identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

PUBLIC COPY

[redacted]

C1

Date: MAY 22 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a mosque. 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 imam. 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.

On appeal, the petitioner submits a brief from counsel.

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 U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the alien 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 petition was filed on July 14, 2008. Therefore, petitioner must establish that the

beneficiary was continuously performing qualifying religious work in lawful status throughout the two-year period immediately preceding that date.

The USCIS 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.

According to the Form I-360 petition and accompanying evidence, the beneficiary entered the United States on October 18, 2005 in nonimmigrant visitor status and was later granted R-1 nonimmigrant status which authorized his employment with the petitioner, [redacted] from June 30, 2006 to April 17, 2009. In a letter submitted with the petition, the petitioner indicated that the beneficiary began working as an imam on a voluntary basis for the petitioning organization in November, 2005, and has been working as a paid imam for the organization since June, 2006. The petitioner stated that the beneficiary works full time as an imam for which he receives a stipend of $3,000 per month or $36,000 per year. The petitioner also stated that it "sponsors and shares its physical plant with the [redacted] a not-for-profit, New York State and New York City certified and accredited school." In a letter from the [redacted], the principal stated that the beneficiary leads daily prayers at noon for the school community and congregants and also regularly delivers religious lectures to students and provides religious guidance. The petitioner also submitted a copy of the beneficiary's 2007 Internal Revenue Service (IRS) Form 1099-MISC, indicating that the beneficiary received $36,000 from the petitioner in 2007.

Additionally, the petitioner submitted a copy of a letter from the beneficiary dated December 20, 2006, signed "[redacted] – [redacted] in which he introduces "the new Board of Directors" of the [redacted]"

On November 24, 2009, USCIS issued a Request for Evidence based on new regulations issued on November 26, 2008. In part, the notice instructed the petitioner to submit additional evidence regarding the beneficiary's work history during the two-year qualifying period immediately preceding the filing of the petition, including evidence that the beneficiary maintained lawful status and evidence of compensation received. The notice also requested copies of the beneficiary's tax documents for the years 2006 to 2008.

In response, the petitioner asserted that its employment of the beneficiary during the qualifying period was authorized and resubmitted a copy of the beneficiary's R-1 approval notice. The petitioner additionally submitted various tax documents for the beneficiary as evidence of compensation. The beneficiary's 2008 Form 1099-MISC indicated that the beneficiary received $36,000 from the petitioner for that year. An IRS Tax Return Transcript for 2008 indicated that the beneficiary received wages of $13,550 and business income of $25,215 (listed on Schedule C as $36,000 from the petitioner, minus $10,785 in expenses) for a total income of $38,765. The petitioner resubmitted the Form 1099-MISC for 2007 indicating that the beneficiary received $36,000 from the petitioner. The beneficiary's 2007 IRS Tax Return Transcript showed wages of $46,500 with a business loss of $6,700 for a total income of $39,800. The beneficiary's 2006 IRS Tax Return Transcript listed wages of $500 and "other income" of $15,000. The petitioner did not submit a Form W-2 or Form 1099 for 2006.

On March 11, 2010, the director issued a Notice of Intent to Deny the petition. In the notice, the director noted discrepancies in the beneficiary's tax documents, and stated the following:

> Two issues are at play here. The first issue is that it appears the petitioner is not paying the proffered wage. The second issue at hand is that the beneficiary appears to be self-employed, very possible [sic] with income from another source.

The director also questioned whether the beneficiary had engaged in unauthorized employment by serving as a member of the petitioner's Board of Trustees.

In a letter responding to the notice, the petitioner stated that none of its directors or trustees receive any compensation. The petitioner asserted that accountants advised that the beneficiary should report earnings as self-employed income on Schedule C. The petitioner and counsel also asserted that the accountant who prepared the beneficiary's tax returns miscategorized some of the beneficiary's income on his tax returns resulting in some of the discrepancies noted by the director. The petitioner additionally stated that "[a]s part his duties as the [redacted] imam, [redacted] leads daily prayers at the [redacted] and delivers religious lectures and guidance to students and staff." The petitioner acknowledged that the beneficiary receives compensation from the [redacted] The petitioner submitted New York State and federal tax documents showing that

the [redacted] paid the beneficiary $500 in 2006, $10,500 in 2007, $13,550 in 2008 and $12,000 in 2009. As evidence of the beneficiary's 2006 compensation from the petitioner, the petitioner submitted photocopies of processed checks for $3,000 each from the petitioner to the beneficiary, including three checks dated July 22, 2006 with notations for "May 06," "Jun 06," and "July 06," a check dated October 1, 2006 with a notation for "Oct/2006" and a check dated December 1, 2006 with a notation for "Dec. 2006." The petitioner also submitted a copy of the beneficiary's tax return for 2006 listing a total income of $15,500, including $15,000 listed as "Lecture Fees" under "other income."

On February 7, 2011, the director denied the petition, finding that the petitioner failed to establish that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition. Specifically, the director found that the petitioner had failed establish the continuity of the beneficiary's employment and she also found that the beneficiary had engaged in unauthorized employment with the [redacted] during the qualifying period, thereby failing to maintain lawful status.

