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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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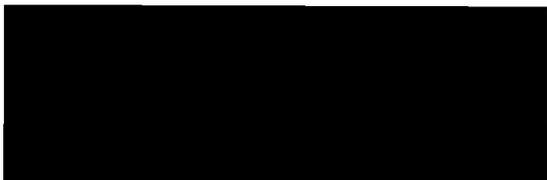
DATE: **DEC 29 2011** OFFICE: CALIFORNIA SERVICE CENTER 

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:

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 \$630. 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 matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a chapter of an organization of [REDACTED]. 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 imam. The director determined that the petitioner had not established that the beneficiary had the required two years of authorized and lawful work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel.

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 USCIS regulation

at 8 C.F.R. § 204.5(m)(11) requires that qualifying prior experience, if acquired in the United States, must have been authorized under United States immigration law.

The petitioner filed the Form I-360 petition on June 4, 2010. On that form, asked to specify the beneficiary's current nonimmigrant status and its date of expiration, the petitioner stated that the beneficiary was an "Overstay H-1" whose status expired on October 5, 2002, more than seven and a half years before the petition's filing date. Counsel signed Part 11 of the Form I-140, thereby acknowledging that counsel prepared the petition form.

In an accompanying letter, the beneficiary stated:

When I came to America, I was a tourist. I arrived on June 23, 1998 and I was admitted for six months. During that period I extended my stay until June 3, 1999. While I was here I was asked to serve as a Teacher in a [redacted] . . . I was a teacher in that school until I left in January 2003. I left the school both because there begun [*sic*] to be a problem with the Principal and also because I was offered the position [of] Imam at [the petitioning mosque]. . . .

When I was teaching at a [redacted], I had an R visa later changed to an H1b. A Labor Certification for me as a religious teacher was filed on February 9, 2001 and approved on June 13, 2001. Based on that Labor Certification a visa petition was submitted and approved. As stated above there begun [*sic*] serious problems with [the] Principal of the school since some of these problems involved violations or potential violations of Islamic Law and Practice.

. . . Although I filed [a Form I-485 application] for permanent residence in April 2004 the Decision was delayed and delayed. . . .

I still do not understand why my permanent residence was not granted and why I am in Deportation Proceedings. I was told that the visa petition was revoked but that action was appealed and [the] appeal is still going on.

USCIS records show that [redacted] filed a Form I-129 petition to classify the beneficiary as an R-1 nonimmigrant religious worker on June 22, 1999. The Director, Vermont Service Center (VSC) approved that petition on October 6, 1999, thereby classifying the beneficiary as an R-1 nonimmigrant through October 5, 2002.

Later, the school filed a Form I-140 petition on the beneficiary's behalf on October 1, 2001, with a priority date of February 9, 2001 (the date the Department of Labor accepted the application for labor certification for processing). The VSC director approved the petition on February 14, 2002, thereby classifying the beneficiary as a professional under section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii).

On April 16, 2002, the beneficiary filed a Form I-485 adjustment application based on the approved immigrant petition from the school. The adjustment application was still pending when, on March 6, 2009, the Director, Texas Service Center (TSC) revoked the approval of the petition, citing a “3rd Circuit Indictment” that “clearly states the Enterprise existed for the purposes of obtaining money and other property by defrauding governmental entities, financial institutions, businesses, and individuals through fraudulent schemes and misrepresentations.”

On May 7, 2009, the TSC director issued an amendment to the notice of revocation, citing a court finding that the school’s principal “was involved in fraud and racketeering. This meets the understanding of willful misrepresentation of a material fact in a labor certification filing, and is grounds for the invalidation of an approved labor certification under Title 20 CFR § 656.30(d)(1986).” The TSC director stated: “the Form I-140 is automatically revoked as of the date of approval,” and noted that “there is no appeal from this decision,” although the petitioner could file a motion to reopen or a motion to reconsider. On the same day, the TSC director denied the beneficiary’s Form I-485.

An attorney representing the school filed a motion to reopen and to reconsider on May 19, 2009. USCIS records indicate that the motion was “administratively closed” on December 15, 2009. The record before the AAO provides no further details regarding the administrative closure of the motion.

Returning to the proceeding at hand, the director issued a request for evidence on February 7, 2011, instructing the petitioner to submit, among other things, “evidence of the beneficiary’s current immigration status . . . [and] a copy of the beneficiary’s current Employment Authorization Document.” In response, counsel stated: “The Service has in its records documentation of the legal status of the beneficiary through until [*sic*] the present time since his prior visa petition is still under consideration on appeal as relevant to continuity of status. The I-485 is pending before the Immigration Judge.”

Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition. 8 C.F.R. § 103.2(b)(14). The petitioner must actually submit requested evidence. It cannot suffice for the petitioner or counsel to assert that that USCIS records contain the required information. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

One reason USCIS cannot rely on counsel’s unsupported assertions is that those assertions might be incorrect. Such is the case here. The revocation of the previous petition was never “on appeal.” The petitioner filed a motion to reopen and to reconsider, which was never under the AAO’s jurisdiction. *See* 8 C.F.R. § 103.5(a)(1)(ii), which places jurisdiction over a motion with the officer that made the most recent decision in the proceeding. The filing of a motion does not confer lawful status. *See* 8 C.F.R. § 103.5(a)(1)(iv), which states that the filing of a motion does not stay the execution of any decision in a case.

