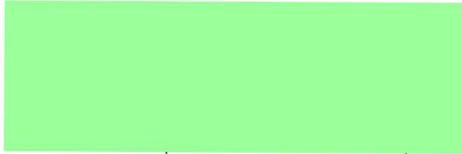




U.S. Citizenship
and Immigration
Services

(b)(6)



Date:

FEB 04 2013

Office: CALIFORNIA SERVICE CENTER

FILE:

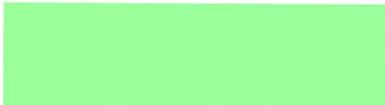
IN RE:

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,


f 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. The matter is now before the AAO on motions to reopen and to reconsider. The motions will be dismissed.

The petitioner is a district council of the Assemblies of God. It seeks to classify the beneficiary 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 senior pastor. The AAO affirmed the director's decision that the petitioner had failed to establish how it intends to compensate the beneficiary.

On motion, [REDACTED] the petitioner's superintendent, states:

[O]ur company used the services of a non-attorney individual who assisted in completing all legal paperwork for [the beneficiary's] initial submission. Our office never received any written or verbal requests of any sort from this individual's office requesting any documentation to support [the beneficiary's] method of income. It was not until he was denied the first time that we contacted a licensed attorney who then contacted our office both via mail and verbally requesting all proper documentations to assist [the beneficiary's] case.

The AAO notes that the director's request for evidence (RFE) instructing the petitioner to, *inter alia*, submit evidence in accordance with 8 C.F.R. § 214.2(r)(11) to establish how it intended to compensate the beneficiary was mailed to the petitioner at the petitioner's address. The petitioner, however, did not address the issue in its response.

Counsel asserts that the court in *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005), found that "[a]lthough there is no Sixth Amendment right to counsel in an immigration proceeding, the due process guarantees of the Fifth Amendment 'still must be afforded to an alien petitioner'" and that the court "recognized that if the ineffective assistance of an individual purporting to be counsel prevents Petitioner from preparing his case, then that is a denial of due process." Counsel further asserts that the petitioner was denied due process because it was "prevented from filing the documents requested by the Service because of deception, fraud, and error on the part of a non-attorney."

Counsel's argument is without merit. First, the Ninth Circuit stated that while "there is no Sixth Amendment right to counsel in a deportation proceeding, the due process guarantees of the Fifth Amendment 'still must be afforded to an alien petitioner.'" The instant proceeding is not a deportation proceeding, and counsel has pointed to no deprivation of life, liberty or property rights that is applicable to the instant proceeding. The court did not express any opinion regarding the rights of an individual represented by a person "purporting to be counsel." Furthermore, there is no evidence in the record, and the petitioner does not allege, that the non-attorney utilized by the petitioner purported to be an attorney.

The Ninth Circuit recognized the application of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an

appeal based on ineffective assistance of counsel) in determining whether counsel has been ineffective. There is, however, no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. See 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. Cf. *Matter of Lozada*, 19 I&N Dec. 637. Regardless, current counsel's claims of ineffective assistance of prior counsel without anything further do not meet the *Lozada* requirements. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Counsel has submitted no documentary evidence to support any of the three *Lozada* requirements.

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 The petitioner has provided no new evidence in support of its motion to reopen.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as 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).

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).

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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 September 10, 2012 is affirmed, and the petition remains denied.