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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: WAC 09 060 50674 Office: CALIFORNIA SERVICE CENTER Date: **MAR 18 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:
[Redacted]

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 employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a religious order of nuns. 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 instructor. The director determined that, because the beneficiary was not in a lawful immigration status during the qualifying period, the petitioner had not established she had been working continuously in a qualifying religious occupation or vocation for the two years immediately preceding the filing of the visa petition.

On appeal, counsel states that the petitioner had received ineffective assistance of counsel with the filing of a previous Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, on behalf of the beneficiary and that as a result, the beneficiary was in an unauthorized immigration status at the time the present petition was filed. Counsel asserts that but for the ineffective assistance of prior counsel, the previous petition would have been approved.

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 issue presented on appeal is whether the petitioner has established that the beneficiary worked continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m) provides that to be eligible for classification as a special immigrant religious worker, the alien must:

(4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. A break in the continuity of the work during the preceding two years will not affect eligibility so long as:

(i) The alien was still employed as a religious worker;

(ii) The break did not exceed two years; and

(iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.

Therefore, the petitioner must show that the beneficiary had been working 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 December 29, 2008. Accordingly, the petitioner must establish that the beneficiary had been continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

On the Form I-360 petition, the petitioner stated that the beneficiary was present in the United States pursuant to an R-1 nonimmigrant religious worker visa that expired on August 15, 2006. The petitioner provided a copy of the beneficiary's Form I-94, Departure Record, which reflects that she entered the United States on December 19, 2004 in an R-1 status that was valid until August 15, 2006. The director found that the beneficiary had not left the United States after her period of authorized employment and as she was not in a lawful immigration status during the period that she worked for the petitioning organization, any work performed by the beneficiary in the United States interrupted the continuity of her work experience for the purpose of this visa petition.

On appeal, counsel states that the petitioner provided prior counsel with all of the information and fees to file an I-360 petition on behalf of the beneficiary in May 2006 and that counsel failed to file the petition until August 10, 2006, five days before the expiration of the beneficiary's R-1 status. Counsel also asserts that prior counsel also failed to timely respond to the director's request for additional evidence, resulting in a denial for abandonment of the petition. Counsel asserts that

although the director approved a subsequent motion to reopen, prior counsel failed to remit the required fee and again the petition was denied. Counsel stated that prior counsel was subsequently suspended from practicing before the Executive Office of Immigration Review (EOIR) on July 3, 2008 and subsequently disbarred on October 16, 2008. Prior counsel has also been disbarred by the State of Massachusetts. Counsel argues that because of prior counsel's negligence in the petitioner's prior filing, the instant petition should be approved as USCIS would have approved the prior petition.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

Counsel provides a copy of the July 3, 2008 order from the EOIR suspending prior counsel from practicing before the Department of Homeland Security and a copy of a notice from the Massachusetts Board of Bar Overseers of the Supreme Judicial Court indicating that prior counsel had been disbarred on October 16, 2008. The petitioner provided no affidavit regarding her agreement with prior counsel and no documentation of the basis for the actions taken by either organization or whether or not the suspension and disbarment were related to prior counsel's breach of fiduciary duties to his clients, especially the petitioner in the present case. Additionally, the petitioner provided no evidence that prior counsel has been made aware of the petitioner's claim against him and given an opportunity to respond. Accordingly, the petitioner has failed to meet the substantive requirements of *Lozada*.

Counsel asserts that the petition would have been approved had it not been for prior counsel's negligence; however, nothing in the record supports counsel's assertion. The record does not contain a copy of the previous petition or the evidence provided by the petitioner in support of that petition. We note that as the director issued a request for additional evidence in the prior case, the record suggests that the first petition was deficient. It is not clear that the petition would have been approved had counsel and the petitioner timely responded to that request. Furthermore, the petitioner provided no documentation to establish that it attempted to renew the beneficiary's R-1 status or that it submitted a change of status so that the beneficiary could have remained in the United States in a legal status.

The record reveals that the beneficiary was in an unlawful immigration status throughout the qualifying period. Therefore, the petitioner has failed to establish that she worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the petition.

Beyond the decision of the director, the petitioner has failed to establish that it is a bona fide nonprofit religious organization.

The regulation at 8 C.F.R. § 204.5(m)(5) provides, in pertinent part:

Tax-exempt organization means an organization that has received a determination letter from the IRS [Internal Revenue Service] establishing that it, or a group that it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the IRC [Internal Revenue Code] of 1986 or subsequent amendments or equivalent sections of prior enactments of the IRC.

Additionally, the regulation at 8 C.F.R. § 204.5(m)(8) provides:

Evidence relating to the petitioning organization. A petition shall include the following initial evidence relating to the petitioning organization:

(i) A currently valid determination letter from the [IRS] establishing that the organization is a tax-exempt organization; or

(ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or

(iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3) of the [IRC] of 1986, or subsequent amendment or equivalent sections of prior enactments of the [IRC], as something other than a religious organization:

(A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;

(B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;

(C) Organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization; and

(D) A religious denomination certification. The religious organization must complete, sign and date a religious denomination certification certifying that the petitioning organization is affiliated with the religious denomination. The certification is to be submitted by the petitioner along with the petition.

The petitioner submitted a copy of a May 5, 2008 letter from the IRS granting it tax exempt status under section 501(c)(3) as a public charity under section 170(b)(1)(A)(vi) of the IRC. According to documentation from the IRS, the petitioner's tax-exempt status derives from classification not under section 170(b)(1)(A)(i) of the IRC, which pertains to churches, but rather under section 170(b)(1)(A)(vi) of the IRC, which pertains to publicly-supported organizations as described in section 170(c)(2) of the IRC, "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes," or for other specified purposes. This section refers in part to religious organization, but to many types of secular organizations as well.

An organization that qualifies for tax exemption as a publicly supported organization under section 170(b)(1)(A)(vi) of the IRC can be either religious or non-religious. The burden of proof is on the petitioner to establish that its classification under section 170(b)(1)(A)(vi) derives primarily from its religious character, rather than from its status as a publicly supported charitable and/or educational institution.

Because the IRS determination letter that classifies an entity under section 170(b)(1)(A)(vi) of the IRC cannot, by itself, establish that the entity is a religious organization, the petitioner must submit additional documentation as required by 8 C.F.R. § 204.5(m)(8)(iii).

The petitioner submitted a copy of a November 3, 2008 letter from the Massachusetts Department of Revenue, advising that the petitioner is exempt from Massachusetts sales/use tax as a tax exempt organization under section 501(c)(3) and a February 20, 2003 letter from the Secretary of the Commonwealth of Massachusetts certifying that the petitioner is a domestic organization in good standing and organized under Chapter 180 of the Massachusetts General Laws. The petitioner did not submit a copy of its articles of incorporation or bylaws, any organizational literature or a religious denomination certificate.

Accordingly, the petitioner has failed to establish that it is a bona fide nonprofit religious organization as required by the regulation.

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).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.