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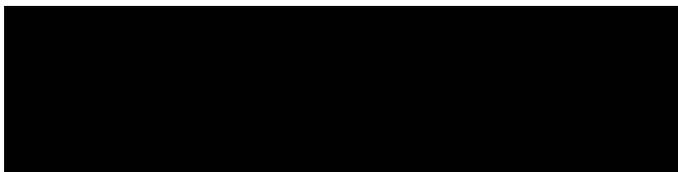
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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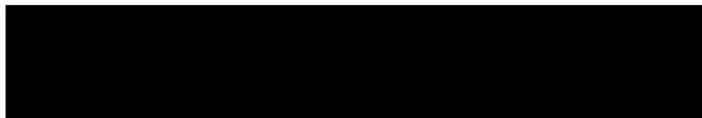
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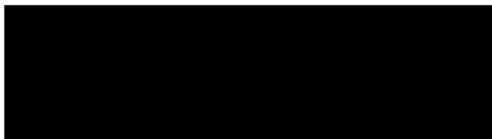
Date: JUN 16 2009

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.

John F. Grissom  
Acting 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 remanded the matter to the director for issuance of a new decision under substantially revised regulations. The director again denied the petition and, on the AAO's instruction, certified the decision to the AAO for review. The AAO will affirm the director's decision to deny the petition.

The petitioner is a Baptist church which 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 minister. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous and lawfully authorized work experience as a minister immediately preceding the filing date of the petition.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.4(a)(2) indicates that the petitioner may submit a brief within 30 days after the director serves notice of a certified decision. The permitted time period has elapsed, and the AAO has received no response to the certified denial. The AAO therefore considers the record to be complete as it now stands.

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, 2009, 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, 2009, 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).

When the petitioner filed the petition on July 17, 2007, older regulations governed the special immigrant religious worker program. Subsequently, however, Congress enacted the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008).<sup>1</sup> As required under section 2(b)(1) of that statute, U.S. Citizenship and Immigration Services (USCIS) promulgated 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 there was a pending appeal in this proceeding when the new statute became law, the matter is still pending and therefore subject to the new rule.

Because the regulations under which the petition was originally adjudicated are no longer in effect, it would serve no useful purpose to discuss the early stages of this proceeding. We shall concentrate, instead, on how the petitioner’s evidence relates to the regulations now in effect, and the director’s actions under those new regulations.

The 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 regulation at 8 C.F.R. § 204.5(m)(11) reads, in part: “Qualifying prior experience during the two years immediately preceding the petition . . . if acquired in the United States, must have been authorized under United States immigration law.”

In a letter accompanying the initial filing of the petition, [REDACTED] the petitioner’s Senior Pastor and President, stated that the petitioner “has traveled extensively throughout the United States for the past 8 years in relation to our church and the ministries throughout this country.” The petitioner must establish that the beneficiary was continuously performing qualifying religious work, under lawful immigration status permitting such work, throughout the two years immediately prior to the July 2007 filing date.

On the Form I-360 petition, under “Current Nonimmigrant Status,” the petitioner wrote “B1/B2 (VISITOR),” a nonimmigrant classification that does not authorize the alien to work for a United States employer. The petitioner also indicated that the beneficiary last entered the United States on

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<sup>1</sup> The use of the term “nonminister” in the name of the statute simply acknowledges that certain provisions of the statute that pertained to nonministers – but not to ministers – had expired and therefore required reauthorization in order to remain in effect. Therefore, the term “nonminister” does not mean that the new regulations apply only to nonministers. Many key provisions in the regulations, including the provisions relating to past experience, apply equally to both ministers and nonministers.

April 12, 2007, indicating that the beneficiary had left and returned to the United States during his eight years with the petitioning church. Elsewhere on the same form, asked whether the beneficiary had “ever worked in the U.S. without permission,” the petitioner answered “No.” By signing Form I-360, the petitioner certified under penalty of perjury that “this petition and the evidence submitted with it is true and correct.”

The director initially denied the petition on December 11, 2007, based on a number of factors pertaining both to the beneficiary and to the petitioning entity. The petitioner appealed that decision on January 14, 2008. On December 12, 2008, the AAO remanded the matter to the director for adjudication under the new regulations.

