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FILE:

WAC 04 178 50553

Office: CALIFORNIA SERVICE CENTER

Date: AUG 06 2009

IN RE:

Petitioner:

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

  
John F. Grissom

Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The Administrative Appeals Office (AAO) remanded the matter for consideration under new regulations. The director issued a new decision, denying the petition, which the petitioner appealed to the AAO. The appeal will be dismissed.

The petitioner seeks classification 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 rabbi. When he filed the petition, he indicated that he sought employment at [REDACTED] East Valley Jewish Community Center ([REDACTED] Palm Desert, California). That synagogue belongs to the United Synagogue for Conservative Judaism. The petitioner subsequently left California and [REDACTED], accepting employment with [REDACTED] in Cheswick, Pennsylvania. The director denied the petition because the petitioner failed to submit documentation of [REDACTED]'s federal tax-exempt status.

On appeal, the petitioner submits a brief from counsel. Counsel makes no attempt to dispute the grounds underlying the director's decision. Instead, counsel argues that the regulations now in effect should not apply to this proceeding.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

*Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 589.

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 October 1, 2008, 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 October 1, 2008, 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 petitioner filed the petition on June 3, 2004 on his own behalf, based on his employment with [REDACTED]. The director approved the petition on June 13, 2005. U.S. Citizenship and Immigration Services (USCIS) regulations then in effect at 8 C.F.R. § 204.5(m)(4) required the petitioner to establish the terms of a specific job offer.

USCIS subsequently learned, through contact with [REDACTED] officials, that the petitioner left Beth Shalom in 2004 and that [REDACTED] officials were unaware of the visa petition. After issuance of a notice of intent to revoke on May 12, 2008, the director revoked the approval of the petition on June 24, 2008, because the job offer at the heart of the petition no longer existed.

The petitioner appealed the revocation on July 11, 2008, asserting that the director failed to take into account the petitioner's subsequent employment with another synagogue ([REDACTED]). This appeal was still pending on November 26, 2008 when, as instructed by Congress, USCIS issued new regulations pertaining to the special immigrant religious worker classification. The AAO remanded the petition on December 15, 2008, so that the director could consider the petition under the new regulations.

On March 16, 2009, the director issued a notice to the petitioner, indicating that the director would deny the petition unless the petitioner submitted documentation to comply with new requirements in the revised regulations. One of the new requirements cited was the requirement at 8 C.F.R. § 204.5(m)(8) for the submission of a currently valid IRS determination letter for the alien's intending employer or a parent organization with a group exemption. The new regulation does not indicate that alternative evidence will be accepted instead of a currently valid IRS determination letter.

In response to the notice, the petitioner submitted various documents, which counsel described as follows:

- Synagogue's tax certificate from Commonwealth of Pennsylvania, showing tax-exempt status as a religious organization (attached)
- Synagogue's Bylaws (attached)
- **Synagogue newsletters (attached)**. Note, postage on the newsletters has been paid as a **Non-Profit Organization**.

The certificate from the Commonwealth of Pennsylvania establishes exemption from Pennsylvania taxes, rather than federal income taxes. The petitioner did not submit a valid IRS determination letter for [REDACTED]. Counsel did not explain this omission, or even directly address the new regulation that specifically requires the submission of an IRS determination letter.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

[REDACTED], Executive Director of Adat Shalom, stated "our congregation is not currently a member of the United Synagogue for Conservative Judaism (whose membership we allowed to lapse for financial, not theological, reasons)." The lapse in membership means that Adat Shalom would not be covered by any group exemption granted to the United Synagogue for Conservative Judaism.

In a new decision dated May 5, 2009, the director found that "the petitioner has not established that the organization seeking the self-petitioner's services is exempt from taxation in accordance with section 501(c) of the Internal Revenue Code of 1986." The director quoted the new regulations, requiring the submission of an IRS determination letter from the intending employer, either individually or under the umbrella of a group exemption.

On appeal, counsel correctly protests that the director referred to the decision as a denial rather than a revocation. Counsel states: "The remainder of this brief will presume that the May 5, 2009, **denial** notice was really a **revocation** notice and will proceed accordingly." We agree that, under the circumstances, the director's decision is more properly deemed a revocation than a denial. This correction of terminology, however, does not change the substance or outcome of the decision.

