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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



**U.S. Citizenship
and Immigration
Services**

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FILE: [Redacted]
WAC 08 019 51780

Office: CALIFORNIA SERVICE CENTER

Date: JAN 06 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
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 subsequently remanded the petition to the director for a new decision based on revised regulations. The director determined that the petitioner had failed to submit required evidence, and therefore the director again denied the petition and certified the decision to the AAO. The AAO will affirm the director's decision.

The petitioner is a Protestant Christian church belonging to Christian Evangelistic Assemblies (CEA). 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 youth pastor. The director determined that the petitioner had not established that had the requisite two years of qualifying continuous work experience immediately preceding the filing date of the petition.

In response to the certified denial, the petitioner submits witness letters, a brief from counsel, and information about the beneficiary's prior secular employment.

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 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 petition was filed on October 26, 2007. Therefore, the petitioner must establish that the beneficiary was continuously and lawfully performing qualifying religious work throughout the two years immediately prior to that date.

The USCIS regulation at 8 C.F.R. § 204.5(m)(11) reads:

(11) *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.

On the Form I-360 petition, instructed to list the beneficiary's "Current Nonimmigrant Status" and its expiration date, the petitioner indicated that the beneficiary's B-2 nonimmigrant visitor status expired in June 1999.

[REDACTED] of the petitioning church, stated that the beneficiary "has been serving the spiritual needs of our growing congregation since March 2006 until the present time." [REDACTED] added that the beneficiary "has four years of religious experience with Crosswinds Community Church in Palmdale, CA having served in various capacities." We note that, although the

petitioning church is in California,
Houston, Texas.

letter is on CEA letterhead, showing an address in

██████████ of Northview Community Church, Cedar Park, Texas, stated that the beneficiary “was an intern at Crosswind Community Church from March 2002 to March 2004. He continued to work for the church thereafter as the Ministerial Assistant. [In] Oct. 2005 ██████████ followed me as Senior Pastor. [The beneficiary] continued to work as a[n] MA for ██████████ until March 2006.”

In a September 20, 2005 letter, ██████████ verified the beneficiary’s “employment as a Ministerial Assistant at Crosswind Community Church.”

The petitioner submitted copies of payroll records and Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements showing that CEA paid the beneficiary \$12,340.00 in 2004, \$13,260.00 in 2005 and \$18,979 in 2006. The petitioner did not submit a Form W-2 for 2005. The 2006 total is split onto two Forms W-2, reflecting the beneficiary’s change of employment from the church in Palmdale to the petitioning church in Fairfield.

The director denied the petition on April 2, 2008, under regulations then in effect, observing that the petitioner had not submitted any documentation of the beneficiary’s employment during 2007. The petitioner filed a timely appeal. While the appeal was pending, USCIS published new regulations relating to the special immigrant religious worker program. 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).

The AAO remanded the petition to the director on December 12, 2008, with instructions to allow the petitioner an opportunity to submit newly-required evidence. In a notice mailed March 23, 2009, the director advised the petitioner of the revised regulations and stated that failure to submit the required evidence would result in the denial of the petition.

The petitioner’s response to the notice included a letter from ██████████ of the petitioning church, who stated: “During 2007, [the beneficiary] had worked full-time for [the petitioning church], and he **received continual support** from the church in the way of housing, as well as the church meeting his day-to-day needs” (emphasis in original). In an earlier letter, ██████████ had indicated that the church paid the beneficiary “a cash allowance which averaged between \$400-\$600 per week. He also received room and board. For that reason, there are no payroll records or forms W-2 reflecting this compensation.”

The petitioner submitted a copy of the beneficiary’s 2006 and 2007 IRS Form 1040 income tax returns and associated documents, which repeatedly and consistently showed the beneficiary’s occupation as “graphic artist.” On the 2006 tax return, the beneficiary claimed that he and his spouse earned a total

of \$35,700 in wages, all from the petitioning entity. The tax return was prepared by [REDACTED]

The 2007 tax return documents include an IRS Form W-2 Wage and Tax Statement in worksheet form, apparently completed by the beneficiary himself, indicating that CEA had paid the beneficiary \$4,700 in 2007, and had paid his spouse (identified as a "cook") \$2,899 that same year. The beneficiary reported a total of \$9,519 in wages and \$19,415 in business income for the year, indicating that the majority of the couple's income (\$21,335 out of \$28,934) came from sources other than CEA. The beneficiary signed the return next to the typed words "Graphic Artist." The section marked "Paid Preparer's Use Only" identifies no preparer. The only annotation in that section is the phrase "Self-Prepared."

The director denied the petition on May 7, 2009, and certified the decision to the AAO. The director stated that, under the new regulations, unauthorized employment in the United States does not count towards the required qualifying experience. The director also found that the petitioner had failed to provide sufficient information about the beneficiary's work at the church. Furthermore, the director noted the beneficiary's reported employment as a graphic artist.

In response to the certified decision, counsel argues that the petitioner has provided a sufficient description of the beneficiary's duties. We do not disagree with this claim, but serious issues remain that prevent approval of the petition.

