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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

C1

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 19 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant 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 $630. 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 Director, California Service Center denied the employment-based immigrant visa petition. The matter 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 an associate pastor. The director determined that the petitioner had not established that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the petition.

On appeal, counsel states that in denying the petition, the director erred in the application of law and misapplied the 2008 religious worker rules to the instant case. Counsel submits a brief and additional documentation 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 issue presented is whether the petitioner has established that the beneficiary worked continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m) 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 worked 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 April 23, 2009. Accordingly, the petitioner must establish that the beneficiary was in a lawful immigration status and continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

The regulation at 8 C.F.R. § 204.5(m)(11) provides:

> *Evidence relating to the alien's prior employment.* Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:
>
> (i) Received salaried compensation, the petitioner must submit IRS [Internal Revenue Service] documentation that the alien received a salary, such as an IRS Form W-2 [Wage and Tax Statement] or certified copies of income tax returns.
>
> (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.

> (iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS [U.S. Citizenship and Immigration Services].
>
> If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

In its April 14, 2009 letter submitted in support of the petition, the petitioner stated that the beneficiary had "been compensated for his professional services in valid R-1 status from July 14, 2006 to the present time." With the petition, the petitioner submitted copies of checks that it made payable to the beneficiary beginning in April 2007 through March 2009. However, many of these checks do not indicate that they have been processed by the bank. The petitioner submitted copies of its monthly bank statements for December 2008 through February 2009. These statements reflect payments for the checks issued in those months; however, the petitioner submitted no similar documentation for payments made in other months. The petitioner also submitted a copy of a June 11, 2008 Form I-797A, Notice of Action, approving the beneficiary for R-1 nonimmigrant religious worker status from June 3, 2008 to June 2, 2010.

The director denied the petition, stating:

> The beneficiary was initially granted R-1 status on June 14, 2006 to work for [redacted]. The petitioner has not provided evidence to establish how long he worked for that church. The petition filed by [redacted] was revoked on October 31, 2007. The first check written to the beneficiary from [the petitioner] was dated April 29, 2007. The beneficiary was not granted authorization to work for [the petitioner] until June 3, 2008. Therefore, the beneficiary violated his status when he went to work for the petitioner in April 2007. As such, the beneficiary was not employed in lawful immigration status from April 2007 until June 2008.

On appeal, counsel states that the beneficiary was approved for R-1 status to work for [redacted] from July 14, 2006 to June 1, 2009, but that his employment was interrupted when he was involved in a physical altercation with one of the other pastors and a mutual restraining order was issued against both in March 2007. As a result, the beneficiary was prohibited from contacting his former employer. On April 2, 2007, the petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, for a change of employers on behalf of the beneficiary. This petition was approved on June 11, 2008. Counsel asserts that the petitioner's Form I-129 petition was accompanied by a "request for discretionary relief from the technical lapse in the Beneficiary's status as a nonimmigrant pursuant to 8 C.F.R. § 248.1." The cited regulation provides:

> (a) *General.* Except for those classes enumerated in § 248.2, any alien lawfully admitted to the United States as a non-immigrant, including an alien who acquired such status pursuant to section 247 of the Act, 8 U.S.C. 1257, who is continuing to maintain his or her non-immigrant status, may apply to have his or her non-immigrant classification changed to any non-immigrant classification other than that of a spouse or fianc(e), or the child of such alien . . .
>
> (b) Except in the case of an alien applying to obtain V nonimmigrant status in the United States under § 214.15(f) of this chapter, a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service, and without separate application, where it is demonstrated at the time of filing that:
>
> > (1) The failure to file a timely application was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
> >
> > (2) The alien has not otherwise violated his or her nonimmigrant status;
> >
> > (3) The alien remains a bona fide nonimmigrant; and
> >
> > (4) The alien is not the subject of removal proceedings under 8 CFR part 240.

Counsel states, "The petitioner believes the Service made a ruling that extraordinary circumstances existed in this case and that the beneficiary did not engage in unauthorized employment. The Form I-129 was pending at the time the beneficiary commenced employment." Counsel also asserts that prior to November 26, 2008, when USCIS implemented new regulations governing religious worker petitions, "the Service's position was that once an I-129 petition to change employer's [sic] was filed, that beneficiary was allowed to change employers, as long as the Form I-129 was ultimately approved." Counsel further asserts that as the "time period at issue is employment in 2007, which was one year prior to the enactment of the religious worker rules," the final rule should not be retroactively applied.

Counsel's arguments are without merit. First, the regulation cited above gives USCIS the discretion to waive the timely filing for a change in status under certain specified conditions. The petitioner submits a copy of a Form I-797A reflecting that the petition of [redacted] for the beneficiary for R-1 status was approved for a period valid from July 14, 2006 to June 1, 2009. Thus, when the petitioner filed the Form I-129 petition on behalf of the beneficiary, he was still in an approved R-1 status. The petitioner filed for a change of employers and not a change of status for the beneficiary.

Thus, the exception of the regulation does not apply to the beneficiary and the Form I-129 filed on his behalf by the petitioner.

Counsel also argues:

> [T]he final religious worker rules were effective as of November 26, 2008 which govern the definition of "unauthorized employment." However, prior to the enactment of the 2008 regulations, the Service's position was that once an I-129 petition to change employer[s] was filed, that beneficiary was allowed to change employers, as long as the Form I-129 was ultimately approved. That the start date of employment could commence upon filing the petition. The time period at issue is employment in 2007, which was one year prior to the enactment of the religious worker rules. The position of the Service has been that these final rules are effective as of November 26, 2008 and should not be retroactively applied to the petitioner.

Counsel's argument is without merit. As previously stated, on November 26, 2008, USCIS issued a rule setting forth new regulations for special immigrant religious worker petitions. 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). The instant petition was filed on May 5, 2009. Thus, as the petition was filed subsequent to the implementation date of the new regulations, it was impossible for the case to have been adjudicated prior to that date.

Additionally, counsel submits no documentation to support her statement that under former USCIS policy, a beneficiary was allowed to change employers prior to approval by USCIS. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The regulation at 8 C.F.R. § 214.1(e) states that a nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

The record reflects that the beneficiary began his employment with the petitioning organization prior to approval by USCIS. Therefore, he failed to maintain his immigration status. As the beneficiary was not in a lawful immigration status during the period that he worked for the petitioning organization, any work performed by the beneficiary in the United States for the petitioning organization interrupted the continuity of his work experience for the purpose of this visa petition. Even if this period of continuity was not in question, the petitioner failed to provide documentary evidence of the beneficiary's prior employment as outlined by the regulation at 8 C.F.R. § 204.5(m)(11).

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

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.