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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
and Immigration
Services**

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FILE:

SRC 06 214 52952

Office: CALIFORNIA SERVICE CENTER

Date: **MAY 18 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 Protestant Christian church of the Church of God denomination. 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 senior pastor. 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. Under 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. The record contains no response to the notice of certification. The AAO will base its decision on the record 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 in 2006, 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).¹ 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.”

On Form I-360, filed July 7, 2006, the petitioner claimed that the beneficiary had been in the United States since April 12, 1992, more than fourteen years prior to the filing date, and thus was not outside the United States during the two-year qualifying period. Therefore, 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 July 7, 2006.

Also on Form I-360, under “Current Nonimmigrant Status,” the petitioner wrote “EWI,” meaning “entered without inspection.” For the expiration date of that status, the petitioner wrote “NA,” meaning “not applicable.” Entry without inspection confers no lawful status, and therefore there is

¹ 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.

no expiration date. Elsewhere on the same form, asked whether the beneficiary had “ever worked in the U.S. without permission,” the petitioner answered “Yes.”

The director initially denied the petition on August 29, 2008, based on questions regarding the beneficiary’s work experience and the petitioner’s status as a non-profit religious organization. The petitioner appealed that decision on October 1, 2008. On December 18, 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 director requested documentation relating to various issues, but emphasized (with bold type) the regulatory requirement that the beneficiary’s experience “must have been authorized under United States immigration law.” On March 4, 2009, the director received a response from the petitioner.

In a cover letter accompanying the petitioner’s response, counsel wrote that the director “asked for (1) an Attestation from an authorized representative of the church, (2) Evidence relating to the petitioning organization regarding its tax-exempt status, (3) Evidence relating to compensation, and (4) Evidence pertaining to the alien’s prior employment.” Counsel did not address the issue of the beneficiary’s immigration status. The exhibits accompanying the petitioner’s response indicated that the petitioner had employed the beneficiary, but did not show that the beneficiary was authorized to work in the United States during the 2004-2006 qualifying period.

On March 11, 2009, the director denied the petition, stating:

USCIS records state that Beneficiary . . . entered the United States without admission (EWI). 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.

Hence, the evidence is insufficient to establish that the beneficiary has been performing **full-time work** (authorized under United States immigration laws) for at least the **two-year period immediately preceding** the filing of the petition **in lawful immigration status**.

(Emphasis in original.) As noted elsewhere in this decision, the record contains no response to the notice of certification. It appears, therefore, that the petitioner has not contested the director’s finding that the beneficiary lacked employment authorization during the two-year qualifying period. This lack of employment authorization, admitted under penalty of perjury on the Form I-360 petition, disqualifies the beneficiary from receiving the benefit sought.

For the above reasons, we affirm the director's finding that the beneficiary was not in lawful status during the 2004-2006 qualifying period. Because the petitioner lacked lawful immigration status throughout the 2004-2006 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 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 sustained that burden. Accordingly, the AAO will affirm the denial of the petition.

ORDER: The director's decision of March 11, 2009 is affirmed. The petition is denied.