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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: MAR 16 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 and it 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 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.

Counsel asserts on appeal that the director inappropriately applied the U.S. Citizenship and Immigration Services (USCIS) regulation of November 2008 to the instant petition. 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 February 12, 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.

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 documentation that the alien received a salary, such as an IRS Form W-2 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.
>
> If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

On the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, the petitioner stated that the beneficiary arrived in the United States pursuant to a B-2 nonimmigrant visitor's visa that expired on February 2, 2002. According to counsel, the beneficiary began working with the petitioner in 2003 and in an August 9, 2007 sworn statement, [redacted], a deacon with the petitioner, stated that the beneficiary had received a stipend for his work as pastor since 2004. USCIS records do not reflect that the beneficiary was in a lawful immigration status during the two years prior to the filing of the visa petition.

The director determined that as the beneficiary was not in a lawful immigration status during the two years prior to the filing of the petition, the petitioner had failed to establish that the beneficiary worked continuously during the qualifying period.

On appeal, counsel argues that the director's application of regulations promulgated by USCIS on November 26, 2008 "violate the prohibition against retroactivity." Citing *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), in which the Supreme Court "explained that the presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," counsel asserts that retroactive application of the regulations to the instant petition "confounds elementary considerations of fairness." Counsel argues: "With its retroactive application, the California Service Center wiped away years of [the beneficiary's] efforts and robbed him of the opportunity to avail of other avenues, which may have been available to him."

Counsel further argues that "the new regulations do not contain a provision of retroactivity" and that the "California Service Center's departure from the traditions and practice of American jurisprudence constitutes arbitrary and capricious action. Additionally, failure to adhere to established policy of anti-retroactivity is an abuse of discretion within the meaning of the Administrative Procedure Act."

In *Landgraf*, 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 "the new [USCIS] regulations do not contain a provision of retroactivity."

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).

The instant petition was filed on February 12, 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 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 or to change his status after his authorized period of admission had expired. 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 "inappropriate," 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.

Additionally, the petitioner submitted insufficient documentation to establish that the beneficiary worked during the qualifying period. The petitioner submitted an October 31, 2007 letter from [redacted], an accountant, who certified that the beneficiary had been the pastor of the petitioning organization since January 2005 and had received an "average weekly salary of $310 in 2005 and $342 in 2006." However, the petitioner submitted no other documentation such as an IRS Form W-2 or certified copies of income tax returns to establish the beneficiary's qualifying work experience, as required by 8 C.F.R. § 204.5(m)(11).

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

Beyond the decision of the director, the petitioner has not established how it intends to compensate the beneficiary.

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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.

In his August 9, 2007 statement, [redacted] stated that the beneficiary received approximately $1,400 per month in cash stipends. However, the record does not establish that the petitioner has offered the beneficiary a specific salary.

The regulation at 8 C.F.R. § 204.5(m)(10) provides that the petitioner must submit:

> *Evidence relating to compensation.* Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. If IRS documentation, such as IRS Form W-2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

As discussed above, [redacted] stated that the beneficiary had received compensation averaging $310 in 2005 and $342 in 2006. The petitioner, however, submitted no verifiable documentation such as IRS Form W-2, certified tax returns, budgets or other documentation as listed above, to establish that the beneficiary received the stated compensation. The petitioner has therefore failed to establish how it intends to compensate the beneficiary.

The petitioner has also failed to meet the requirements of the regulation at 8 C.F.R. § 204.5(m)(7), which requires the petitioner to submit a detailed attestation with details regarding the petitioner, the beneficiary, the job offer, and other aspects of the petition. The record contains no such attestation.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.