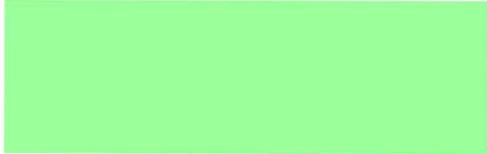




U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **SEP 20 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 director granted motions to reopen and reconsider on October 19, 2010 and January 31, 2011 and again dismissed the petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and subsequent motions to reopen and 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 is a Jewish temple. 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 music, language, and prayer teacher. In dismissing the petitioner's original appeal on September 28, 2012, the AAO agreed with the director's determination that the petitioner had not established that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition and additionally found that the petitioner had failed to establish that it qualifies as a bona fide nonprofit religious organization.

On October 26, 2012, the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision. The AAO dismissed the motions on June 4, 2013, finding that the petitioner failed to meet the requirements of a motion to reopen or reconsider. In dismissing the motion to reopen, the AAO found that the petitioner had not submitted any evidence which could be considered "new" under 8 C.F.R. § 103.5(a)(2) or which established eligibility for the benefit sought. In dismissing the motion to reconsider, the AAO thoroughly discussed the petitioner's arguments and found that the petitioner had failed to establish that the AAO's previous decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, or was incorrect based on the evidence of record at the time of the initial decision.

On motion, the AAO will only consider arguments and evidence relating to the grounds underlying the AAO's most recent decision. In order to establish grounds to reopen or reconsider the instant proceeding, the petitioner bears the burden of establishing that the AAO's June 4, 2013 dismissal for failure to meet the requirements of a motion to reopen or reconsider was itself in error.

In support of the instant motions to reopen and to reconsider, the petitioner submits a brief from counsel, a June 28, 2013 letter from the accounting firm [REDACTED] a June 28, 1996 letter to the Internal Revenue Service (IRS) from the accounting firm [REDACTED] an August 28, 1996 letter from the IRS to the petitioner, and a June 28, 2013 letter from Rabbi [REDACTED]

In denying the petitioner's April 30, 2010 Form I-360 petition, the director found that the petitioner failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately prior to the filing of the petition. In its September 28, 2012 decision, the AAO found that the petitioner had not submitted sufficient evidence to explain the beneficiary's self-employment earnings and to establish that the self-employment was authorized and qualifying religious work and that the petitioner failed to rebut

the director's finding that the beneficiary engaged in unauthorized employment for Congregation [REDACTED]. The AAO stated the following, in pertinent part:

A review of the beneficiary's tax returns indicates that he claimed all of the income reported by the petitioner, and allegedly by Congregation [REDACTED] as self-employment income from his work as a music teacher. His 2008 Schedule C-EZ, Net Profit from Business, indicates that he deducted expenses totaling \$1,610 for teaching materials, telephone, car and truck expenses, and meals and entertainment. The beneficiary deducted similar expenses in 2009 in the amount of \$2,040 on self-employment income of \$5,199, although he was allegedly paid only \$930 by the petitioner. As discussed above, the petitioner does not identify how much of this extra income that it paid to the beneficiary in 2008 or 2009 was for teaching and how much was for his performance during liturgical services. The AAO also notes that the beneficiary did not deduct the airfare or lodging that he allegedly received from Congregation [REDACTED] for his participation in its fundraiser. Thus the record does not establish that the beneficiary received only a "small honorarium" from Congregation [REDACTED] and does not sufficiently explain his self-employment earnings or rebut the director's finding that he beneficiary engaged in unauthorized employment.

In support of its October 26, 2012 motions, the petitioner, through previous counsel, repeated previously made arguments that the beneficiary did not engage in employment with Congregation [REDACTED] and that the funds received by the beneficiary from that organization were an honorarium for participation in a fundraising event which should not be considered employment income. The petitioner submitted a letter from the beneficiary's accountant explaining the rationale for advising the beneficiary to report the funds from [REDACTED] as income. In its June 4, 2013 decision to dismiss the motions, the AAO found that the petitioner failed to present any new evidence on this issue to serve as a basis for the motion to reopen, noting that all of the submitted evidence "was either previously submitted or was previously available and could have been provided on appeal." Additionally, the AAO found that the petitioner failed in its motion to reconsider to cite any pertinent authority to establish that the AAO erred as a matter of fact or law in its prior decision.

