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

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U.S. Citizenship and Immigration Services

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[redacted]

DATE: APR 0 9 2012 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

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 petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO subsequently remanded the petition to the director for a new decision based on revised regulations. The director again denied the petition, and the petitioner again appealed the decision to the AAO. The AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen. The AAO will dismiss the motion.

The petitioner is a church belonging to the Eastern Pennsylvania Conference (EPC) of the United Methodist Church (UMC). 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 "Chinese Community Liaison – pastor to the Chinese Community." The director determined that the petitioner had not established that the beneficiary had the required two years of qualifying, lawful work experience immediately preceding the filing date of the petition. The AAO affirmed the director's decision and dismissed the petitioner's appeal.

On motion, the petitioner submits a brief from counsel, witness affidavits, and other exhibits.

In this decision, the term "prior counsel" shall refer to [redacted], who represented the petitioner prior to the present motion. The term "counsel" shall refer to the present attorney of record.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

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 . . . ; 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 AAO's dismissal notice of January 25, 2011 listed the prior history of the proceeding, and the AAO incorporates that decision by reference. Briefly, 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 USCIS regulation at 8 C.F.R. § 204.5(m)(11) requires that qualifying prior experience, if acquired in the United States, must have been authorized under United States immigration law.

The petitioner filed the Form I-360 petition on July 20, 2007; that filing date marked the end of the two-year qualifying period for which the petitioner must establish the beneficiary's lawful status and authorized employment.

The petitioner's statements and evidence showed that the beneficiary held R-1 nonimmigrant religious worker status authorizing her to work for the New York Annual Conference (NYAC) of the UMC – and only for the NYAC – throughout the two-year qualifying period from July 2005 to July 2007, and through to November 10, 2007. At the time of that employment, the USCIS regulation at 8 C.F.R. § 214.2(r)(6) read:

> *Change of employers.* A different or additional organizational unit of the religious denomination seeking to employ or engage the services of a religious worker admitted under this section shall file Form I-129 with the appropriate fee. The petition shall be filed with the Service Center having jurisdiction over the place of employment. The petition must be accompanied by evidence establishing that the alien will continue to qualify as a religious worker under this section. Any unauthorized change to a new religious organizational unit will constitute a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

The record shows, and the petitioner does not dispute, that the beneficiary left the NYAC on April 30, 2007, and began working for the petitioner in Philadelphia on May 1, 2007. The director denied the petition on March 15, 2010, stating that the beneficiary violated her R-1 nonimmigrant status by performing work for the petitioner when her status only authorized her to work for the NYAC.

On appeal from that decision, prior counsel claimed that the beneficiary "was, in effect, in the employ of the New York Annual Conference at all applicable times." The petitioner documented recent fund transfers in an attempt to show that NYAC had now assumed the cost of the beneficiary's salary in 2007, and that therefore the NYAC was, effectively, the beneficiary's employer throughout that period.

Prior counsel stated that "[n]unc pro tunc relief should be recognized in this matter." The AAO rejected this contention, and stated:

> Generally, *nunc pro tunc* relief is a remedy for administrative or judicial error *by the government* as a means to prevent inequity or injustice. It is not a means for a petitioner, or any related private entity, to correct its own errors or retroactively change disqualifying circumstances of its own making.

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). This provision would, in many contexts, be meaningless if an applicant or petitioner could erase disqualifying circumstances simply by making changes after the fact, and then demanding that USCIS consider those changes to have already been in effect as of the filing date. USCIS and its predecessor, the Immigration and Naturalization Service, have consistently held that the applicant or petitioner must establish eligibility at the time of filing. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The AAO also questioned the petitioner's claim that it was always the intention for NYAC to pay the beneficiary's salary, and that other arrangements were in place only because they were simpler.

