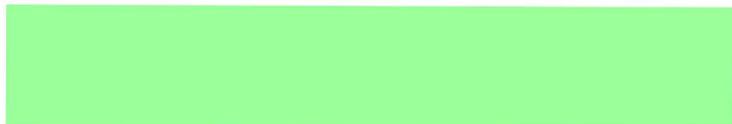




U.S. Citizenship
and Immigration
Services

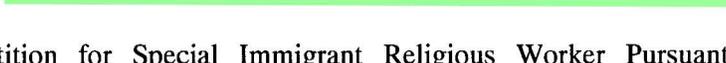
(b)(6)



Date: Office: CALIFORNIA SERVICE CENTER

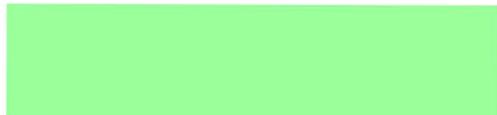
FILE: 

MAY 16 2013

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 as well as a subsequent motion to 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 describes itself as “a Religious Institute within the Roman Catholic 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 minister. The AAO, in its May 16, 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 June 15, 2012, the petitioner filed a motion to reconsider the AAO’s decision. The AAO dismissed the motion on December 20, 2012, finding that the petitioner failed to meet the requirements of a motion to reconsider. In dismissing the motion, the AAO thoroughly discussed the petitioner’s arguments and found that the petitioner had failed to establish that the director’s decision was based on an incorrect application of law or USCIS policy, or that the AAO’s decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel for the petitioner filed the instant Form I-290B, Notice of Motion, on January 22, 2013 along with a copy of a brief previously submitted in support of the petitioner’s June 15, 2012 motion. On the Form I-290B, counsel stated: “See attached legal argument to be supplemented within 30 days by evidence not previously considered in prior Motion and Appeal.” A cover letter accompanying the motions also indicated counsel’s intent to supplement the filing “with additional evidence and/or documents relative to the matter” within 30 days. No further argument or legal grounds were provided to support either motion on the Form I-290B, nor was the purportedly forthcoming evidence identified to support the motions. The record indicates that no brief or additional evidence has been received to date.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.3(a)(2)(vii) allows for limited circumstances in which a petitioner can supplement an already-submitted appeal. This regulation, however, applies only to appeals, and not to motions to reopen or reconsider. There is no analogous regulation which allows a party to submit new evidence in furtherance of a previously-filed motion.

Similarly, the instructions to the Form I-290B provide that unlike appeals, motions may not be supplemented and specifically state that all evidence “must be submitted with the motion.” The Form I-290B itself contains six boxes, one of which the petitioner must check to indicate whether the petitioner is filing an appeal or motion. Of the three boxes that pertain to motions, all indicate that the brief and/or additional evidence is “attached” to the motion. The form contains no provision for the submission of briefs or evidence after the filing of the motion. Pursuant to the regulation at 8 C.F.R. § 103.2(a)(1), every benefit request must be executed and filed in accordance with form instructions which are incorporated into the regulation.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), 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 Service policy. The plain language of each regulation makes clear that submission of the supporting material and a legal basis for the motion is mandatory, not permissible. This language, combined with the form instructions and the form, explicitly require the motion to reopen and reconsider to be supported at the time of filing.

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 fails to assert any new facts or submit any additional documentary evidence. 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.

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 that were decided in error or overlooked in the prior decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

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).

In the instant motion to reconsider, counsel resubmits a brief containing the exact arguments already addressed by the AAO in its previous decision. These arguments do not address the AAO's most recently issued decision, but instead relate to the director's January 20, 2011 decision to deny the petition and the AAO's May 16, 2012 dismissal of the petitioner's appeal. On motion, the AAO will only consider arguments and evidence relating to the grounds underlying the AAO's most recent decision. The petitioner bears the burden of establishing that the AAO's December, 2012 dismissal for failure to meet the requirements of a motion to reconsider was itself in error. If the petitioner can demonstrate that the AAO erred by dismissing that motion, then there would be grounds to 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 June 15, 2012 filing met the requirements of a motion to reconsider.

The motion to reopen is unsupported by documentary evidence that demonstrates new facts to be considered. Similarly, the motion to reconsider is devoid of any legal argument that demonstrates error on the part of the AAO in its prior decision.

Accordingly, the instant motion does not meet the regulatory requirements of a motion to reopen or 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 motion to reopen and the motion to reconsider are dismissed, the decision of the AAO dated December 20, 2012, is affirmed, and the petition remains denied.