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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  
and Immigration  
Services

**PUBLIC COPY**

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[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: **JAN 25 2011**

IN RE:

Petitioner:

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, 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*

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 again denied the petition, and the petitioner again appealed the decision to the AAO. The AAO will dismiss the appeal.

The petitioner is a church belonging to the Eastern Pennsylvania Conference (EPC) of the United Methodist Church (UMC). 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 “Chinese Community Liaison – pastor to the Chinese Community.” The director determined that the petitioner had not established that the beneficiary had the required two years of qualifying, lawful work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel and exhibits in support of the argument that an “internal administrative error” by the UMC led to the denial of the petition; that the UMC had remedied the error; and that, therefore, the petitioner had overcome the grounds for denial.

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 . . . ; 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 petitioner filed the Form I-360 petition on July 20, 2007. At that time, the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(3)(ii)(A) required the intending employer to attest that, immediately prior to the filing of the petition, the alien had the required two years of experience in qualifying religious work.

In a letter dated June 28, 2007, [REDACTED] of the petitioning church stated that the beneficiary “comes to us well suited for the job from the [REDACTED] (NY) where she was the pastor from September 1, 2004 to April 30, 2007.” Rev. [REDACTED] added that the beneficiary “is an integral part of our ministry at [the petitioning church].” These statements

indicate that the beneficiary had already begun working at the petitioning church before the filing of the immigrant petition.

Previously, the New York Annual Conference (NYAC) of the UMC had filed a Form I-129 nonimmigrant petition on or about November 8, 2004. USCIS approved that petition, authorizing the beneficiary to work for the NYAC as an R-1 nonimmigrant religious worker until November 10, 2007. The beneficiary had no authorization to work for any other organizational unit of the UMC.

Prior to November 26, 2008, the USCIS regulation at 8 C.F.R. § 214.2(r)(6) read:

*Change of employers.* A different or additional organizational unit of the religious denomination seeking to employ or engage the services of a religious worker admitted under this section shall file Form I-129 with the appropriate fee. The petition shall be filed with the Service Center having jurisdiction over the place of employment. The petition must be accompanied by evidence establishing that the alien will continue to qualify as a religious worker under this section. Any unauthorized change to a new religious organizational unit will constitute a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

The above regulation was in effect when the NYAC filed its nonimmigrant petition in 2004, and when the present petitioner filed this immigrant petition in 2007. More generally, under 8 C.F.R. § 214.1(e) a nonimmigrant may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status. The new regulation at 8 C.F.R. § 214.2(r)(13) contains provisions comparable to the former regulation at 8 C.F.R. § 214.2(r)(6), stating that an R-1 nonimmigrant may not receive compensation for work for any religious organization other than the R-1 petitioner or the alien will be out of status.

On September 17, 2007, the director instructed the petitioner to submit evidence of the beneficiary's employment history during the two-year qualifying period. In response, the petitioner submitted a statement from the beneficiary, which reads, in part:

[My spouse and I] were employed by the New York Annual Conference of the [redacted] and the [redacted] of the [redacted] to start two Fuzhou language ministries. . . . [redacted] gave us salaries through NYAC. . . .

From July 20, 2005 to April 30, 2007, [I] worked as a pastor for the [redacted] New York. . . .

Beginning on May 1, 2007 to present, I have been working as the [redacted] Liaison and pastor for the Chinese community in Philadelphia, [redacted] and [redacted] counties of Pennsylvania. I am employed by the [petitioner]. The [redacted] the senior pastor, is my immediate supervisor.

The petitioner also submitted a three-page "Summary" of the [REDACTED] September 30, 2007," dated October 2, 2007 and signed by Rev. [REDACTED]. In that document, Rev. Czarnecki stated: "After some initial difficulty in getting the cash follow [sic] straightened out with the Conference office, we now receive a check on or about the first of the month for \$4,338.84 to cover [the beneficiary's] salary package. While that was being worked out [the petitioner] covered payroll expenses from our escrow account and then repaid ourselves the amount we had spent to cover payroll."

Photocopied pay receipts show payments to the beneficiary from the NYAC between May 2005 and March 2007. Copies of pay receipts from later in 2007 do not identify the employer, but they reflect withholding of Pennsylvania state income tax, consistent with employment with the petitioner in Philadelphia.

