



U.S. Citizenship
and Immigration
Services

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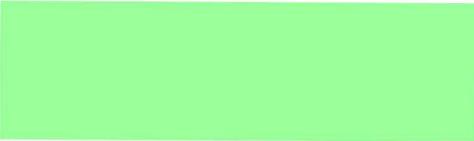


DATE: **MAY 16 2013** Office: CALIFORNIA SERVICE CENTER FILE:

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, initially approved the employment-based immigrant visa petition. On further review, the director determined that the petitioner was not eligible for the visa preference classification. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke (NOIR) approval of the petition and her reasons for doing so. The director subsequently exercised her discretion to revoke approval of the petition on June 23, 2010. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and also dismissed motions to reopen and reconsider as untimely filed. By motion of January 17, 2013, counsel submitted documentation to show that the motions rejected by the AAO were timely filed. The director denied the motion on February 5, 2013. As the director lacked jurisdiction to act on the petitioner's motion, the AAO reopened the matter on service motion and will now dismiss the petitioner's previous motions.

The petitioner is a church corporation. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Act to perform services as a pastor in its church in San Francisco and its "representative to Hispanic Ministers in the United States." The AAO withdrew the director's determination that the beneficiary had failed to maintain his R-1 nonimmigrant religious worker status and that the petitioner had not established that the beneficiary had been a member of its religious denomination for the two years immediately preceding the filing of the petition. However, the AAO concurred with the director that the petitioner had failed to establish that the beneficiary worked continuously as a full-time pastor with the petitioning organization and that the petitioner had not resolved the inconsistencies in the record, in particular the inconsistencies regarding the beneficiary's compensation and job duties.

In support of the motions, the petitioner submitted a June 7, 2012 letter averring that the beneficiary "has been continuously engaged in serving" Hispanic Christians in the San Francisco area since 2003, a June 12, 2012 letter from the beneficiary who stated that he "began planting and pioneering a [redacted] of the Hispanic congregation in San Francisco in January 2003" and that he "filed tax returns in these years and claimed income from my work as a minister," a June 12, 2012 letter of recommendation from [redacted] president and founder of the [redacted] who stated that he had known the beneficiary since June 2008, and a letter from Dr. [redacted] president of [redacted], who stated that he has known the beneficiary for 16 years and that they had ministered in each other's church and at conferences. Dr. [redacted] also explains the relationship between the church at which the beneficiary works and the college and seminary. The petitioner also submits over 30 other "letters of support." The petitioner resubmitted copies of the beneficiary's federal income tax returns with copies of the supporting IRS Forms W-2 and IRS Forms 1099-MISC, Miscellaneous Income. The AAO declined to consider the documentation for 2005 and 2007 that was submitted for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The AAO also found that the petitioner failed to submit primary documentation regarding the beneficiary's employment as instructed by the director in her NOIR.

The AAO also concurred with the director that the petitioner had not resolved issues regarding the beneficiary's compensation and duties, finding that the petitioner had paid the beneficiary less than the proffered \$4,000 per month in 2006 and 2007, that his duties were different than that initially outlined in the petition, and that the petitioner had established a relationship between the petitioner and [REDACTED] where the beneficiary states he teaches.

In the June 2012 motion, counsel asserted:

Although [the beneficiary] has received income from other sources during the course of his employment as the [REDACTED] [REDACTED] operating as a charter of [REDACTED], such compensation has been consistent with his duties as a "minister" and fully endorsed by [the petitioner] and [REDACTED] . . . Furthermore, [the beneficiary] engages in these activities in an effort to spread the message of Pentecostalism and attract new converts to his church, a well recognized traditional duty of Pentecostal and Christian ministers.

Counsel further asserted:

[N]either the regulations nor the INA require that a petitioning religious organization pay a prevailing wage to its intended beneficiary. Rather, the petitioner must show "verifiable evidence of how the petitioner intends to compensate the alien." . . . Anything more would unduly interfere with a religious organizations [sic] right to freely practice its religion. Clearly, both [the petitioner] and [REDACTED] are financially viable organizations with sufficient incomes and budgets to adequately pay [the beneficiary], and have done so for nearly seven years. . . . To the extent that [the beneficiary's] federal income tax returns reflect a gross income under the "anticipated salary" of \$4,000 per month, such an event had no impact on [his] ability to support himself and his family and, more importantly, it is clear that [the beneficiary] had no need to work outside of his vocation as a Minister to support himself, which is the central question to the compensation inquiry.

Counsel's assertions are not persuasive. Regarding the beneficiary's salary, neither the AAO nor the director implies that the beneficiary must be paid a specific or "prevailing" wage. Nonetheless, the petition was approved based on specific declarations by the petitioner, including how much it would compensate the beneficiary for his services. The issue in the instant case is not whether the petitioner has the ability to pay the beneficiary a wage that would prevent him from becoming a public charge but rather whether the petitioner has abided by the assertions made within its petition. The regulations do not permit the petitioner to change the terms of the job offer because the beneficiary is able to supplement his income with an amount that will equal or exceed the salary promised by the petitioner.

Furthermore, whether the beneficiary has continuously worked as a minister from the two years prior to the filing of the petition is a matter of fact to be established by the evidence of record. The

burden is on the petitioner to establish that the beneficiary has met the requirements of the regulations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

While submitting additional documentation on appeal and on motion, the petitioner failed to provide sufficient evidence in the record before the director to establish that the beneficiary worked continuously during the relevant period. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal or motion. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's NOIR. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal or motion.

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

A review of the evidence that the petitioner 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. All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. The petitioner's motion is not an opportunity for the petitioner to correct its own defects in the record. In addition, the petitioner failed to explain why the evidence was previously unavailable and could not have been submitted earlier.

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

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 NEW COLLEGE DICTIONARY, (3d Ed 2008). (emphasis in original).

reopen a proceeding bears a “heavy burden.” *INS v. Abudu*, 485 U.S. at 110. The petitioner failed to meet that burden with its motion of January 17, 2013. The petitioner submitted no new documentation in response to the AAO’s notice of reopening on service motion. Accordingly, the petitioner’s motion to reopen of January 17, 2013 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. 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. A motion to reconsider is not a process by which a party may submit, for example, the same brief presented on appeal and seek reconsideration by generally alleging 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).

In this case, the petitioner failed to support its motion with any legal argument or precedent decisions to establish that the AAO decision was based on an incorrect application of law or USCIS policy. The motion to reconsider will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that “[a] motion that does not meet applicable requirements shall be dismissed.” Accordingly, the motions will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motions are dismissed. The AAO’s decision of May 14, 2012 is affirmed and the petition remains denied.