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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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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **OCT 07 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal from that decision. The matter is now before the AAO on a motion to reconsider. The AAO will dismiss the motion.

The petitioner is described as "a place of worship as well as a forum for the free interchange of ideas and viewpoints . . . to foster a better understanding and tolerance amongst the world's religions," as well as "an Islamic education organization, following the Sunni tradition." 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 imam/religious director. The director determined that the petitioner had not established: (1) that the beneficiary had the requisite two years of continuous, qualifying work experience immediately preceding the filing date of the petition; (2) that the beneficiary qualifies for the position offered; (3) the petitioner's ability to compensate the beneficiary; or (4) the petitioner's status as a qualifying religious organization. In its appellate decision, the AAO withdrew the director's findings with regard to points (2), (3) and (4) but agreed with the director on point (1).

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. 8 C.F.R. § 103.5(a)(1)(i). If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The AAO issued its decision on Friday, April 9, 2010. The director received the petitioner's motion on Monday, May 17, 2010, 38 days after the date of the AAO's decision. The motion was not timely filed, and therefore the AAO must dismiss the motion.

Even if the motion were timely, the AAO would have affirmed the prior decision on the merits. On motion, counsel states: "Petitioner moves for reconsideration on grounds of newly discovered facts." We note that a motion to reconsider is not a forum for introducing new facts or evidence. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). "Newly discovered facts" cannot establish that the decision was incorrect based on the evidence of record at the time of the initial decision, because those facts were not part of the record at the time of the initial decision.

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 USCIS regulation at 8 C.F.R. § 204.5(m)(11) requires that 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. The petitioner filed the Form I-360 petition on March 24, 2009, and therefore the two-year qualifying period immediately preceded that date.

Previously, the AAO acknowledged the petitioner's submission of documentation showing that the beneficiary held employment authorization from September 19, 2006 to August 6, 2008, and from October 14, 2008 to July 16, 2010. In its dismissal notice, the AAO stated: "The petitioner has submitted no documentation to show that the beneficiary was authorized to work for the petitioner between August 7 and October 13, 2008."

On motion, counsel acknowledges the gap in the beneficiary's employment authorization, but asserts that, because the gap occupied less than 10% of the qualifying period, "the period of time . . . is very short and should be subject to the de minimis rule." We disagree that USCIS can or should disregard a lapse of more than two months during a two year period. Similarly, counsel asserts that only a few days elapsed between August 6, 2008, when the beneficiary's employment authorization expired, and August 12, 2008, when USCIS received the beneficiary's second application for such authorization, but this confirms rather than refutes a finding that the beneficiary's employment authorization expired before its renewal.

Counsel states:

Petitioner contends the Beneficiary timely executed and returned the Application for Employment Authorization (the Application) on May 28, 2008, and if said Application was timely submitted by previous counsel there would have been no unauthorized employment by the Beneficiary. Petitioner argues that the failure of prior counsel to timely submit the Application was due to inadvertence, mistake, excusable neglect or surprise, all within the context that should not be to the prejudice of the Beneficiary. The Beneficiary executed the Application in good faith and in a timely manner and reasonably believed that prior counsel would have submitted the documents in time to avoid a lapse in work authorization.

To establish the ineffective assistance of prior counsel, an applicant must submit: (1) an affidavit setting forth in detail the agreement that was entered into with the purportedly ineffective counsel with respect to the actions to be taken and what representations prior counsel did or did not make to the applicant in this regard, (2) evidence that the attorney whose integrity or competence is being impugned be informed of the allegations leveled against him or her and be given an opportunity to respond, and (3) evidence regarding 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), *reaff'd*, *Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009). Here, the petitioner has not met any of these requirements. Counsel has simply alleged error on the part of the beneficiary's prior attorney.

The material issue is whether the beneficiary held employment authorization, not whether he desired or intended to do so. For whatever reason, the beneficiary's employment authorization expired in August 2008, and (because he did not receive a new employment authorization document) the beneficiary would have had reason to know of this expiration. Nevertheless, tax documents in the record show that the beneficiary received a full year's pay in 2008. The record, therefore, indicates that the beneficiary's employment continued through the period when he lacked authorization to work. Such work is inherently disqualifying under 8 C.F.R. §§ 204.5(m)(4) and (11).

Counsel's arguments on motion do not persuade us to change our prior finding that the beneficiary did not continuously engage in lawfully authorized employment throughout the two-year period immediately preceding the petition's filing date. Therefore, even if the motion were timely, we would still affirm the prior dismissal of the appeal.

ORDER: The motion is dismissed as untimely.