In the instant filing, the petitioner, through counsel, again argues that the beneficiary was not engaged in unauthorized employment with Congregation [REDACTED] and submits "new evidence" on this issue in the form of a June 28, 2013 letter from Rabbi [REDACTED]. In the letter, as in a previously submitted letter dated January 4, 2011, Rabbi [REDACTED] asserts that the \$4,189 paid to the beneficiary by Congregation [REDACTED] consisted of money to cover travel, lodging and food expenses "and a small honorarium." The instant letter additionally provides a breakdown of the payment "to the best of [Rabbi [REDACTED] recollection," including the various expenses covered and a \$1,750 honorarium.

Regarding the issue of the petitioner's status as a bona fide nonprofit religious organization, the AAO found in its September 28, 2012 decision that the petitioner failed to meet the requirements

of 8 C.F.R § 204.5(m)(5) and (8), which require a petitioning religious organization to possess a currently valid determination letter from the IRS establishing that the petitioner is exempt from taxation under section 501(c)(3) of the Internal Revenue Code (IRC) or that it is covered by a group tax-exemption. The AAO noted that the petitioner had submitted a letter from the IRS confirming the tax-exempt status the [REDACTED]; under section 501(c)(3) of the IRC as well as proof of the petitioner's membership in that organization. However, the AAO found that the determination letter did not indicate that the [REDACTED] was granted a group exemption which would apply to subordinate units. In its June 4, 2013 decision dismissing the petitioner's previous motions, the AAO found that the petitioner again "failed to establish that it has a currently valid determination letter from the IRS establishing the petitioner's tax exemption or that the petitioner is covered under currently valid determination letter from the IRS establishing that the Union for Reform Judaism has a group tax-exemption."

In a brief submitted in support of the instant motions, counsel for the petitioner states the following:

The AAO has noted that the Petitioner has not provided evidence "*that it has a currently valid determination letter from the IRS establishing the petitioner's tax exemption*". To this point we are submitting as evidence a letter from [REDACTED] a letter from [REDACTED] and a letter from the IRS dated August 28, 1996 all pointing to the fact that the petitioner is not required to file annual tax returns because it is exempt for being a synagogue, a religious organization operated exclusively for religious purposes.

The petitioner submits a letter from the accounting firm [REDACTED] stating that the petitioner is exempt from income tax under Section 501(a) of the IRC and classified as a church under Section 501(c)(3) of the IRC and that, under Department of Treasury Regulations, the petitioner is exempt from filing an annual tax return. The petitioner also submits a June 28, 1996 letter from the accounting firm [REDACTED] to the IRS stating the following regarding the petitioning temple:

In response to your letters dated April 22, 1996 and May 28, 1996, requesting the above named taxpayer's Form 940 for December 31, 1995, please be advised that the taxpayer is not required to file this form. The taxpayer is a church (synagogue), operated exclusively for religious purposes and is exempt from tax under IRS Section 501(a) as an organization described in Section 501(c)(3). As clearly stated in the instructions to Form 1023, "Application for Recognition of Exemption", churches are not required to file Form 1023 in order to be considered as tax exempt under Section 501(c)(3).

Additionally, the petitioner submits an August 28, 1996 letter from the IRS to the petitioner, stating in pertinent part: "Thank you for responding to our inquiry about the above tax return. Based on our information, we agree that you are no longer required to file this tax return."

In the preamble to the final regulations, USCIS acknowledged that the IRS does not require all churches to apply for a determination letter, but stated that the requirement is included in the final rule because it is a “valuable fraud deterrent” and an IRS determination letter provides “verifiable documentation that the petitioner is a bona fide tax-exempt organization or part of a group exemption.” See 73 Fed. Reg. 72280, 72281 (Nov. 26, 2008). To the extent that the petitioner argues that it qualifies as a bona fide religious organization without a valid determination letter, such argument is contrary to the plain language of the regulations. See 8 C.F.R. § 204.5(m)(5) and (8).

The IRS letter submitted in support of the instant motion, unlike the “determination letter” required under USCIS regulations, does not indicate that the petitioner has applied for and been granted tax exempt status under section 501(c)(3) of the IRC.

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 instant motion, the petitioner has again failed to present any evidence on this issue that could be considered “new” to serve as a basis for reopening the petition. Further, the evidence submitted does not overcome the deficiencies specified in earlier decisions as discussed above and therefore does not establish eligibility for the benefit sought.

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 (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 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.

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).

The motion to reconsider does not allege that the issues 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. Although the petitioner alleges error in the AAO's previous decision, the petitioner has not cited any pertinent legal authority to establish that the AAO erred as a matter of fact or law in its June 4, 2013 to dismiss the petitioner's motions. 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. Accordingly, the AAO will dismiss the motion to reconsider.

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 and the motion to reconsider are dismissed, the decision of the AAO dated June 4, 2013, is affirmed, and the petition remains denied.