

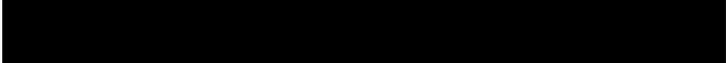
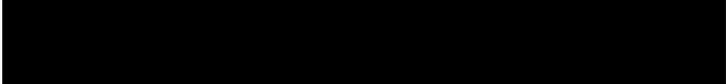


U.S. Citizenship
and Immigration
Services



813

Date: **NOV 09 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,


Perry Rhew
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. The matter is now 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 nonimmigrant religious worker under section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1), to perform services as a religious iconographer. The AAO affirmed the director's decision that the petitioner had failed to establish how it intends to compensate the beneficiary.

On motion, counsel asserts that the petitioner has shown its intention and ability to compensate the beneficiary. Counsel submits a brief and additional documentation in support of the motions.

In its decision, the AAO determined that the petitioner's budget for 2010 that it submitted on appeal did not indicate any funds that were set aside for the beneficiary's salary and that the budget reflected a net income of \$12,810, which would be insufficient to pay the beneficiary's salary of \$1,400 per month. On motion, counsel states, "However, the budget reflects \$72,000 designat[ed] for 'salary,' an amount that would far exceed the intended compensation for Beneficiary of \$1,400 monthly." The petitioner submits on motion "a certified 2011 Income Statement, certified 2011 Assessment, and certified 2012 budget." Counsel asserts that these "documents were unavailable at the time of CSC's decision given the nature of the documents and time of the decision in June 2011."

Counsel also argues that the beneficiary did not engage in unauthorized employment. However, as discussed in the AAO's prior decision, the issue of the beneficiary's failure to maintain his R-1 nonimmigrant religious worker status is not within the AAO's jurisdiction and was not a basis of the AAO's dismissal of the appeal and is not an issue in the instant motion.

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

While counsel asserts that the 2010 budget contains a line item for salary that would exceed the proffered compensation for the beneficiary, a review of the document does not indicate how much, if any, of the \$72,000 salary budget included the salary intended for the beneficiary. The AAO notes that the document reflects a "six months actual" salary expense of \$55,138.66 and a "2010 budget" salary expense of \$72,000. The petitioner does not explain how, or if, the budget for 2010 is an increase over the 2009 budget nor does the 2010 budget on its face establish that the petitioner has the ability to compensate the beneficiary.

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).

All of the financial documentation submitted on motion is dated subsequent to the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not 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 Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). Thus, the 2011 and 2012 documentation is not evidence of how the petitioner intended to compensate the beneficiary as of the date the petition was filed.

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 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 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 decision of the AAO dated February 24, 2012 is affirmed, and the petition remains denied.