We note that the petitioner filed a Form I-129 nonimmigrant petition on the beneficiary's behalf (with receipt number WAC 08 021 50266) on October 29, 2007. Part 2, line 2 of the Form I-129 offered the following choices:

- a.  New employment (including new employer filing H-1B extension).
- b.  Continuation of previously approved employment without change with the same employer.
- c.  Change in previously approved employment.
- d.  New concurrent employment.
- e.  Change of employer.
- f.  Amended petition.

The petitioner checked "e," "Change of employer," thus acknowledging that the beneficiary held her then-current R-1 nonimmigrant status due to an earlier petition filed by a different employer (the NYAC).

The director denied the petition on December 3, 2007, stating that the petitioner had not provided sufficient evidence regarding the beneficiary's employment during the two-year qualifying period. The petitioner appealed that decision by filing Form I-290B, Notice of Appeal or Motion, on January 3, 2008.

The petitioner's appeal included a January 10, 2008 letter from Rev. [REDACTED] General [REDACTED]

[The beneficiary] is appointed as a full-time pastor in [REDACTED]

The [REDACTED] a mission agency of the [REDACTED] [REDACTED] has been providing a salary supplement grant for [the beneficiary and her spouse] since 2005. In 2005 and 2006, both [the beneficiary and her spouse] were

employed as full-time pastors in the New York area. In May 2007, [the beneficiary] changed her appointment to Philadelphia at the [petitioning church].

While the appeal was pending, USCIS published a rule setting forth new regulations for special immigrant religious worker petitions. 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." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). Accordingly, on December 16, 2008, the AAO remanded the petition to the director for a new decision based on the revised regulations.

On June 10, 2009, the director advised the petitioner of the revised regulations and instructed the petitioner to submit newly-required evidence. The director quoted the new regulation at 8 C.F.R. § 204.5(m)(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.

We note that the revised 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 director, in the notice, emphasized the phrase “must have been authorized under United States immigration law.” In response, the petitioner’s then-attorney, [REDACTED] stated that the beneficiary had worked under an approved nonimmigrant petition, “albeit with different branches of the church.”

The director denied the petition on March 15, 2010, stating that the beneficiary violated her R-1 nonimmigrant status by performing work in Philadelphia when her status only authorized her to work for [REDACTED]

On appeal from the latest decision, counsel argues that the beneficiary “was, in effect, in the employ of the [REDACTED] at all applicable times.” [REDACTED] successor as superintendent of the [REDACTED] claims that the beneficiary worked for [REDACTED] until November 2007, but “[d]ue to an administrative error, we have only recently compensated her for her employment for the period of time running from May 2007 through November 10, 2007.”

[REDACTED] general treasurer of the [REDACTED], states that [REDACTED] “provided a grant to the [REDACTED] to pay [the beneficiary’s] salary.” He states:

Unfortunately, probably because it was administratively easier and more direct to pay [the beneficiary’s] salary to [the petitioner] while [the beneficiary] was in Philadelphia, [REDACTED] did not pay her salary to [REDACTED] during that time. Instead, it paid her salary to [the petitioner]. . . .

In order to reverse these errors . . . [REDACTED] requested that [the petitioner] return [REDACTED] . . . the total sum of the grant funds [REDACTED] paid to [the petitioner] rather than to the [REDACTED]. [The petitioner] has returned the full amount of the grant funds to [REDACTED] has paid that same amount to the [REDACTED]. [REDACTED] has now repaid [the beneficiary] for the period running from May 1, 2007 through November 5, 2007.

The petitioner submitted documentation showing the transfer of funds as described above.

Counsel argues that we should accept this attempt to retroactively engineer a qualifying employment situation:

Nunc pro tunc relief should be recognized in this matter. Such equitable relief has a long and distinguished history in the field of immigration law, since 1940 (see matter of L-, 1 I. & N. Dec. 1 (A.G. 1940)). The use of the nunc pro tunc doctrine is used to return aliens to the position in which they would have been but for a significant error in their immigration proceedings. Please see Edward[s] v. Immigration and Naturalization

Service 393 F.3d 299 (2<sup>nd</sup> Circuit, 2004), which recognized that nunc pro tunc relief should be made available in immigration cases.