Counsel argues that “USCIS is attempting to . . . retroactively apply a new standard to a previously approved I-360 petition” because the petition was originally approved before the new regulation at 8 C.F.R. § 204.5(m)(8) took effect. In this proceeding, USCIS did not begin with an approved petition and then use new regulations as a pretext to revoke that approval. Rather, USCIS revoked the approval of the petition in June 2008, under the old regulations. Thus, USCIS had already found the petition to be deficient several months before the regulations changed; the change in the regulations did not cause the initial revocation.

Section 2(b)(1) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008) required USCIS to promulgate a rule setting forth new regulations for special immigrant religious worker petitions. 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).

Section 557(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 557(b), provides that an initial agency decision is not final if “there is an appeal to, or review on motion of, the agency within time provided by rule.” Because the petitioner’s appeal was pending on November 26, 2008, USCIS had not issued a final decision on the instant proceeding and the matter was subject to the new rule. The director did not apply the new regulations to an approved petition; the director applied the new regulations to a revoked petition with a pending appeal. If the petition had never been revoked prior to November 26, 2008, then the matter would not have been pending on that date, and the approval would have remained in effect.

Counsel alleges that to apply the new regulations to this petition would go against Congressional intent. Congress is presumed to be aware of existing administrative and judicial interpretations. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). *Lorillard* is of particular interest here because Congress had specifically instructed USCIS to issue new regulations. When Congress revisited the statute after the new regulations appeared, Congress did not alter or nullify the provision making the regulations apply retroactively to pending cases. Instead, Congress extended the statutory expiration date from March 6, 2009 to September 30, 2009 in section 1 of Pub. L. No. 111-9, 123 Stat. 989 (2009), thereby leaving the new regulations in effect without change.

Acknowledging the AAO’s December 15, 2008 remand order, counsel stated that the AAO “returned these proceedings to the status quo ante, namely, an approved I-360.” The purpose of the remand order, however, was not to restore the approval of the petition, but to facilitate a new adjudication of the revoked petition under the new regulations. The AAO made no finding as to the merits of the petitioner’s original appeal, nor did the AAO find that the director erred in revoking the approval of the petition. There is no evidence in the record that counsel, at that time, protested the remand order.

Because the petitioner's appeal was still pending on November 26, 2008, it is subject to the new regulations that Congress directed USCIS to issue. The petitioner has failed to submit documentation required under those new regulations. Under such circumstances, the petition cannot be approved.

Even if we had the authority to consider the petition under the old regulations, which we do not, counsel has not shown or even directly claimed that such consideration would result in reinstatement of the revoked approval. There remains the issue that formed the basis of the earlier revocation. The director already advised the petitioner of this issue in the notice of intent to revoke in May 2008, and neither the director nor the AAO have ruled that the matter is resolved. Therefore, in this decision we reiterate an existing issue, rather than raise a new issue.

Under both the old and the new regulations, a special immigrant religious worker petition requires a specific job offer; it cannot suffice for the alien to intend to work, somehow, as a religious worker. There is no statutory or regulatory provision to allow an alien to file a special immigrant religious worker petition based on employment with one employer, and then change employers while the petition is still pending. This, however, is what the petitioner did, leaving ██████████ in 2004 while the petition was pending. While counsel now protests the retroactive application of the regulations, the petitioner has sought retroactive consideration of his new position at Adat Shalom, and USCIS published no corresponding retroactivity provision in the *Federal Register*. The director originally revoked the approval of the petition because there no longer exists a valid job offer from ██████████ and this circumstance still applies now. The claimed job offer that formed the very foundation of the petition in 2004 no longer exists, and the petitioner's relocation to Pennsylvania does not lead us to believe that the petitioner has any intention of working for Beth Shalom in California.

Furthermore, 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). The petitioner, here, filed the petition before he began working for ██████████. His employment at ██████████ therefore, cannot establish eligibility as of the petition's filing date. The petition rests on a job offer that no longer exists, and which therefore cannot continue to form the foundation for this proceeding. Long before any change in the regulations, the director improperly approved the petition in 2005, based on conditions that no longer existed, and both the old and the new regulations required revocation of that improper approval.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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.

**ORDER:** The appeal is dismissed.