Regarding the continuity of the beneficiary's employment, the director explained that the qualifying period began on July 14, 2006, so as part of the qualifying period, the petitioner must demonstrate that the beneficiary was continuously employed from July through December of 2006. The director noted that, while the five submitted paychecks from 2006 together with the $500 from the [redacted] account for the total income reflected on the beneficiary's tax return for that year, the notations on the paychecks indicated that they were for May, June, July, October, and December of 2006. Therefore, the director determined that the petitioner had failed to demonstrate that the beneficiary was continuously employed in a compensated position during August, September and November of 2006. The director additionally found that the petitioner had failed to resolve some of the inconsistencies in the tax documents submitted, including why the beneficiary reported income as self-employment and why various business expenses were deducted. Although counsel asserted that an accountant was responsible for incorrect categorizing of income on the beneficiary's tax returns without providing a letter from the accountant or other documentary evidence to support the assertion. 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 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel for the petitioner argues that the evidence establishes that the beneficiary worked solely as an imam for the petitioner and the [redacted] during the qualifying period and asserts that the director places undue emphasis on the deductions shown on the tax returns. Counsel again asserts that the deductions were an error made by the beneficiary's tax preparer. The petitioner submits no further evidence in support of counsel's assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported statements of counsel on appeal are not evidence

and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

More importantly, counsel's brief does not address the questions raised by the director regarding the continuity of the beneficiary's employment from July to December of 2006. Therefore, the AAO agrees with the director that the petitioner has failed to establish that the beneficiary was continuously engaged in qualifying religious work throughout the two years immediately preceding the filing date of the petition.

Regarding the beneficiary's immigration status and employment authorization during the qualifying period, the regulation at 8 C.F.R. §§ 214.2(r)(3)(ii)(E), as was in effect in 2006 when the beneficiary was approved as an R-1 nonimmigrant, required an authorized official of the organization to provide the "name and location of the specific organizational unit of the religious organization" for which the alien would work. The regulation at 8 C.F.R. § 214.2(r)(6) stated:

> *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 ... Any unauthorized change to a new religious organizational unit will constitute a failure to maintain status..."

Further, pursuant to 8 C.F.R. § 214.1(e), a nonimmigrant may engage only in such employment as has been authorized. Any unlawful employment by a nonimmigrant constitutes a failure to maintain status.

In the decision, the director noted that, although the [redacted] shares a location with the petitioner, it is a separate entity with a different Employer Identification Number. The director therefore determined that the beneficiary's employment with the [redacted] beginning in 2006 was unauthorized and constituted a failure to maintain status.

On appeal, counsel argues that the requirement of employment authorization should not be applied to this case because the petition was filed before the new religious worker regulations went into effect. Counsel notes that the regulation in effect at the time the petition was filed did not require the qualifying experience to be authorized.

If USCIS had not intended the lawful employment requirement to be retroactive, it would have phased in the requirement or specified that it applies only to employment that took place after November 26, 2008. Instead, supplementary information published with the new rule specified: "All cases pending on the rule's effective date and all new filings will be adjudicated under the standards of this rule." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). Thus, the regulations and standards provided within were to be applied immediately and retroactively, and include work performed before the effective date.

The wording of the relevant legislation demonstrates Congress' interest in USCIS regulations and the agency's commitment to combating immigration fraud. Section 2(b) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391 (Oct. 10, 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))

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." As we have previously noted, USCIS applied the new regulations to already-pending cases as well as new filings.

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 promulgate, 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). It is therefore presumed that Congress has no objection to the new regulations as published, or to USCIS' interpretation and application of those regulations.

Counsel alternately asserts that the [redacted] is closely affiliated with the petitioner and that the beneficiary's work at the [redacted] is one of his duties as the petitioner's imam as listed on his Form I-129 petition. Counsel argues:

> That the [redacted] paid the beneficiary directly was an error, but given the circumstances (the close relationship between the two organizations, the religious

[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.

> mission of both organizations, and the petitioner's disclosure on its R-1 petition) an understandable, forgivable error...

In this instance, the beneficiary's R-1 status only authorized his employment with the named employer, The [redacted] Regardless of the petitioner's close affiliation with the [redacted] the beneficiary was not permitted to engage in employment with that organization without first obtaining authorization through a separate Form I-129 petition. Therefore, the AAO agrees with the director's determination that the beneficiary failed to maintain his lawful status by engaging in such employment.

Lastly, counsel asserts that the purpose of the new religious worker regulations is to "deter and detect fraud." He argues that, because there is no fraud in this case, "to deny this I-360 on the basis of 8 C.F.R. 204.5(m)(11) would be to promote form over substance, and would in no way advance the purpose of the anti-fraud regulations."

This argument is not convincing. The regulation at 8 C.F.R. § 204.5(m)(4) requires that the beneficiary must have been in lawful immigration status during the qualifying period and the regulation at 8 C.F.R. § 204.5(m)(11) requires that the beneficiary's employment in the United States during that time must have been authorized under immigration law. The regulations make no provision for any exception to these requirements and the AAO does not have authority under the Act or the regulations to make such an exception.

Because the petitioner has not established that the beneficiary has the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition, the AAO will affirm the director's decision to deny the petition.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.