On motion, counsel states: "The Petitioner is filing a nunc pro tunc Application, pursuant to 8 C.F.R. § 214.19(c)(4)(i)-(iv), to cure the period of unlawful status." The AAO had already explained that *nunc pro tunc* relief is a means to remedy government error, not a means by which the petitioner could, several years after the fact, retroactively erase disqualifying violations by the beneficiary. Counsel, on motion, does not address or answer the AAO's findings, instead merely repeating that the petitioner seeks *nunc pro tunc* relief.

There is no regulation at 8 C.F.R. § 214.19(c)(4)(i)-(iv). Counsel appears to refer to 8 C.F.R. § 214.1(c)(4), which reads:

> 4) *Timely filing and maintenance of status.* An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such 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, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:
>
> (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
>
> (ii) The alien has not otherwise violated his or her nonimmigrant status;
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> (iii) The alien remains a bona fide nonimmigrant; and
>
> (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

The above regulation applies only to instances in which an alien's nonimmigrant status expired before the filing of an application for extension of stay, and "[t]he alien has not otherwise violated his or her nonimmigrant status." In the present instance, the beneficiary's R-1 status did not expire owing to the

untimely filing of an application for extension of stay. Rather, the beneficiary made an unauthorized change of employment several months before her R-1 nonimmigrant status was due to expire, and thereby did violate her nonimmigrant status in a manner unrelated to the expiration that status.

Counsel cites section 245(k) of the Act, which reads, in full:

> 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.

The statute quoted above concerns adjustment of status, not the antecedent petition phase. The regulations at 8 C.F.R. §§ 204.5(m)(4) and (11) do not allow 180 days of unauthorized employment or failure to maintain status, and section 245(k) of the Act does not require USCIS to approve any petition on the beneficiary's behalf. Rather, section 245(k) of the Act presumes an approved petition or other avenue to adjustment of status.

Furthermore, the beneficiary's failure to maintain status began on May 1, 2007. The petitioner filed a new nonimmigrant petition on the beneficiary's behalf (with receipt number WAC 08 021 50266) on October 29, 2007.[1] Even if the filing of the new petition immediately conveyed lawful status on the beneficiary, the beneficiary would already have been out of status for more than 180 days:

May	31 days	
June	30 days	
July	31 days	
August	31 days	
September	30 days	
October	28 days	(before October 29)
Total	181 days	

According to USCIS records, the petition did not grant the beneficiary R-1 nonimmigrant status until November 11, 2007, thus adding another 13 days to the above sum, for an overall total of 194 days.

[1] The AAO notes that, although the director approved the nonimmigrant petition on November 18, 2008, the director subsequently revoked that approval on March 1, 2010.

Because this period exceeded 180 days in length, counsel's assertions regarding section 245(k) of the Act do not apply.

The petitioner submits affidavits from four witnesses and an unsworn statement from the petitioner's minor child. For the most part, these statements address the beneficiary's contributions to the community, and to the church's desire to retain her services. The AAO is not indifferent to these considerations, but the grounds for denial are not discretionary ones that USCIS is free to waive on humanitarian or other grounds. The provisions under consideration do not apply only to unwanted members of their respective communities.

The regulations are binding on USCIS employees in their administration of the Act, and USCIS employees do not have the authority to create *ad hoc* remedies in situations such as this one. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission,* 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C.,1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). An agency is not entitled to deference if it fails to follow its own regulations. *U.S. v. Heffner,* 420 F.2d 809, (C.A. Md. 1969) (government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down).

[redacted] senior pastor of the petitioning church, acknowledges: "We now understand that we have improperly filed petitions based on poor advice from our prior attorneys." Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In this instance, an official of the petitioning entity has blamed the present situation on "poor advice from . . . prior attorneys," but this assertion alone does not meet the *Lozada* test.

The petitioner has not submitted new evidence of eligibility, or provided any other new facts relevant to the proceeding. The petitioner's filing, therefore, does not meet the regulatory requirements of a motion to reopen. The AAO will therefore dismiss the motion and not disturb its prior decision.

ORDER: The motion is dismissed.