The petitioner submits an affidavit from the beneficiary, who states:

I entered the United States [in] December 1998. After my entry [into] the United States, I was employed as a graphic artist from January 1999 to April 3, 2001.

From June 2000 to April 2001, I was employed as a Graphic artist by [REDACTED] [REDACTED] filed a labor certification application on my behalf which qualified me for adjustment of status under Section 245(i) of the Immigration and Nationality Act. I terminated my employment with [REDACTED] and moved to Signed Contract Inc. but the company filed a petition for bankruptcy and terminated my employment. . . .

My tax returns for 2006 erroneously indicate that I was employed as a Graphic Artist.

My main concern at the time my tax return for 2006 was prepared was to determine the amount due to the IRS. . . . For that reason, I neglected to inform the tax preparer of my change of employment.

The petitioner submits a copy of a May 7, 2001 letter from the California Employment Development Department, acknowledging that "[REDACTED] filed an "Alien Labor Certification application" on April 13, 2001. The record contains no evidence that the application was ever approved, or that Fast Signs

ever filed any petition on the beneficiary's behalf. The beneficiary claims to have left [REDACTED] almost immediately after that company filed the labor certification application on his behalf.

The beneficiary blamed his tax preparer for the "Graphic Artist" annotation on his 2006 tax return. He made no mention, however, of his 2007 tax return. As we have noted, the 2007 return is marked "Self-prepared," and reflects significant income over and above what the beneficiary claimed as income from the petitioning organization. The beneficiary's failure to address these facts greatly reduces his credibility on this point.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 582, 591-92.

Counsel states that the new regulations prohibiting consideration of unauthorized employment should not apply to the beneficiary, because: "In the case of *I.N.S. v. St Cyr* 533 U.S. 289 (2001), the U.S. Supreme Court determined that . . . it is presumed that Congress does not intend to give retroactive effect to statutes." Counsel argues, unpersuasively, that the new regulations retroactively "change the definition of a religious worker in INA § 101(a)(27)(C)." The regulations do not so much "change the definition of a religious worker" as establish the parameters of eligibility for an immigration benefit.

The wording of the relevant legislation demonstrates Congress' interest in USCIS regulations. 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))

When USCIS published the new rule in November 2008, it did so in accordance with explicit instructions from Congress. 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). Furthermore, 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 requested, 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). We may therefore presume that Congress has no objection to the new regulations as published, or to USCIS' interpretation and application of those regulations.

Counsel states:

Before [the beneficiary] obtained the qualifying experience, an application for labor certification was filed on behalf of the beneficiary rendering him eligible for adjustment of status under INA § 245(i). The labor certification application was filed on April 13, 2001. INA § 245(i) provides that a person who lawfully entered the United States but is unlawfully employed, may still qualify for adjustment of status [under certain conditions]. . . . Because of the change in the regulations, the beneficiary was deprived of the opportunity to show that he is eligible for relief under INA § 245(i).

Section 245(i) of the Act permits certain aliens to adjust status in the United States, despite otherwise disqualifying unlawful presence. Here, the petitioner has shown that a prospective employer submitted a labor certification application to authorities in California. The question of whether this filing qualifies the beneficiary for section 245(i) relief lies outside the scope of this proceeding. Even if we were to find that the beneficiary qualifies for such relief, that finding would not change the outcome of the present proceeding.

Section 245(i) relief applies at the adjustment stage, not the petition stage. The present proceeding is not an adjustment proceeding. Section 245(i)(2)(A) of the Act requires that an alien seeking section 245(i) relief must be "eligible to receive an immigrant visa"; that is, the alien must be the beneficiary of an approved immigrant visa petition. The law most certainly does not require USCIS to approve every petition filed on behalf of aliens who seek section 245(i) relief. Rather, such relief presupposes an already-approved petition. Without an approved petition, the beneficiary has no basis for adjustment of status, and therefore section 245(i) relief never comes into play.

The new regulations at 8 C.F.R. § 204.5(m) say nothing about what benefits are or are not available to the beneficiary at the adjustment stage, and the director, in this proceeding, did not bar the beneficiary from ever receiving benefits under section 245(i) of the Act. Rather, the director found

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.

that the beneficiary's lack of lawful status during the two-year qualifying period prevents the approval of the present petition. The beneficiary's hypothetical eligibility for section 245(i) relief at the adjustment stage does not require us to approve the petition before the beneficiary has even reached that stage.

The petitioner does not dispute the director's finding that the beneficiary engaged in unauthorized employment during the two-year qualifying period. Rather, the petitioner, through counsel, has argued that this unauthorized employment should not disqualify the beneficiary. For the reasons explained above, we reject this argument. Under 8 C.F.R. §§ 204.5(m)(4) and (11), the petition cannot be approved, because the beneficiary's religious employment in the United States during the qualifying period was not authorized under United States immigration law.

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 May 7, 2009 is affirmed. The petition is denied.