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

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 0 4 2010

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 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 school. 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 an instructor. 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 director "erred in this matter in that under general rules of statutory construction, a substantive, noncurative, adverse change in administrative rules is not to be applied retroactively unless the language of **both** the administrative rule and the statute authorizing the rule requires the result." [Emphasis in the original.] 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
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> (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 January 9, 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.

As it relates to the beneficiary's immigration status and work history, the record contains a May 2, 2008 letter, submitted in response to the director's March 7, 2008 request for evidence (RFE), in which the beneficiary stated that he had initially entered the United States pursuant to an H-1B visa to work for [redacted]. The beneficiary further stated that he left that company in September 1999 to work for the petitioning organization. The record contains a copy of a Form I-797A approving the beneficiary for H-B1 status valid from February 26, 1999 to November 11, 2001 based on a petition filed on his behalf by [redacted]. As previously indicated, the beneficiary admitted that he left this company less than a year after the petition was approved. The record contains a copy of the beneficiary's passport and Form I-94, Departure Record, which shows that he last entered the United States on June 24, 1998 pursuant to a B-2 visa.

In denying the petition, the director noted:

> Subsequent to the beneficiary's separation from [redacted], there was no authorization for the beneficiary to engage in employment in the United States, nor does the record show that the beneficiary filed a Change of Status application which, if approved, could have authorized the beneficiary to engage in

> lawful employment assuming all other requirements prescribed . . . for the new immigration status had been met.
>
> The beneficiary worked as a Religious Instructor for [the petitioning organization] without lawful immigration status since September 1999.

On appeal, counsel does not dispute that the beneficiary engaged in unauthorized employment. Instead, counsel argues that the Act at 8 U.S.C. § 1101(a)(27)(C) requires only that the petitioner establish that the alien has been engaged in qualifying religious work for the two years immediately preceding the filing of the visa petition. Counsel further argues that the petitioner and the beneficiary relied upon the previous regulation at 8 C.F.R. § 204(m)(3)(ii)(A) which mirrored the language of the statute. Counsel then argues that the new regulation at 8 C.F.R. § 204.5(m)(4) requiring experience gained in the United States to be in a lawful immigration status "constituted a substantive, noncurative adverse change in administrative rules that could not be applied retroactively since the language of the regulation did not clearly express that the law was to be applied retroactively to all pending Special Immigrant Religious Worker petitions."

Citing *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), counsel states that "[d]etermining whether a regulation or statute may be applied retroactively requires a two step analysis:" first, "whether the statute or regulation clearly expresses that the law is to be applied retroactively," and if it not, "whether application of the regulation would have a retroactive effect."

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 that neither the Act nor the new USCIS regulation state that the rule will be retroactively applied.

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).

In proposing the requirement that all prior qualifying employment have been authorized and "in conformity with all other laws of the United States" such as the Fair Labor Standards Act of 1938 and "tax laws," USCIS explained that "[a]llowing periods of unauthorized, unreported employment to qualify an alien toward permanent immigration undermines the integrity of the United States immigration system." 72 Fed. Reg. 20442, 20447-48 (April 25, 2007). Accordingly, the adoption of the final rule requiring that all prior qualifying employment have been lawful clearly comports with the explicit instructions from Congress to "eliminate or reduce fraud." As we have previously noted, USCIS applied the new regulations to pending cases as well as new filings. When USCIS published the new rule in November 2008, it did so in accordance with explicit instructions from Congress.

Further, contrary to counsel's argument, supplementary information published with the new rule specifically indicated that the new regulatory provision applied to "[a]ll cases pending on the rule's effective date. 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). If USCIS had not intended the lawful employment requirement to be retroactive, it would have phased in the requirement or specified that it applies only to employment that took place after November 26, 2008. Instead, 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." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). Thus, the regulations apply immediately and retroactively, not only to work performed before the effective date, but also to previously filed petitions still pending on that date.

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*, asserts that application of the new regulation impairs the petitioner and the beneficiary by a new disability that prevents the beneficiary from being eligible for consideration under this preference visa classification. 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.

Counsel also argues that the court in *Kankamalage v. INS*, 335 F.3d 858 (9th Cir. 2003) "determined that the application of a new regulation that takes away an applicant's eligibility acquired under existing laws will not be given effect." However, as previously discussed, the beneficiary was not "eligible" for special immigrant status because his petition had not been approved.

Accordingly, the USCIS retroactive application of the requirements of the November 26, 2008 regulation was not in error 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 petitioner does not dispute the director's finding that the beneficiary engaged in unauthorized employment during the two-year qualifying period. Rather, the petitioner, through counsel, has argued that this unauthorized employment should not disqualify the beneficiary. For the reasons explained above, we reject this argument. Under 8 C.F.R. §§ 204.5(m)(4) and (11), the petition cannot be approved, because the beneficiary's religious employment in the United States during the qualifying period was not authorized under United States immigration law.

The petitioner has therefore failed to establish that the beneficiary, because of his unauthorized employment, worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the visa petition.

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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.

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.