



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: OCT 10 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 (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,

for Ron Rosenberg
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. The matter is now before us on a motion to reconsider. The motion will be denied, our previous decision will be affirmed, and the petition will remain denied.

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 parish priest. The director determined that the petitioner had not submitted required evidence to establish that it qualifies as a bona fide nonprofit religious organization, and that the petitioner failed to establish that the beneficiary would be employed in a qualifying full time position. In our May 12, 2014 decision, we found no error in the director's determination regarding the first ground for denial and we withdrew the director's finding regarding the second ground. As an additional matter, we found that the petitioner failed to establish that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing of the petition.

On motion, the petitioner submits a brief and a letter from its president.

In our decision dismissing the petitioner's original appeal, we specifically and thoroughly discussed the petitioner's evidence and determined that the petitioner had not met the evidentiary requirements at 8 C.F.R. § 204.5(m)(8) to establish that it qualifies as a bona fide nonprofit religious organization. The petitioner submitted a letter from the Internal Revenue Service recognizing the tax-exempt status of the [REDACTED] (the diocese) under section 501(c)(3) of the Internal Revenue Code, as well as a letter from the diocese stating that the petitioning church is a part of the diocese. On appeal, the petitioner argued that it is automatically considered tax-exempt by the IRS, and that it had submitted evidence of its exemption under state law, which "serve[s] the equivalent purpose of the IRS determination letter." The petitioner alternately argued that a diocese is, by definition, a group of churches, and that the petitioner is therefore covered by a group exemption through its relationship to the diocese. We discussed the rationale for including the requirement of a valid IRS determination letter in the current regulations, published on November 26, 2008. We stated that the petitioner had notice of the filing requirements through the regulations and the form instructions, and through the director's request for evidence. We found that, as the submitted determination letter did not indicate that the IRS granted the diocese a group exemption that would apply to subordinate organizations, the petitioner's evidence did not meet the requirements of 8 C.F.R. § 204.5(m)(8).

We additionally found that the petitioner failed to establish the beneficiary's qualifying experience under 8 C.F.R. § 204.5(m)(4), which requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation continuously for at least the two-year period immediately preceding the filing of the petition. Specifically, we found that the petitioner submitted evidence indicating that the beneficiary was engaged in secular employment during the two years preceding the filing of the petition in addition to his work as a priest. As the regulation at 8 C.F.R. § 204.5(m)(5) defines "minister" in part as one who "[w]orks solely as a

minister in the United States,” we found that the beneficiary’s experience could not be considered qualifying ministerial work.

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 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.

In the motion to reconsider, the petitioner contends that we were incorrect to find that the petitioner failed to submit required evidence of its tax-exempt status. First, the petitioner argues that it should not be “penalize[d]” for the change in filing requirements. The petitioner notes that the beneficiary was first granted R-1 nonimmigrant status authorizing his work for the petitioner in 2007 under the previous regulations then in effect, and that “there is no reasonable expectation that the petitioner and beneficiary would have knowledge regarding USCIS policy changes made after 2007.” The petitioner requests additional time in which to obtain the required IRS determination letter, citing the following statement from the preamble to the current regulations governing special immigrant religious workers:

If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information.

73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). The cited statement was included in a discussion of DHS’ decision not to allow for a 30-day effective date for the regulation, and to apply the regulation to all cases pending on the effective date. The instant petition was filed on March 1, 2013. As it was neither pending on November 26, 2008, nor filed within 30 days after that date, the above statement is not applicable. Further, as stated in our previous decision, the petitioner was put on notice of the filing requirements through the regulations and the form instructions, and was given an additional opportunity to provide the required evidence in response to the director’s request for evidence.

The petitioner’s argument that the petitioner and the beneficiary could not reasonably be expected to have knowledge of policy changes after 2007 is without merit. The requirement for a currently valid letter from the IRS has been in effect since 2008, was published in the Federal Register, has been incorporated into the Code of Federal Regulations, and is included on the form instructions. It is reasonable to expect that a petitioner or applicant who is seeking an immigration benefit would determine the evidence needed to gain approval of such benefit.

