

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**

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invasion of personal privacy
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DATE: **APR 02 2012** OFFICE: CALIFORNIA SERVICE CENTER [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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,

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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 AAO will dismiss the appeal.

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 had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

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).

At issue on appeal is whether or not the petitioner has established that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or 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 petitioner filed the petition on August 27, 2009. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work throughout the two years immediately prior to that date.

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

(11) *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, the petitioner indicated that the beneficiary arrived in the United States on March 18, 2004. Therefore, the beneficiary was in the United States throughout the entire two-year qualifying period. On the Form I-360, under "Current Nonimmigrant Status," the petitioner wrote "B-2." The record shows that the beneficiary entered the United States as a B-2 nonimmigrant visitor, and then converted to R-1 nonimmigrant status on April 1, 2006, which expired on March 31, 2009.

The director denied the petition on May 3, 2010, finding that the petitioner had failed to establish that the beneficiary maintained continuous employment in the two years preceding the filing of the petition. The beneficiary purportedly worked for the Wyclif Presbyterian Church from April 2006 to August of 2009 in the position of associate pastor. The petitioner submitted a signed letter from [REDACTED] dated February 2, 2010 to this effect. The director noted that the beneficiary did possess employment authorization from October 22, 2009 to October 21, 2011. However, he was not

authorized to work between April 1, 2009 and October 21, 2009, the majority of which fell within the two-year qualifying period prior to the filing of the petition.

On appeal, counsel concedes that the beneficiary was engaged in unauthorized work, but asserts that, according to § 245(k) of the Act, the beneficiary's 149 days of unauthorized employment should not disqualify him from adjusting status or having his prior employment qualify under 8 C.F.R. § 204.5(m)(11).

Section 245(k) of the Act reads:

An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 203(b) (or, in the case of an alien who is an immigrant described in section 101(a)(27)(C), under section 203(b)(4)) may adjust status pursuant to subsection (a) and notwithstanding subsection (c)(2), (c)(7), and (c)(8), if –

- (1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;
- (2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days –
 - (A) failed to maintain, continuously, a lawful status;
 - (B) engaged in unauthorized employment; or
 - (C) otherwise violated the terms and conditions of the alien's admission.

Although section § 245(k) of the Act does enable a person who is adjusting status in an employment-based category to adjust even if he or she has been out of status or worked without authorization for less than 180 days, at issue for this proceeding is whether the beneficiary is eligible for approval of the special immigrant petition. Here, the beneficiary has no approved petition, is not eligible to receive an immigrant visa, and therefore is not eligible to adjust status. Any discussion of eligibility for adjustment of status is premature. At this time, the petitioner must establish that the beneficiary meets all of the requirements for 8 C.F.R. §204.5(m), which, as cited above, requires two years of lawful continuous employment.

The AAO notes that counsel submitted an additional letter dated February 8, 2012, asserting that a United States District Court, Northern District of California ruling in *Shia Association of Bay Area, et al. v. United States of America, et al.*, No. 11-1369 (N.D. Cal. Feb. 1, 2012) bears weight upon the matter at hand. The AAO acknowledges that counsel submitted this decision in support of her previous § 245(k) assertions on appeal. Within the February 8, 2012 letter, counsel states that the submitted case reflects that the court ruled that 8 C.F.R. §§ 204.5(m)(4) and (11) are ultra vires.

Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The AAO additionally notes that a separate district court, with similar facts that turned on the alien's unlawful immigration status and unauthorized employment, instead found USCIS' lawful employment requirement to be reasonable. *Islamic and Educational Center "Ezan" of Greater Des Moines v. Napolitano*, No. 4:11-cv-00045 (S.D. Iowa Oct. 26, 2011). Accordingly, the AAO does not find counsel's assertions within her February 8, 2012 letter to be persuasive.

Moreover, it is well settled that the regulations which USCIS promulgates have the force and effect of law and are binding on USCIS. *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). The AAO is a component of USCIS, and therefore subject to USCIS regulations. Therefore, even if the AAO found counsel's arguments to be wholly persuasive, the AAO has no authority to overturn or change USCIS regulations.

As it relates to counsel's argument that the regulation is ultra vires, Congress' interest in USCIS regulations is evident from the wording of section 2(b) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391 (Oct. 10, 2008):

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."

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 ordered USCIS to publish, 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).

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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed.

¹ P.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.