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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

C1

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 25 2010

WAC 08 228 51355

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a minister. The director determined that, as the beneficiary's qualifying experience in the United States was in an illegal status, the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition.

Counsel asserts on appeal that the "retroactive application of the 11/26/2008 regulation to the [petitioner's] 08/20/2008 filing" deprived the petitioner of due process. Counsel submits a brief in support of the appeal.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

> (i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;
>
> (ii) seeks to enter the United States –
>
> > (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,
> >
> > (II) before September 30, 2012, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or
> >
> > (III) before September 30, 2012, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and
>
> (iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The regulation at 8 C.F.R. § 204.5(m)(4) provides that to be eligible for classification as a special immigrant religious worker, the alien must:

> (4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. A break in the continuity of the work during the preceding two years will not affect eligibility so long as:
>
> (i) The alien was still employed as a religious worker;
>
> (ii) The break did not exceed two years; and
>
> (iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.

Therefore, the petitioner must show that the beneficiary has been working in a qualifying religious occupation or vocation, either abroad or in lawful immigration status in the United States, continuously for at least the two-year period immediately preceding the filing of the petition. The petition was filed on August 20, 2008. Accordingly, the petitioner must establish that the beneficiary was continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

On his Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, the petitioner indicated in Part 3 that the beneficiary had entered the United States on June 21, 1991 without inspection. In her decision, the director stated that immigration records confirm that the beneficiary was not present in the United States in any authorized legal status. Counsel does not contest the director's finding on appeal, arguing, however, that the regulations implemented on November 26, 2008 pursuant to a change in the immigration laws should not have been applied to the petitioner.

Counsel argues that in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court set forth a "two part test to determine whether a statute created an impermissible retroactive effect" which is applicable to both Congressional statutes and administrative rules. In *Landgraf,* the petitioner argued that provisions of the Civil Rights Act of 1991 that permitted compensatory and punitive damages for specified violations of Title VII and provided for a trial by jury if the petitioner claimed these damages, were applicable to her case even though her complaint had been dismissed and the case was pending on appeal at the time the 1991 Civil Rights Act became law. The Supreme Court, while stating there is a "presumption against statutory retroactivity" grounded in all of the Court's decisions and in several provisions of the Constitution, also recognized that:

> While statutory retroactivity has long been disfavored, deciding when a statute operates "retroactively" is not always a simple or mechanical task . . . the ban on retrospective legislation embraced "all statutes, which, though operating only from their passage, affect vested rights and past transactions . . . [E]very statute, which

> takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.
>
> A statute does not operate "retrospectively" merely because it is applied to a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law. Rather the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. [citations and footnotes omitted.] 511 U.S. at 268-269.

The Court, citing its decision in *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 109 S. Ct. 468 (1988), stated that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Counsel argues on appeal that the new USCIS regulation "does not expressly state that the provisions of the new regulation will apply to petitions filed before the effective date of the regulations."

When USCIS published the new rule in November 2008, it did so in accordance with explicit instructions from Congress. Supplementary information published with the new rule specified:

> All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information. 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

Section 557(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 557(b), provides that an initial agency decision is not final if "there is an appeal to, or review on motion of, the agency within time provided by rule." The instant petition was filed on August 20, 2008 and no decision had been rendered by USCIS as of the date the new rule was implemented. Accordingly, the petition was pending on the effective date of the regulation and is therefore subject to the new rule.

The wording of the relevant legislation demonstrates Congress' interest in USCIS regulations. Section 2(b)) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008), reads in pertinent part:

> *Regulations* – Not later than 30 days after the date of the enactment of this Act, the Secretary of Homeland Security shall –
>
> (1) issue final regulations to eliminate or reduce fraud related to the granting of special immigrant status for special immigrants described

> in subclause (II) or (III) of section 101(a)(27)(C)(ii) of the Immigration and Nationality Act (8 U.S.C.) 1101(a)(27(C)(ii).

Furthermore, the October 2008 legislation extended the special immigrant nonminister religious program only until March 5, 2009. From the wording of the statute, it is clear that this extension was so short precisely because Congress sought to learn the effect of the new regulations before granting a longer extension. Congress has since extended the life of the program three times.[1] On any of those occasions, Congress could have made substantive changes in response to the regulations they requested, but Congress did not do so. Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). We may therefore presume that Congress has no objection to the new regulations as published, or to USCIS' interpretation and application of those regulations.

Counsel, again citing *Landgraf*, also asserts that the November 26, 2008 rule was "impermissibly applied" because "the new provision takes away or impairs vested rights acquired under existing laws," and if such "rights are affected, the statute or regulation cannot be applied retroactively." Counsel, however, cited no rights that had vested for the petitioner or the beneficiary. The pending petition had not been adjudicated or approved in any manner by USCIS. A petitioner has no established "right" that its petition will be approved prior to its review and adjudication by USCIS and the beneficiary has no right to adjust status to nonimmigrant status. Neither the petitioner nor the beneficiary therefore had vested rights that were affected by the new rule and its implementing regulation.

Accordingly, the USCIS retroactive application of the requirements of the November 26, 2008 rule was not "impermissible," as the rule mandated application to pending petitions and the petitioner had no vested rights that were established by the application of the rule to pending petitions.

The petition will be denied for the above stated reasons. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

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[1] Pub. L. No. 111-9 § 1 (March 20, 2009) extended the program to September 29, 2009. Pub .L. No. 111-68 § 133 (October 1, 2009) extended the program to October 30, 2009. Pub .L. No. 111-83 § 568(a)(1) (October 28, 2009) extended the program to September 29, 2012.