



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **OCT 24 2013** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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 a motion to reopen. The matter is now again before the AAO on a motion to reopen. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a [REDACTED]. It seeks to classify the beneficiary as a nonimmigrant religious worker under section 101(a)(15)(R) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R), to perform services as a religious priest. The director determined that the petitioner failed to establish that it had extended a qualifying job offer to the beneficiary and failed to satisfactorily complete a compliance review site inspection. The director also determined that the petitioner failed to complete the required employer attestation. The AAO, in its May 23, 2012 decision, agreed with the director's determinations. Regarding the issue of a qualifying job offer, the AAO found that the petitioner had not established how it intends to compensate the beneficiary.

The petitioner filed a motion to reopen the petition on June 22, 2012. The AAO dismissed the motion on January 10, 2013, finding that the petitioner's filing failed to meet the requirements of a motion to reopen. The AAO found that the petitioner had not submitted any evidence which could be considered "new" under 8 C.F.R. § 103.5(a)(2), noting that the petitioner neither argued nor submitted evidence to establish that the evidence submitted on motion was not available during the earlier stages of the proceeding. The AAO further found that the submitted evidence failed to establish eligibility for the benefit sought.

The instant motion to reopen was filed on February 11, 2013. In support of this motion, the petitioner submits a brief from counsel, a letter from the petitioner, copies of the petitioner's tax returns for the fiscal years 2008 through 2010, copies of the petitioner's Profit and Loss Statements covering the period from October 2009 to September 2012, a letter from Liberty Tax Service, recommendation letters from congregation members, an employment contract, an article from a local newspaper, and copies of documents already in the record.

Much of the submitted evidence does not address the AAO's most recently issued decision, but instead relates to the eligibility issues discussed in the director's September 7, 2011 decision and the AAO's May 23, 2012 dismissal of the petitioner's appeal. On motion, the AAO will only consider arguments and evidence relating to the grounds underlying the AAO's most recent decision. The petitioner bears the burden of establishing that the January 10, 2013 dismissal for failure to meet the requirements of a motion to reopen was itself in error. If the petitioner can demonstrate that the AAO erred by dismissing that motion, then there would be grounds to reopen or reconsider the proceeding. The AAO will not therefore consider the petitioner's arguments and evidence regarding the underlying decisions to deny the petition and to dismiss the original appeal.

In support of its June 22, 2012 motion, the petitioner submitted copies of processed checks issued to the beneficiary between December 2010 and May 2012. In its dismissal, the AAO noted that this evidence did not relate to the petitioner's ability to compensate the beneficiary as of the petition's October 19, 2009 filing date. 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. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). Counsel asserted on motion that the petitioner had requested Internal Revenue Service (IRS) certified copies of its tax returns but had not yet received them, stating: "Petitioner was informed that it now takes 60 days to obtain certified copies of the financial documents." The regulation at 8 C.F.R. § 214.2(r)(11) requires, as initial evidence, verifiable evidence of how the petitioner will compensate the alien, including IRS documentation or an explanation for its absence along with comparable, verifiable documentation. The AAO noted that the petitioner "failed to provide certified copies of tax returns with the petition and failed to explain why the documents were unavailable." The AAO further noted that more than 60 days had elapsed since the filing of the motion and the record did not indicate any attempt to submit the certified returns.

The petitioner now submits copies of its Forms 990, Return of Organization Exempt From Income Tax, with stamps indicating receipt by the IRS. The first return is for the tax year October 1, 2008 to September 30, 2009, and a stamp indicates it was filed on May 18, 2010. Although the return covers the same period as an uncertified return submitted with the previous motion, the figures on the two returns are not identical, thus indicating that the version previously submitted to the AAO was not in fact filed with the IRS. The petitioner provides no explanation for the discrepancies between the forms. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Additionally, although counsel states that the returns "unfortunately took longer than 60 days to be obtained," no further explanation is provided as to why this return, filed in 2010, was previously unavailable and could not have been submitted in response to the January 3, 2011 Notice of Intent to Deny, on appeal, or in support of the previous motion. Accordingly, it will not be considered "new" for the purpose of serving as a basis to reopen the instant proceeding. Furthermore, the tax return indicates that the petitioner's expenses exceeded its revenue for the year. Although the petitioner reported net assets of \$435,551 at the end of the year, the assets included \$8,170 in cash and \$13,000 in "Other assets," with the remainder of the assets consisting of fixed assets: "Land, buildings, and equipment." Because no evidence was provided to establish the nature of the \$13,000 in "Other assets," the tax return does not establish that the petitioner had the necessary \$14,400 in available liquid assets to pay the beneficiary the proffered wage of \$1,200 per month.