On February 4, 2009, the director issued a notice of intent to deny the petition. In the notice, the director quoted the new regulations, including the requirement that, if the alien worked in the United States during the two-year qualifying period, such work must have been authorized under United States immigration law. The petitioner replied to the notice on March 4, 2009.

The petitioner’s response included a February 27, 2009 letter from [REDACTED] who stated that the beneficiary “will be remunerated with a monthly salary of \$1000.00 as soon as he is eligible to work in the United States. In the meantime, the Church is providing him with financial support such as a place to live, transportation, food, cell phone and cover other expenses as well as other privileges to sustain him.”

The Board of Immigration Appeals ruled that an alien who “receives compensation in return for his efforts on behalf of the Church” is “employed” for immigration purposes, even if that compensation takes the form of material support rather than a cash wage. *See Matter of Hall*, 18 I&N Dec. 203, 205 (BIA 1982). By asserting that the beneficiary “has been serving the [petitioning church] since 1999” in exchange for “financial support” and other benefits, the petitioner essentially admitted that it had employed the beneficiary at a time when the beneficiary lacked employment authorization.

On April 8, 2009, the director denied the petition, stating: “Beneficiary has maintained a Visitor’s Visa (B2) from 2001 through 2007. There is nothing in the record to show that Beneficiary subsequently attained lawful immigration status authorizing gainful employment during the prescribed two-year period immediately preceding the filing of this I-360 petition.” Pursuant to 8 C.F.R. § 103.4(a)(2), the director permitted the petitioner 30 days to submit a brief in response to the notice of certification. Because the record contains no response from the petitioner, we conclude that the petitioner has not contested the director’s finding.

Because the beneficiary lacked lawful immigration status throughout the 2005-2007 qualifying period, he was unable to accumulate qualifying experience pursuant to 8 C.F.R. §§ 204.5(m)(4) and (11). The AAO affirms the director’s decision to deny the petition based on this lack of qualifying experience.

The issue discussed above is, by itself, entirely sufficient grounds for denial of the petition, and for affirmation of that denial. Beyond the above, review of the record reveals another issue of concern. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

8 C.F.R. § 204.5(m)(7) reads:

Attestation . An authorized official of the prospective employer of an alien seeking religious worker status must complete, sign and date an attestation prescribed by USCIS and submit it along with the petition. If the alien is a self-petitioner and is also an authorized official of the prospective employer, the self-petitioner may sign the attestation. The prospective employer must specifically attest to all of the following:

- (i) That the prospective employer is a bona fide non-profit religious organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation;
- (ii) The number of members of the prospective employer’s organization;
- (iii) The number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion;
- (iv) The number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years by the prospective employer’s organization;
- (v) The number of special immigrant religious worker and nonimmigrant religious worker petitions and applications filed by or on behalf of any aliens for employment by the prospective employer in the past five years;
- (vi) The title of the position offered to the alien, the complete package of salaried or non-salaried compensation being offered, and a detailed description of the alien’s proposed daily duties;
- (vii) That the alien will be employed at least 35 hours per week;
- (viii) The specific location(s) of the proposed employment;

(ix) That the alien has worked as a religious worker for the two years immediately preceding the filing of the application and is otherwise qualified for the position offered;

(x) That the alien has been a member of the denomination for at least two years immediately preceding the filing of the application;

(xi) That the alien will not be engaged in secular employment, and any salaried or non-salaried compensation for the work will be paid to the alien by the attesting employer; and

(xii) That the prospective employer has the ability and intention to compensate the alien at a level at which the alien and accompanying family members will not become public charges, and that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization.

The director listed the above requirements in the February 2009 notice of intent to deny the petition. The petitioner's response to that notice addressed some, but not all, of the required elements. The petitioner, for instance, provided no information about other employees or about other petitions it has filed. The attestation is, therefore, deficient in the above respects.

The AAO will affirm the denial of the petition for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 director's decision of April 8, 2009 is affirmed. The petition is denied.