USCIS closed the motion in December 2009, before the petitioner filed the present petition. Also, the TSC director denied the Form I-485 adjustment application on May 7, 2009, simultaneously with the

amended revocation notice. Therefore, the Form I-485 was not “pending” in early 2011 as counsel claimed.

Regarding the beneficiary’s employment authorization, counsel stated: “It is my understanding that the employment authorization was extended when he requested adjustment of status.” A pending adjustment application does not automatically authorize the applicant to work in the United States. Rather, the regulation at 8 C.F.R. § 274a.12(c)(9) includes adjustment applicants within the category of “aliens who must apply for employment authorization.”

USCIS records show that, when the beneficiary filed his Form I-485 on April 16, 2002, he also filed a Form I-765 Application for Employment Authorization. USCIS approved that application and issued him a Form I-766 Employment Authorization Document valid for one year, from May 30, 2002 to May 29, 2003. Employment authorization does not automatically renew. Therefore, when the beneficiary’s employment authorization expired in May 2003, he had no authorization to work for the petitioner or for any other employer in the United States. There is no record that the beneficiary filed – or that USCIS approved – any further Form I-765 applications after the first one in 2002. There is, therefore, no evidence that the beneficiary had employment authorization during the 2008-2010 qualifying period. Likewise, there is no evidence that the beneficiary held any lawful nonimmigrant status after his R-1 nonimmigrant status expired in October 2002.

The director denied the petition on June 2, 2011, stating: “the petitioner did not submit evidence of the beneficiary’s current immigration status, nor did it explain why it was unable to comply with the request.” The director concluded that the available evidence “is insufficient to establish that the beneficiary has been in a valid immigration status beyond October 5, 2002 [or] authorized to work in the United States beyond May 29, 2003.”

On appeal, counsel protests that, of all the employment-based immigrant classifications, only the one for religious workers requires lawful status and employment authorization. Counsel claims that this requirement “has no basis in the statute” and may violate the free exercise clause of the First Amendment to the Constitution.

USCIS regulations are binding on USCIS employees in their administration of the Act. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C.,1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). An agency is not entitled to deference if it fails to follow its own regulations. *U.S. v. Heffner*, 420 F.2d 809, (C.A. Md. 1969) (government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down). The AAO, as a component of USCIS, is bound by USCIS regulations and has no authority to ignore or strike down those regulations.

In terms of congressional intent, the wording of the relevant legislation demonstrates Congress’s interest in USCIS regulations and the agency’s commitment to combating immigration fraud. 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))

Previously, in proposing the requirement that all prior qualifying employment have been authorized and “in conformity with all other laws of the United States” such as the Fair Labor Standards Act of 1938 and “tax laws,” USCIS explained that “[a]llowing periods of unauthorized, unreported employment to qualify an alien toward permanent immigration undermines the integrity of the United States immigration system.” 72 Fed. Reg. 20442, 20447-48 (April 25, 2007). Accordingly, the adoption of the final rule requiring that all prior qualifying employment have been lawful clearly comports with the explicit instructions from Congress to “eliminate or reduce fraud.”

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 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). Congress has extended the life of the program three times since March 2009.¹ On any of those occasions, Congress could have repudiated or modified the regulatory “lawful employment” requirement, but did not do so. Instead, Congress has repeatedly endorsed the current regulation – including the clauses disputed by counsel – by renewing the statute without substantive change, precisely the situation covered by *Lorillard*. The AAO may therefore presume that Congress has no objection to the new regulations as published, or to USCIS’s interpretation and application of those regulations.

Apart from disputing the validity of the regulations, counsel’s only argument on appeal is that the beneficiary was not responsible for the circumstances that led to the revocation of his previous employer’s Form I-140 petition. Counsel maintains that the beneficiary’s “prior experience was and remains valid as qualifying experience for a religious occupation,” even if “the [redacted] had [been] taken over as a vehicle for fraudulent petitions.”

¹ 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.

The beneficiary's authorized employment with the [REDACTED] took place between 1999 and 2003. By statute and regulation, a given period of past experience does not remain as a permanent anchor for a special immigrant religious worker petition. Rather, the relevant two years of experience must have immediately preceded the filing of the petition. *See* section 101(a)(27)(C)(iii) of the Act and 8 C.F.R. § 204.5(m)(4). The petitioner filed the Form I-360 petition in June 2010, and therefore the beneficiary must have worked in lawful immigration status, with employment authorization, continuously from June 2008 to June 2010. The petitioner has not met this requirement, or rebutted the director's finding that the beneficiary lacked lawful status after 2002 and employment authorization after 2003. As noted previously, when counsel prepared the petition form, counsel acknowledged that the beneficiary had no immigration status apart from an "overstay."

The applicable regulations do not permit the beneficiary's past work in the United States to meet the two-year experience requirement unless the beneficiary was in lawful status with employment authorization during that time. The available evidence indicates that the beneficiary lacked both lawful status and employment authorization in 2008-2010. Therefore, the AAO finds that the director acted properly in denying the petition, and indeed had no discretion to approve it.

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 met that burden. Accordingly, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed.