

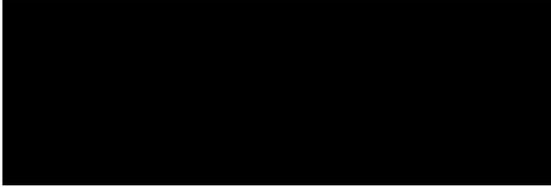
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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FILE:



Office: CALIFORNIA SERVICE CENTER Date: **SEP 09 2010**

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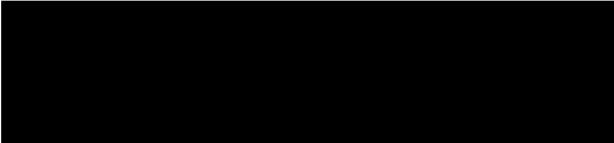
Petitioner:



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:

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, with a fee of \$585. 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 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 church. 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 its Hispanic ministry developer and associate pastor. The director determined that the petitioner had not established that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the visa petition.

Counsel states on appeal that the instant petition should not be subject to the U.S. Citizenship and Immigration Services (USCIS) regulations promulgated on November 26, 2008 after the petition was filed. Counsel also alleges that the November 2008 regulations violate the Religious Freedom Restoration Act (RFRA) of 1993. Counsel requested two extensions of time in which to file a brief and submit additional evidence, both of which were granted. Counsel's request of September 30, 2009 extended the filing date for the brief until December 25, 2009. However, as of this date, more than five months after the extension was granted, the AAO has received no further documentation. Therefore, the record will be considered complete as presently constituted.

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 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 worked 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 August 28, 2008. Accordingly, the petitioner must establish that the beneficiary was continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

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

*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.

In a March 23, 2009 letter submitted in response to the director's request for evidence (RFE) dated January 27, 2009, the petitioner stated that the beneficiary had worked as Hispanic ministry developer and recruiter with the petitioning organization since June 1, 2002. Additionally, in its April 30, 2008 letter submitted with the petition, the petitioner stated that the beneficiary became pastor of the Latin American Christian Reformed Church (CRC) in Anaheim, California in January 2008.

On the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, the petitioner stated that the beneficiary arrived in the United States on May 13, 1997 and that her lawful immigration status expired on October 12, 1997. The petitioner submitted a copy of the beneficiary's visa, reflecting that she was granted a B1/B2 nonimmigrant visitor's visa that was valid from December 11, 1997 to December 9, 1998. The petitioner also provided a copy of the beneficiary's Form I-94, Departure Record, which reflected that she entered the United States on May 13, 1997 for an approved stay until October 12, 1998.

The director denied the petition, determining that, as the beneficiary was not in an a lawful immigration status during the qualifying two-year period, the petitioner had failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for the two years immediately preceding the filing of the visa petition.

On appeal, counsel argues that the statute "does not require the work experience obtained in the United States must have been authorized under United States immigration law in order to qualify as full-time work experience." Counsel further asserts that the regulation that requires qualifying work experience in the United States "is overboard and contrary to the statute and should not be applied."

We do not find counsel's argument persuasive. 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, 122 Stat. 4193 (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.<sup>1</sup> 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 also asserts that the regulation also violates the petitioner's religious freedom under the RFRA by "creat[ing] a substantial burden" on the petitioner's exercise of its religion. Counsel does not explain how the requirement that qualifying experience in the United States be in a lawful immigration status interferes with the petitioner's ability to practice its religion. Additionally, arguments regarding the RFRA were addressed in the comments accompanying the final rule:

#### *F. Religious Freedom Restoration Act of 1993 (RFRA)*

Commenters asserted that the proposed regulation would violate the First Amendment, Const. of the United States, Amdt. I (1791), and the Religious Freedom Restoration Act of 1993, Public Law 103-141, sec. 3, 107 Stat. 1488 (Nov. 16, 1993) (RFRA), found at 42 U.S.C. 2000bb-1, by placing a substantial burden on a religion that is not in the furtherance of a compelling government interest, or at least not furthered by the least restrictive means. Some commenters stated that preventing fraud was commendable but that a compelling government interest has not been established. Several commenters said that filing petitions for

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<sup>1</sup> Pub. 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.

nonimmigrants or having to request an extension of status after only one year would place undue financial and paperwork burdens on religions. Additionally, the commenters stated that the proposed definitions of religious occupation and religious vocation prohibited their denominations from utilizing the program.

USCIS disagrees with the specific notion that the final rule violates the RFRA. The RFRA provides:

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except \* \* \* if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

Public Law 103-141, sec. 3, 42 U.S.C. 2000bb-1. The final rule is intended to permit religious organizations to petition for admission of religious workers under restrictions that have less than a substantial impact on the individual's or an organization's exercise of religion. A petitioner's rights under RFRA are not impaired unless the organization can establish that a specific provision of the rule imposes a significant burden on the organization's religious beliefs or exercise. Further, this rule is not the sole means by which an organization or individual may obtain admission to the United States for religious purposes, and DHS believes that the regulation, and other provisions of the INA and implementing regulations, can be administered within the confines of the RFRA. An organization or individual who believes that the RFRA may require specific relief from any provision of this regulation may assert such a claim at the time they petition for benefits under the regulation.

Nor does this final rule impose a "categorical bar" to any religious organization's petition for a visa or alien's application for admission. Instead, the rule sets forth the evidentiary standards by which USCIS will adjudicate nonimmigrant and immigrant petitions.

USCIS also does not believe that the new requirements will reduce the diversity or types of religious organizations that practice in the United States or the types of religious workers whom religious organizations could hire. Changes have been made so that the final definitions of "religious occupation," "religious vocation," "minister," and "denomination" will not prevent religious organizations from using the religious worker program as some commenters claimed. Additionally,

rather than the proposed one year initial period of admission and two extensions of two years each, the final rule permits up to 30 months for the initial period of admission and one extension of up to 30 months. Therefore, the final rule imposes a much smaller financial and paperwork burden on petitioners than the proposed rule.

Eradicating fraud where fraud has been determined to exist in one-third of nonimmigrant visa petitions, as discussed in the proposed rule, is a compelling government interest to ensure the integrity of the immigration process as well as for the protection of national security. See 72 FR at 20442. Therefore, the final rule retains the requirements that a religious organization file a petition for each religious worker and submit an IRS determination letter establishing the organization's tax-exempt status. Additionally, USCIS will maintain the discretion to conduct on-site inspections as USCIS believes they are the most effective and least restrictive means of combating fraud in the religious worker program.

USCIS will consider all of the factual evidence presented in support of a petition for a religious worker under the provisions of the rule. After reviewing the comments and the applicable law, however, USCIS does not believe that the evidentiary requirements of the rule constitute a violation of the RFRA.

The record does not establish that the beneficiary was in an authorized immigration status during the qualifying period. Any work in an unauthorized status interrupts the continuous work experience for purpose of this visa petition. The petitioner has failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the visa petition.

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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.