

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



D13

Date: DEC 21 2012

Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE:

Petitioner: 

Beneficiary: 

PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and motions to reopen and to reconsider. The matter is again before the AAO on motions to reopen and to reconsider. The motions will be dismissed.

The petitioner is a church. It seeks to extend the beneficiary's status as a special immigrant religious worker pursuant to section 101(a)(15)(R)(1) of the Act to perform services as an associate music minister. On appeal and on motion, the AAO noted that although the director determined that beneficiary has reached the statutory maximum period for which he can qualify as an R-1 nonimmigrant religious worker, the petitioner had not addressed, and therefore had waived, this issue. The AAO affirmed the director's findings that the petitioner had engaged in a conspiracy with the beneficiary to obtain R-1 status.

Counsel asserts on motion that the petitioner "vehemently den[ies] and disagree[s] with the finding of conspiracy in regard to filing of the I-129 petition." Counsel asserts that there was a legitimate job offer with a salary of \$1,400 per month, that the beneficiary has performed the duties of the position, and that the "non-payment of the proffered salary to Beneficiary at the time the service was rendered does not negate the legitimacy of the job offer and the R1 Petition." The petitioner submits copies of checks made payable to the beneficiary from September 2011 to May 2012 in support of the motion. The 2011 checks are annotated as payments numbers one through four for wages. The petitioner also provided copies of previously submitted documentation.

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.<sup>1</sup> A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). The petitioner's motion is not an opportunity for the petitioner to correct its own defects in the record.

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,

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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).

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 cannot be used to raise a legal argument that could have been raised earlier in the proceedings. 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 may not have been addressed by the party. A motion to reconsider is not a process by which a party may submit, for example, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. 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. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

In this case, the petitioner failed to support its motion with any legal argument or precedent decisions to establish that the AAO decision was based on an incorrect application of law or USCIS policy. The motion to reconsider will be dismissed.

The AAO notes that even if the petitioner had established that the petitioner and beneficiary did not enter into a conspiracy to obtain immigration benefits, the petition still could not be approved. Neither the petitioner nor counsel acknowledges the fact that the beneficiary has exceeded the five-year statutory limitation for which he can be approved for R-1 status. Therefore, the beneficiary is statutorily ineligible and therefore cannot be approved for an extension of his R-1 status.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

**ORDER:** The motions to reopen and reconsider are dismissed, the previous decisions of the AAO dated August 19, 2011 and May 11, 2012 are affirmed, and the petition remains denied.