



U.S. Citizenship  
and Immigration  
Services

(b)(6)



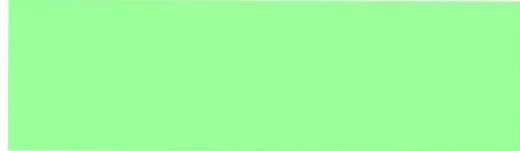
DATE **OCT 08 2013** Office: CALIFORNIA SERVICE CENTER

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 (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 Administrative Appeals Office (AAO) summarily dismissed the appeal. The matter is now before the AAO on a motion to reopen. The motion will be dismissed.

The petitioner is a mosque. 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 an imam. The director determined that the petitioner failed to establish that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition. The petitioner filed a Form I-290B, Notice of Appeal or Motion, on November 8, 2012. On April 11, 2013, the AAO summarily dismissed the petitioner's appeal, finding that the petitioner failed to specifically identify an erroneous conclusion of law or a statement of fact in the director's decision as a basis for the appeal. The AAO stated, in pertinent part:

The regulation at 8 C.F.R. § 103.3(a)(1)(v) provides that “[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.” Counsel makes only general references to the “erroneous facts” without any substantive argument pointing to specific facts or analyses in contention. It is unclear how counsel's reference to the beneficiary's tax return relates to the director's finding that the petitioner failed to establish that the beneficiary was engaged in qualifying, authorized employment during the qualifying period. Further, while counsel indicated that a brief and/or additional evidence would be forthcoming within thirty days, to date, careful review of the record reveals no subsequent submission. Therefore, the appeal form itself appears to constitute the entire appeal.

The AAO also noted that the appeal was untimely filed.

The petitioner has now filed a motion to reopen. Accompanying the Form I-290B, the petitioner submits a copy of the AAO's April 11, 2013 summary dismissal, a May 15, 2013 letter from the AAO indicating that the petitioner's I-290B with filing fee were being returned as the AAO does not accept such filings, and a letter from counsel indicating that the petitioner is “resubmitting” the motion after the incorrect filing.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the affected party or the attorney or representative of record must file the motion within 30 days of service of the unfavorable decision. If the decision was mailed, it must be filed within 33 days. *See* 8 C.F.R. § 103.8(b).

The record indicates that on May 13, 2013, despite the filing instructions on the Form I-290B, the petitioner sent the motion to the Vermont Service Center. The regulation at 8 C.F.R. § 103.2(a)(1) states that “[e]very application, petition, appeal, motion, request, or other document submitted on any form prescribed by this chapter I, ... must be filed with the location and executed in accordance with the instructions on the form, such instructions being hereby

incorporated into the particular section of the regulations in this chapter I requiring its submission.” The regulation at 8 C.F.R. § 103.2(a)(7)(i) provides that “a benefit request will be considered received by USCIS as of the actual date of receipt at the location designated for filing.” On May 15, 2013, the AAO returned the motion as improperly filed. The motion was received at the location designated for filing on June 3, 2013, or 53 days after the decision was issued. Accordingly, the motion was untimely filed.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) allows USCIS, in its discretion, to accept an untimely motion to reopen if the petitioner demonstrates that the delay was reasonable or beyond his or her control. However, in this instance the petitioner has not alleged or submitted evidence to establish that its failure to file a motion within the prescribed time was reasonable or beyond its control.

Notwithstanding the improper filing, on the Form I-290B, counsel for the petitioner states the following:

The petitioner had established the beneficiary had established he had the requisite two years experience to perform services as an imam. The Service failed to take into consideration the documentary evidence submitted by the beneficiary. (Please see attachment.)

Counsel’s argument regarding the beneficiary’s experience relates to eligibility issues contained in the director’s September 28, 2012 decision. Counsel does not identify which documentary evidence “the service failed to take into consideration.” However, as the AAO stated that no evidence was submitted on appeal and the petitioner has offered no evidence or argument that any such evidence was submitted, this too can only relate to issues addressed in the director’s decision.

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 summary dismissal of the petitioner’s appeal for failure to identify a basis for the appeal was itself in error. If the petitioner can demonstrate that the AAO erred by summarily dismissing that appeal, then there would be grounds to reopen the proceeding. The petitioner’s non-specific claims would be insufficient to meet the requirements of a substantive appeal and are likewise insufficient to meet the requirements of a motion to reopen. Regardless, the filing of a motion does not present a new opportunity as though the summary dismissal never existed. The petitioner has not claimed or shown that the AAO should not have summarily dismissed the appeal, and the AAO will not consider the petitioner’s arguments regarding the underlying decisions to deny the petition.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. *See* 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.<sup>1</sup> Counsel argues generally on motion that the beneficiary

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<sup>1</sup> 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).

held the requisite experience and that USCIS failed to consider evidence, again failing to specify any error or evidence that was overlooked. However, counsel does not argue or provide any documentary evidence to demonstrate that the petitioner properly identified an error in the director's decision in its November 8, 2012 appeal, or that the AAO erroneously summarily dismissed that appeal. A review of counsel's statement 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. 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.

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, that burden has not been met.

**ORDER:** The motion to reopen is dismissed, the decision of the AAO dated April 11, 2013 is affirmed, and the petition remains denied.