The petitioner also submits a tax return covering the period October 1, 2009 to September 30, 2010. The figures on this document match those on the previously submitted uncertified return for the same period. However, the return lists "Beginning of Current Year" net assets of \$414,251, which is not consistent with the end of year figure of \$435,551 for the October 1, 2008 to September 30, 2009 return, discussed above. No explanation is provided for this discrepancy. Additionally, the petitioner submits a tax return for the period October 1, 2010 to September, 2011. However, as this document is not relevant to the petitioner's ability to compensate the beneficiary as of the filing date, it will not be considered.

In the June 22, 2012 motion, counsel asserted that the petitioner's profit and loss statement for October 2009 through September 2010 established its ability to pay the beneficiary the proffered wage. The AAO noted that "the petitioner submitted no documentation to support the representations of its financial status as made in the unaudited reports."

On motion, the petitioner submits a letter from [REDACTED] manager of Liberty Tax Service in [REDACTED] California, stating that Liberty Tax Service prepared the petitioner's profit and loss statements and balance sheets for fiscal years 2009 through 2011 based on documentation provided by the petitioner. The petitioner has not established that this evidence was not previously available and could not have been submitted earlier in the proceedings.

Regarding the issue of the employer attestation, the petitioner asserted in the previous motion that former counsel had not completed the attestation and had not notified the petitioner that USCIS had repeatedly requested the attestation. The AAO found that the petitioner failed to provide the documentation required to establish an ineffective assistance of counsel claim under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), and that "it cannot be ascertained from the record and the petitioner's statement alone that fault with the submission of the required attestation rests solely with counsel." In a brief accompanying the instant motion, counsel argues that the AAO was wrong to apply the requirements of *Matter of Lozada* to the instant proceeding. Counsel states:

Matter of Lozada applies in the context of removal proceedings, not visa petition proceedings before USCIS. *See Id.* at 639 ("The high standard we announce here is necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come *before the Board.*") (emphasis added). Nothing in *Matter of Lozada* implies that the standard is applicable to motions before the USCIS.

The regulation at 8 C.F.R. § 1003.1(g) states that decisions of the Board of Immigration Appeals (BIA) "shall be binding on all officers and employees of the Department of Homeland Security." Further, binding USCIS policy in the Adjudicator's Field Manual, Subchapter 14.4(a), effective July 2, 2013, provides: "Designated DHS, BIA, and Attorney General precedent decisions shall serve as binding legal authority for determining later cases involving the same issue(s)." Accordingly, the AAO correctly applied the BIA's ineffective assistance of counsel requirements to the petitioner's claim. Regardless, the petitioner has submitted no documentary evidence to support the claim.

The petitioner additionally submits letters of recommendation from members of the congregation, a newspaper article mentioning the beneficiary's activities with the congregation, and a new employment contract dated February 6, 2013. This evidence supports the assertion that the beneficiary has been performing ongoing religious work with the congregation. However, it does not relate to the petitioner's failure to meet the requirements of a motion in its June 22, 2012 filing. Nor does it establish eligibility for the benefit sought by demonstrating that the petitioner extended a qualifying job offer to the beneficiary at the time of filing.

According to the regulation at 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 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 A review of counsel’s assertions and evidence on motion reveals no fact that could be considered “new” under 8 C.F.R. § 103.5(a)(2) and, therefore, such cannot be considered a proper basis for a motion to reopen. Counsel does not establish that the petitioner met the requirements of a motion to reopen in its June 22, 2012 filing, or that the AAO erroneously dismissed that motion. 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.

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 to reopen is dismissed, the prior decisions of the AAO are affirmed, and the petition remains denied.

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).