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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]

DATE: JAN 26 2012 Office: CALIFORNIA SERVICE CENTER [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 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 that the beneficiary had engaged in unauthorized employment and that the petitioner had failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the visa 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).

The issues presented on appeal are whether the beneficiary had engaged in unauthorized employment and 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 petitioner filed the Form I-360 on August 21, 2009. 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 [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.
>
> 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 last arrived in the United States on September 7, 2007. Therefore, the beneficiary was not in the United States throughout the entire two-year qualifying period. On the Form I-360, under "Current Nonimmigrant Status," the petitioner wrote "R-1." The record shows that the beneficiary's R-1 nonimmigrant religious worker status was valid from July 20, 2006 to May 26, 2008.

In its August 12, 2009 letter accompanying the Form I-360, the petitioner stated that the beneficiary had been working for its church since 2003 in R-1 status. The petitioner's business administrator, [redacted] submitted a signed letter dated November 11, 2008, listing total amounts the petitioner had paid the beneficiary for his services as a pastor between 2005 and 2008. According to this letter, the petition did not pay the beneficiary for his services in 2003 or 2004. The petitioner did not submit any Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements issued by the petitioner to the beneficiary for work performed from 2003 onwards. Nor did the petitioner provide copies of pay stubs or checks for services rendered.

On appeal, counsel asserts that the beneficiary has been working in valid R-1 status for a ten-year period and that he was working for the petitioner as a religious minister in the two-year period preceding the filing of the petition.

Counsel concedes that the beneficiary's R-1 visa expired on May 26, 2008. Counsel contends, however, that the beneficiary and his wife had been out of the United States for a total of 860 days between 2003 to 2008 for overseas mission trips, so they should have been able to recapture that time. Counsel has failed to document any of the beneficiary's overseas travel from 2003 onwards. Furthermore, the beneficiary's last entry into the United States was on September 7, 2007, which was less than two years before the filing of the petition. The petitioner has not specifically indicated or demonstrated what type of work, if any, the beneficiary was doing abroad before entering the United States for the last time. Regardless, the AAO does not find counsel's argument to be persuasive, as the beneficiary's R-1 status expired on May 26, 2008, not on some arbitrary other date based upon how many days the beneficiary had purportedly been outside of the country. Counsel additionally contends that USCIS issued an Employment Authorization Document (EAD) to the beneficiary that was valid from November 19, 2009 to November 18, 2011. Counsel stated that he would be including a copy of the document with the appeal, but he failed to do so. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Regardless, even if documented, counsel failed to account for the period of time from the expiration of the R-1 status on May 26, 2008 to the subsequent claimed approval on November 19, 2009.

Within the petitioner's Form I-360, counsel notably conceded that the beneficiary had performed unauthorized work, but asserted that § 245(k) of the Act permits the beneficiary and his wife to adjust status because he was lawfully admitted into the United States at the time of the filing of the petition and because he had not failed to maintain an unlawful status or engaged in unauthorized employment for an aggregate period exceeding 180 days. The AAO does not find this argument to be persuasive, as the beneficiary's R-1 status expired on May 26, 2008, and the petitioner did not file the Form I-360 until August 21, 2009.

The AAO notes that, under 8 C.F.R. § 214.1(c), a nonimmigrant may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status. The regulations at 8 C.F.R. §§ 204.5(m)(4) and (11) require the beneficiary's prior employment to have been lawful and authorized. The beneficiary's nonimmigrant religious worker status expired on May 26, 2008. Thus, the petitioner has failed to provide evidence demonstrating that the beneficiary completed two years of qualifying experience immediately prior to the filing of the petition according to 8 C.F.R. § 204.5(m)(11).

As previously stated, the beneficiary has not been in lawful status since May 26, 2008. The regulation at 8 C.F.R. § 204.5(m)(4) prohibits U.S. Citizenship and Immigration Services (USCIS) from considering work that was not "in lawful immigration status" and any "unauthorized work in the United States." The regulation at 8 C.F.R. § 204.5(m)(11) requires that "qualifying prior experience . . . must have been authorized under United States immigration law." Therefore, the regulations, separately and together, require that USCIS must have affirmatively authorized the beneficiary to perform any claimed religious functions while in the United States. The record therefore reflects that the beneficiary was not in an authorized immigration status during the two years immediately preceding the filing of the visa petition. Accordingly, any work that he may have performed in an unauthorized status would interrupt the continuity of the qualifying work experience.

The petitioner has failed to submit sufficient documentation to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the petition.

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.