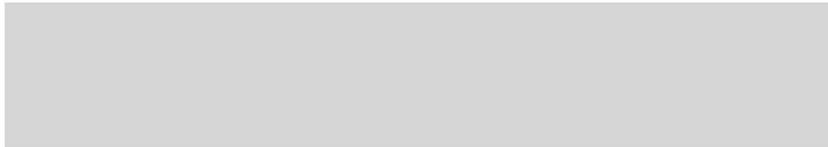




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: AUG 25 2015

FILE #: [REDACTED]

PETITION RECEIPT #: [REDACTED]

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:

NO REPRESENTATIVE OF RECORD

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center (director), denied the employment-based immigrant visa petition and we dismissed a subsequent appeal. The matter is now before us on a motion to reconsider. The motion will be denied.

The petitioner is a Sikh temple that 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 priest. The director denied the petition, concluding that the petitioner did not establish that the beneficiary had the requisite two years of qualifying religious work experience while in lawful immigration status. On appeal, we affirmed the director's decision and also found that the petitioner had not submitted sufficient evidence of the beneficiary's compensation during the qualifying two-year time period. The petitioner now files a motion to reconsider.

RELEVANT LAW AND REGULATIONS

Section 203(b)(4) of the Act, 8 U.S.C. § 1153(b)(4), provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before September 30, 2015, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before September 30, 2015, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of [the Internal Revenue Code]) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The regulation at 8 C.F.R. § 204.5(m) states that in order to be eligible for classification as a special immigrant religious worker, the beneficiary must:

(1) For at least the two years immediately preceding the filing of the petition have been a member of a religious denomination that has a bona fide non-profit religious organization in the United States.

(2) Be coming to the United States to work in a full time (average of at least 35 hours per week) compensated position in one of the following occupations as they are defined in paragraph (m)(5) of this section:

- (i) Solely in the vocation of a minister of that religious denomination;
- (ii) A religious vocation either in a professional or nonprofessional capacity; or
- (iii) A religious occupation either in a professional or nonprofessional capacity.

(3) Be coming to work for a bona fide non-profit religious organization in the United States, or a bona fide organization which is affiliated with the religious denomination in the United States.

(4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. . . .

The regulation at 8 C.F.R. § 204.5(m)(11) provides:

Evidence relating to the alien's prior employment. Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:

- (i) Received salaried compensation, the petitioner must submit IRS [Internal Revenue Service] documentation that the alien received a salary, such as an IRS Form W-2 [Wage and Tax Statement] or certified copies of income tax returns.
- (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.
- (iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account

statements, trust documents signed by an attorney, or other verifiable evidence acceptable to [U.S. Citizenship and Immigration Services (USCIS)].

If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

However, on April 7, 2015, the Court of Appeals for the Third Circuit held that the lawful immigration status requirement in 8 C.F.R. 204.5(m)(4) and (11) is *ultra vires* and impermissibly conflicts with section 245(k) of the Act with respect to adjustment of status. See *Shalom Pentecostal Church v. U.S. Dep't of Homeland Sec.*, 783 F.3d 156, 165-67 (3^d Cir. 2015). In accordance with this decision, USCIS will no longer deny special immigrant religious worker petitions based on the lawful status requirements at 8 C.F.R. 204.5(m)(4) and (11) in the Third Circuit. As a result of this decision and other district court cases,¹ USCIS implemented a policy to apply the *Shalom Pentecostal Church* decision nationally, pending the issuance of amended regulations that will remove the lawful status requirements in 8 C.F.R. 204.5(m)(4) and (11). See USCIS Policy Memorandum PM-602-0119, *Qualifying U.S. Work Experience for Special Immigrant Religious Workers* (July 5, 2015), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0705_Lawful_Status_PM_Effective.pdf (July 15 Policy Memorandum). Accordingly, USCIS no longer requires that the qualifying religious work experience for the two-year period preceding the submission of a Petition for Special Immigrant (Form I-360) be in lawful immigration status.

PERTINENT FACTS AND PROCEDURAL HISTORY

The petitioner filed the Form I-360 seeking to classify the beneficiary as a special immigrant religious worker on February 17, 2012, to perform services as a priest. On August 27, 2012, the director denied the petition, concluding that the beneficiary had worked for, and been compensated by, the [REDACTED] prior to receiving USCIS approval. Therefore, the director concluded that the beneficiary did not have the requisite two years of continuous religious work experience in lawful immigration status as required under 8 C.F.R. § 204.5(m). The director denied the petition accordingly.

The petitioner filed an appeal, contending that the beneficiary's prior work experience was not unauthorized under the pre-November 2008 regulations. According to the petitioner, the beneficiary was first granted an R-1 visa on July 6, 2005, which was valid for five years. The petitioner stated that it filed a Petition for a Nonimmigrant Worker (Form I-129) on the beneficiary's behalf in October of 2006, which was approved in September of 2007. The petitioner asserted that under the previous regulations, the beneficiary could perform religious services for any religious organization belonging to the same denomination. In addition, the petitioner asserted that the beneficiary was not required to work at any specific location under the previous regulations. According to the petitioner, the Federal Register clearly stated that the new regulations were effective on November 26, 2008, and there was no indication that they were retroactive in nature. Therefore, the petitioner claimed the beneficiary's eight

¹ See *Congregation of the Passion v. Johnson*, 2015 WL 518284 (N.D. Ill. Feb. 6, 2015); *Shia Ass'n of Bay Area v. United States*, 849 F.Supp.2d 916 (N.D. Cal. 2012).

months of working for the [REDACTED] and his work for the petitioner from December 2011 until February 2012, was not unauthorized under U.S. immigration laws.

On February 27, 2013, we dismissed the appeal. We discussed the former regulation at 8 C.F.R. § 214.2(r)(3)(ii)(E), which required petitioners to provide “[t]he name and location of the specific organizational unit of the religious organization” for which the beneficiary would work. In addition, we discussed the former regulation at 8 C.F.R. § 214.2(r)(6), which required a “different or additional organizational unit of the religious denomination seeking to employ” a religious worker to file a new Form I-129, specifying that “[a]ny unauthorized change to a new religious organizational unit will constitute a failure to maintain status. . . .” Therefore, we considered and rejected the petitioner’s interpretation of the previous regulations, and agreed with the director’s determination that the beneficiary’s employment with the [REDACTED] constituted unauthorized employment.

Beyond the director’s decision, we additionally found that the petitioner did not submit sufficient evidence of the beneficiary’s compensation during the two-year qualifying period. Among other things, we found that the IRS Form 1040, U.S. Individual Income Tax Return (Form 1040), were uncertified and did not identify the source of the beneficiary’s income, the paychecks in the record contained only the front side and did not show they had been processed in the normal course of business, and the internal payroll records could not be verified. Accordingly, we dismissed the appeal. The petitioner now files a motion to reconsider.

ANALYSIS

I. Motion to Reconsider

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions or legal citation to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 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 evidence. *Compare* 8 C.F.R. § 103.5(a)(2).

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. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, 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.

The petitioner’s motion to reconsider contends that our interpretation of the previous regulations was erroneous and narrow. The petitioner asserts that the beneficiary’s first employer, the [REDACTED] New York, did not file a Form I-129 on behalf of the beneficiary, but

only a sponsorship letter. Therefore, according to the petitioner, the former regulation did not require the mention of a specific work place and the beneficiary's first employer's sponsorship letter "automatically enabled him to receive a valid R1 approval with five years validity (6th July 2005 to July 5, 2010), authorizing him to accept work as a priest with the temple." In addition, the petitioner asserts that all Sikh temples follow the same ideals, worship the same holy scriptures, and follow only one Guru. As such, the petitioner contends the beneficiary lawfully maintained his R-1 status even though he was working at different locations. As explained below, the motion will be denied.

II. Two-Year Religious Work Experience Requirement

Our previous decision was based upon two findings. First, we upheld the director's conclusion that the beneficiary engaged in unauthorized employment and, therefore, did not work in lawful immigration status during the two years immediately preceding the date the petition was filed (*i.e.*, from February 17, 2010, until February 17, 2012). Second, we found that the petitioner did not establish that the beneficiary was compensated during the qualifying two-year time period.

With respect to our first finding, although the issue of whether the beneficiary worked in unlawful status may be reviewed at a later date if the beneficiary files for adjustment of status, it is no longer a bar to eligibility for the instant petition. *See* July 15 Policy Memorandum; *see also Shalom Pentecostal Church*, 783 F.3d at 160 (describing the two-step process of first obtaining a visa, and then applying for permanent adjustment of status); *Matter of O*, 8 I&N Dec. 295 (BIA 1959) (the visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws). Therefore, notwithstanding the regulation at 8 C.F.R. 204.5(m)(4) and (11) as currently written, in accordance with the Policy Memorandum, we withdraw our previous finding that the beneficiary did not have the requisite two years of qualifying work experience in lawful immigration status.

With respect to our second finding, the regulation at 8 C.F.R. § 204.5(m)(11) requires the petitioner to show that the beneficiary engaged in qualifying religious work for the two years immediately preceding the filing of the visa petition. The regulation specifies the documentation required to establish the qualifying experience. If the beneficiary received salaried or non-salaried compensation, then the petitioner may submit documentation such as certified copies of income tax returns, audited financial statements, or other verifiable evidence. In this case, the petitioner states that the beneficiary worked for the petitioning organization during the qualifying two-year time period, with the exception of approximately eight months (from February 2011 until September 2011) when he worked for the [REDACTED]

In our previous decision, we noted that the record includes a copy of the beneficiary's Form W-2 for 2011, as well as copies of his Form 1040 for several years. However, we found that the tax returns were not certified and did not identify the source of the beneficiary's income aside from the Form W-2 from the [REDACTED]. Furthermore, the Form W-2 shows that the [REDACTED] paid the beneficiary \$4,300.50 in wages; however, the beneficiary's Form 1040 indicates a total income of \$7,501 for 2011. We stated that there is no other IRS tax documentation or other verifiable documentation in the record to establish compensation for the remaining two-year time period.

Specifically, we noted that photocopies of the front sides of checks did not indicate they were processed by a bank in the normal course of business.

On motion, the petitioner submits a “Main Information Sheet,” a single page that provides a “Recap of [the beneficiary’s] 2012 Income Tax Return.” The petitioner also submits a printout showing a “summary [of] FICA earnings.” However, the petitioning organization does not specifically address these documents in its motion and does not indicate what they purport to show. The Main Information Sheet, which appears to be a worksheet from the beneficiary’s tax preparation, indicates the beneficiary’s earned income in 2012 was \$5,669. This document, however, is unverifiable, does not identify the source of the beneficiary’s income, and does not indicate the beneficiary worked full-time in a compensated position. Regarding the printout of FICA earnings, the income listed on the printout is inconsistent with the tax documents in the record. For instance, during the relevant two-year period, the printout states that the beneficiary earned \$7,980 and \$7,255.50 in 2010 and 2011, respectively. However, according to the Form 1040 tax returns in the record, the beneficiary’s total income was \$8,640 and \$7,501 in 2010 and 2011, respectively. The petitioner has not explained this discrepancy and has not submitted any additional IRS tax documentation on motion, such as a Form W-2 or an IRS Form 1099-MISC, Miscellaneous Income, to show any other income and its source. Moreover, the petitioning organization does not address the deficiencies we noted in our prior decision or submit additional documents, such as the front and back sides of checks, or other verifiable evidence of compensation or to establish that the beneficiary worked in a full-time capacity continuously throughout the qualifying period.

Therefore, the petitioner has not established that the beneficiary has the required two years of qualifying religious work experience.

CONCLUSION

The petitioner has not established by a preponderance of the evidence that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing date of the petition. The motion is denied.

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 is denied.