The petitioner alternately argues on motion that the diocese's failure to apply for a group exemption was "unintentional," and was likely based on the belief that the word "diocese" is equivalent to the word "group." The petitioner argues that this error was a "mistake in all innocence," citing language from *Li v. Holder*, 738 F.3d 1160 (9th Cir. 2013), relating to witness credibility determinations. The cited decision is not relevant to the instant matter, in which the issue is not one of credibility, but whether the petitioner submitted the required evidence.

Additionally, the petitioner states that the beneficiary's immediate superior is the head of the diocese, and it therefore contends that the beneficiary "can be considered an employee of the Diocese," for whom the petitioner has submitted a valid IRS determination letter. The Form I-360 petition and employer attestation identified the petitioning church as the prospective employer, and the petitioner cannot change the prospective employer on motion. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, the beneficiary's employment by the diocese is not supported by a valid Form I-360 petition and an employer attestation signed by an authorized official of the prospective employer, as required by regulation.

As a final argument on this issue, the petitioner contends that it has submitted sufficient evidence to establish its tax-exempt status under the "preponderance of the evidence" standard. As discussed in our previous decision, the issue in this matter is not whether the petitioner is tax-exempt, but whether it has submitted the evidence required under the regulations. In this instance, the petitioner has not met the evidentiary requirements of 8 C.F.R. § 204.5(m)(8).

Regarding the issue of qualifying experience, the petitioner argues that we were incorrect to consider the beneficiary's experience during the two years preceding the filing of the petition, as specified in the regulation at 8 C.F.R. § 204.5(m)(4) and (11). The petitioner instead argues that, according to section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), the relevant qualifying period is the two-year period preceding the beneficiary's application for admission to the United States, in this instance in 2007. The petitioner does not cite any pertinent legal authority to support this interpretation of the Act which directly contradicts USCIS regulations. The statute does not provide that any application for admission into the United States is relevant for establishing eligibility as an immigrant religious worker. Rather, the statute at 8 U.S.C. § 1101(a)(27)(C)(iii) provides that the two-year qualifying period must be immediately preceding the period specified in 8 U.S.C. § 1101(a)(27)(C)(i), which applies to those seeking admission into the United States pursuant to 8 U.S.C. § 1101(a)(27)(C).

Alternately, the petitioner argues that the beneficiary's secular employment should be considered "fundraising for the Church," as he had an obligation to ensure that the petitioning church had sufficient operating funds. The petitioner contends that this should be considered "an acceptable administrative duty under 8 C.F.R. § 204.5(m)(5), given that his primary vocation has been and continues to be that of minister." The regulation allows for "administrative duties incidental to the duties of a minister." The submitted copies of the beneficiary's tax returns include income from work he described as "Cleaning Services," "Computer El Technici," and "Pizza." The record does not support the

petitioner's assertion that the income from this work was used to operate the church, or that his duties were incidental to the duties of a minister. Nor has the petitioner cited any pertinent legal authority to support its interpretation of the regulations.

Finally, the petitioner requests consideration of the hardships to be faced by the beneficiary and his family, and the petitioning church, if the beneficiary leaves the United States. While we acknowledge the petitioner's concerns, we do not have discretion to set aside any provision of the pertinent regulations.

It is well settled that the regulations which the Service [now USCIS] promulgates have the force and effect of law and are binding on the Service. *Bridges v. Wixon*, 326 U.S. 135, 153 (1945); *Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923); *Matter of A-*, 3 I&N Dec. 714 (BIA 1949); cf. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984); *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980).

Matter of L-, 20 I&N Dec. 553, 556 (BIA 1992). See also *Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C., 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). An agency is not entitled to deference if it fails to follow its own regulations. *U.S. v. Heffner*, 420 F.2d 809, (C.A. Md. 1969) (government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down); *Morton v. Ruiz*, 415 U.S. 199 (1974) (where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures).

The motion to reconsider does not allege that the issues, as raised on appeal, involved the application of precedent to a novel situation, or that there is new precedent or a change in law that affects our prior decision. Instead, the petitioner reiterates prior arguments and makes the additional arguments discussed above. As noted previously, a motion to reconsider must include specific allegations as to how we erred as a matter of fact or law in our prior decision based on the previous factual record, and it must be supported by pertinent legal authority. Because the petitioner has failed to raise such supported allegations in its motion to reconsider, the AAO will dismiss the motion.

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 May 12, 2014, is affirmed, and the petition remains denied.