



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE **NOV 04 2014**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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 and dismissed two subsequent motions to reopen and to reconsider. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The petitioner filed a complaint with the United States District Court District of Kansas (District Court) seeking judicial review of our decision. The District Court dismissed the case without prejudice, and we subsequently reopened the matter on motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii), and affirmed the denial of the petition. The matter is now before us on a motion to reopen and a motion to reconsider. The motions will be dismissed, our previous decision will be affirmed, and the petition will remain denied.

The petitioner is a church. It seeks to classify the beneficiary as a nonimmigrant 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), to perform services as a sound and music director. The director determined that the petitioner had not established that the beneficiary was a member of its religious denomination for two full years immediately preceding the filing of the petition. In our May 16, 2013, decision dismissing the petitioner's appeal, we affirmed the director's determination and additionally found that the petitioner failed to establish how it intends to compensate the beneficiary. On December 12, 2013, we reopened the matter, finding that the petitioner had established the beneficiary's denominational membership under the governing regulations. We also provided the petitioner an opportunity to submit further information or arguments to support eligibility and overcome the remaining ground for denial. On June 18, 2014, we affirmed the denial of the petition.

In our decision, we specifically and thoroughly discussed the petitioner's evidence and determined that the petitioner failed to establish how it intends to compensate the beneficiary. We stated that the petitioner's bank account statements, without further information about the petitioner's expenses, did not establish the petitioner's ability to provide the proffered compensation of \$26,000 per year plus transportation, as stated on the petition. We further noted that the petitioner's 2010 Internal Revenue Service (IRS) Form 990, Return of Organization Exempt From Income Tax, and its 2010 Profit & Loss statement both indicated a net loss for the year. We therefore found that the evidence did not establish the petitioner's ability to provide the proffered compensation at the time of filing the petition. In addition, we found that the petitioner failed to resolve discrepancies between the figures listed on the Form I-129, the Form 990 and accompanying detail sheets, and the profit and loss statements. Further, we found that the petitioner's 2013 and 2014 financial statements, submitted in response to our December 12, 2013 notice, failed to establish the petitioner's ongoing ability to provide the proffered compensation.

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). In support of the motion to reopen, the petitioner submits a brief and a letter from its pastor, [REDACTED]. The petitioner asserts that, beginning in 2011, the beneficiary received a love offering which was given to him directly by the congregation and was therefore not reflected in the church's bank statements or accounting documents. The petitioner does not provide information about the amount of money purportedly given to the beneficiary, nor does it offer any documentary evidence in support of its assertion. The previously submitted Profit & Loss statement for 2014 includes a budgeted "Love Offering" of \$2,000 per month for the beneficiary, but does not indicate that any funds were in fact paid. The

2013 Profit & Loss statement includes a “Love Offering” of \$12,558 for the year but does not specify the recipient(s). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). Further, the petitioner again fails to resolve the discrepancies noted in our previous decision. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id at 591-592*.

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. Accordingly, the motion to reopen will be dismissed.

In the motion to reconsider, the petitioner contends that our interpretation of the regulations with regard to compensation is “unnecessarily rigid.” The petitioner states:

As the District Court of D.C. held in *Full Gospel Portland Church v. Thornburgh*, 730 F.Supp. 441 (DDC 1988), if a minister receives sufficient pay through a love offering, it is not for the USCIS to dictate that the church itself must pay them more. Ability to pay should not be as strict on an R-1 as it is on a case that went through a labor certification because there is no prevailing wage requirement. If anything, it appears USCIS is mixing the PERM/prevaling wage requirement with the R-1 context.

We note that the cited case discusses evidentiary requirements under the previous regulations for nonimmigrant religious workers which are no longer in effect. The current regulations at issue in this matter were published on November 26, 2008. In addition, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Regardless, in our previous decision we did not find the proposed wage to be insufficient. Rather, we found that the petitioner had not established how it would pay the proffered compensation indicated on the petition. As stated by the petitioner, the regulations governing nonimmigrant religious workers do not include a prevailing wage requirement. Instead, the regulation at 8 C.F.R. § 214.2(r)(8)(viii) requires the petitioner to attest to the details of the compensation it will provide, and the regulation at 8 C.F.R. § 214.2(r)(11) requires the petitioner to submit verifiable evidence establishing how it will provide the specified compensation. Accordingly, the petitioner must demonstrate that it is able to provide the proposed compensation. We applied these regulatory requirements in our previous decision.

On motion, the petitioner also requests relief from the compensation provision of the regulations under the Religious Freedom Restoration Act (RFRA). The petitioner contends that compelling the church to “demonstrate an accounting” of its ability to provide the proffered compensation violates the fundamental Christian tenet of living “by faith.”

In the preamble to the current religious worker regulations, USCIS stated:

USCIS disagrees with the specific notion that the final rule violates the RFRA. The RFRA provides:

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except \* \* \* if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

Public Law 103–141, sec. 3, 42 U.S.C. 2000bb–1. The final rule is intended to permit religious organizations to petition for admission of religious workers under restrictions that have less than a substantial impact on the individual’s or an organization’s exercise of religion. A petitioner’s rights under RFRA are not impaired unless the organization can establish that a specific provision of the rule imposes a significant burden on the organization’s religious beliefs or exercise. Further, this rule is not the sole means by which an organization or individual may obtain admission to the United States for religious purposes, and DHS believes that the regulation, and other provisions of the INA and implementing regulations, can be administered within the confines of the RFRA. An organization or individual who believes that the RFRA may require specific relief from any provision of this regulation may assert such a claim at the time they petition for benefits under the regulation.

73 Fed. Reg. 72276, 72283-84 (November 26, 2008). We note that the petitioner raised no RFRA concerns until the appellate stage of this proceeding. Furthermore, the petitioner cites no judicial finding that any of the current regulations violate RFRA. Absent such a finding, the regulations remain binding on all USCIS employees, and neither the director nor the AAO has any discretion to set aside any provision of those regulations:

It is well settled that the regulations which the Service [now USCIS] promulgates have the force and effect of law and are binding on the Service. *Bridges v. Wixon*, 326 U.S. 135, 153 (1945); *Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923); *Matter of A-*, 3 I&N Dec. 714 (BIA 1949); *cf. Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984); *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980).

*Matter of L-*, 20 I&N Dec. 553, 556 (BIA 1992). See also *Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C.,1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). An agency is not entitled to deference if it fails to follow its own regulations. *U.S. v. Heffner*, 420 F.2d 809, (C.A. Md. 1969) (government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down); *Morton v. Ruiz*, 415 U.S. 199 (1974) (where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures).

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 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 is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). 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. *Id.* at 60.

The motion to reconsider does not allege that the issues, as raised on appeal, involved the application of precedent to a novel situation, or that there is new precedent or a change in law that affects our prior decision. Instead, the petitioner argues that our interpretation of the regulations was overly stringent, and that the regulations violate the church's religious freedom. As noted above, a motion to reconsider must include specific allegations as to how we erred as a matter of fact or law in our prior decision based on the previous factual record, and it must be supported by pertinent legal authority. Because the petitioner has failed to raise such supported allegations of error in its motion to reconsider, we will dismiss the motion to reconsider.

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 and the motion to reconsider are dismissed, the decision of the AAO dated June 18, 2014, is affirmed, and the petition remains denied.