, 2012 decision, USCIS will only consider arguments and evidence on motion relating to the grounds underlying the most recent decision. In this instance, the petitioner bears the burden of establishing that the AAO’s dismissal for failure to meet the requirements of a motion was itself in error. If the petitioner can demonstrate that the AAO erred by dismissing that motion, then there would be grounds to reopen or reconsider the proceeding. The petitioner has not done so in this proceeding. The filing of a motion does not present a new opportunity as though the dismissal of the previous motion never existed. The petitioner has not claimed or shown that its February 27, 2012 filing met the requirements of a motion to reopen or reconsider.

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 filing, the petitioner fails to assert any new facts or submit any additional documentary evidence. Therefore, the evidence submitted will not be considered “new” and will not be considered a proper basis for a motion to reopen.

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).

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.

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.

The instant filing does not allege that the issues, as raised in the previous motions, involved the application of precedent to a novel situation, or that there is new precedent or a change in law that affects the AAO’s prior decision. Instead, the petitioner submits copies of previously submitted documents which relate the director’s initial decision to deny the appeal.

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. Because the petitioner has failed to raise such allegations of error in the instant filing, the AAO will dismiss the motion to reconsider.

For the reasons discussed above, the AAO finds that the instant filing does not meet the requirements of a motion to reopen or a 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 appeal is rejected. The decision of the AAO dated December 24, 2012 is affirmed, and the petition remains denied.