Since that denial was the result of an internal administrative error within the United Methodist Church, which has now been corrected, we request that you consider [the beneficiary] to have been correctly employed by her authorized petitioner, [REDACTED] at all applicable times, nunc pro tunc.

The case law cited above, however, does not support counsel's argument. We quote, here, from the cited *Edwards* decision:

The equitable remedy of nunc pro tunc (literally "now for then") relief has a long and distinguished history in the field of immigration law. . . . When a matter is adjudicated nunc pro tunc, it is as if it were done as of the time that it should have been done. See *Matter of A-*, 3 I. & N. Dec. 168, 172-73 (BIA 1948) (remedying a prior failure to waive grounds of exclusion by entering an order nunc pro tunc).

. . . While our circuit has not previously explicitly invoked the nunc pro tunc doctrine in ordering relief for BIA error, we have, in substance, awarded just such relief where equity required. See *Drax v. Reno*, 338 F.3d 98, 118-19 (2d Cir.2003); see also *Iavorski v. INS*, 232 F.3d 124, 130 n. 4 (2d Cir.2000) (noting that nunc pro tunc relief has long been available to remedy error in immigration cases).

It is thus beyond question that an award of nunc pro tunc may, in an appropriate circumstance, be granted as a means of rectifying error in immigration proceedings.

*Id.* at 308-09 (endnote omitted). Generally, *nunc pro tunc* relief is a remedy for administrative or judicial error *by the government* as a means to prevent inequity or injustice. It is not a means for a petitioner, or any related private entity, to correct its own errors or retroactively change disqualifying circumstances of its own making.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). This provision would, in many contexts, be meaningless if an applicant or petitioner could erase disqualifying circumstances simply by making changes after the fact, and then demanding that USCIS consider those changes to have already been in effect as of the filing date. USCIS and its predecessor, the Immigration and Naturalization Service, have consistently held that the applicant or petitioner must establish eligibility at the time of filing. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

Similarly, the Board of Immigration Appeals has found that creating new documentation after the fact, to create circumstances more favorable to the petitioner or the beneficiary, calls into question the credibility and evidentiary weight of the new documentation. See *Matter of Bueno*, 21 I&N Dec. 1029,

1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991); *Matter of Serna*, 16 I&N Dec. 643, 645 (BIA 1978) (discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). Counsel cites no case law to show that any court has discarded these regulations or binding precedent decisions on the grounds that they are inconsistent with *nunc pro tunc* relief.

We recall ██████████ claim that the ██████████ began paying the beneficiary through the petitioner rather than through ██████████ “probably because it was administratively easier and more direct.” The petitioner itself, however, has submitted material that appears to contradict that claim. The record of proceeding contains a three-page “Summary” of the “██████████/ May 1 – September 30, 2007,” dated October 2, 2007 and signed by Rev. ██████████. In that document, ██████████ reported “some initial difficulty in getting the cash follow [sic] straightened out,” during which time the petitioner paid the beneficiary “from our escrow account” until payments from the ██████████ could begin. This “difficulty” is not consistent with the 2010 claim that the new payment route was “administratively easier.” We note that at no time does the 2007 “Summary” refer to the beneficiary as an ██████████ employee who is somehow on loan to the petitioning church in Philadelphia. The 2007 “Summary” is wholly consistent with the petitioner’s reference to a “[c]hange of employer” on Form I-129.

For the reasons described above, we reject the argument on appeal that the beneficiary actually remained an ██████████ employee even after she relocated to Philadelphia and the petitioner began paying her and consistently referring to her as the petitioner’s own employee. However the petitioner now chooses to portray the situation, in April/May 2010 the beneficiary left one “organizational unit” of ██████████ – ██████████, under ██████████ jurisdiction – and began working for a different “organizational unit – the petitioning church, under the EPC’s jurisdiction. This is precisely the situation described in the USCIS regulation at 8 C.F.R. § 214.2(r)(6) (2007). However one may wish to contort the definition of “employ” (for instance, by arguing that the ultimate source of the beneficiary’s salary remained ██████████), the plain wording of the regulation requires the filing and approval of a new Form I-129 petition whenever “[a] different or additional organizational unit of the religious denomination seek[s] to employ *or engage the services* of a religious worker.” It is indisputable that two different organizational units of ██████████, with non-overlapping geographic jurisdictions, engaged the beneficiary’s services at a time when only the ██████████ had authorization to do so.

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.