



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF C-C-S-O-T-C-R-C-

DATE: MAY 19, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-360, PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT

The Petitioner, a non-profit church, seeks to classify the Beneficiary as a special immigrant religious worker to perform services as a Hispanic ministry developer and associate pastor. *See* Immigration and Nationality Act (the Act) section 203(b)(4), 8 U.S.C. § 1153(b)(4). This immigrant classification allows non-profit religious organizations, or their affiliates, to employ foreign nationals as ministers, in religious vocations, or in other religious occupations in the United States.

The Director, California Service Center, denied the petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal.

The matter is now before us on a motion to reopen and a motion to reconsider. In its motions, the filing party submits additional evidence and argues that the AAO should reopen the decision on the appeal based on changes in U.S. Citizenship and Immigration Services' (USCIS) application of the regulation pertaining to a foreign national's immigration status during the period he or she attains the required experience for the classification.¹ The changed interpretation occurred several years after the AAO dismissed the Petitioner's appeal.

We will deny the motions.

I. LAW

Non-profit religious organizations may petition for foreign nationals to immigrate to the United States to perform full-time, compensated religious work. The petitioning organizations, and the

¹ 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 (3d Cir. 2015). In accordance with this decision 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 2* (July 5, 2015), <https://www.uscis.gov/laws/policy-memoranda>.

foreign nationals who are the beneficiaries of this employment-based visa, must meet certain eligibility criteria. Foreign nationals may also self-petition for this classification.

A motion to reopen must state the new facts to be provided and to be supported by affidavits or other documentation. 8 C.F.R. § 103.5(a)(2). However, any new facts must relate to eligibility at the time the Petitioner filed the petition. *See* 8 C.F.R. § 103.2(b)(1), (12); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A motion to reconsider must offer 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 is based on the existing record and the Petitioner may not introduce new facts or new evidence relative to his or her arguments. 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 materials. *Compare* 8 C.F.R. § 103.5(a)(3) *with* 8 C.F.R. § 103.5(a)(2).

Finally, the regulation at 8 C.F.R. § 103.5(a)(i) provides, in pertinent part:

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

II. ANALYSIS

The issue within these motions relates to whether the AAO will reopen its decision *sua sponte* due to a change in how the regulation is interpreted and applied. On May 28, 2009, the Director denied the petition because the Beneficiary remained in the United States beyond the period of authorized stay and worked for the Petitioner attaining the requisite experience for the position while not authorized for employment in the United States. The Director relied upon the regulation at 8 C.F.R. § 204.5(m)(4) and (11). The AAO dismissed a subsequent appeal on September 9, 2010. The Petitioner filed the present motions on October 24, 2015.

On motions, the Petitioner indicates that although the motions are untimely, the “exceptional situations” standard identified in *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) and *Matter of Vasquez-Muniz*, 23 I&N Dec. 207, 207-08 (BIA 2002) apply to its case. As both of these decisions are under the Executive Office for Immigration Review’s regulation for motions, 8 C.F.R. § 3.2, this standard does not apply to the Petitioner’s motion that is regulated under 8 C.F.R. § 103.5. Moreover, in *J-J-*, the Board of Immigration Appeals (BIA) declined to reopen *sua sponte*, concluding that the rules regarding timely filings “are meant to bring finality to the immigration

proceedings.” 21 I&N Dec. at 984. In *Vasquez-Muniz*, the BIA reopened partially “to assure uniformity of law nationwide on [an] important question.” 23 I&N Dec. at 208.

Further, 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 submit the complete motion within 30 days of service of the unfavorable decision. The Petitioner filed the present motions more than five years after the AAO issued its decision on the appeal in 2010. The only exception for an untimely motion relates to a motion to reopen in which USCIS may, in its discretion, excuse a delay beyond the 30 day limit where the Petitioner demonstrates that the delay was reasonable and was beyond its control. In the present case, the Petitioner has not shown that the delay in filing the motion to reopen was reasonable.

Additionally, the USCIS Policy Memorandum PM-602-0119, *supra* at 2, states that the policy: “applies to all Form I-360 petitions for special immigrant religious worker status currently pending with USCIS and to new petitions filed on or after the date of this memorandum.” Therefore, any petitions denied prior to USCIS issuing the memorandum cannot benefit from the new interpretation. The memorandum also does not allow for any *nunc pro tunc* application of the new interpretation. For this new policy to apply to the Beneficiary, the Petitioner must file a new petition. *Id.*

Finally, the Petitioner offers an unpublished AAO decision dated July 17, 2015. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. We may consider the reasoning within the unpublished decision; however, the analysis does not have to be followed as a matter of law. Within the motions, the Petitioner does not establish that the fact pattern of the unpublished decision correlates with the fact pattern within its own case. The unpublished decision does not impact our determination on the Petitioner’s case.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not established that the petition should be reopened *sua sponte*.

The motions will be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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, the filing party has not met that burden.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of C-C-S-O-T-C-R-C-*, ID# 16400 (AAO May 19, 2016)