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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

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 0 1 2011

IN RE: Petitioner: [redacted]
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:

[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
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 certified the decision to the AAO. The AAO affirmed the director's decision. The matter is now before the AAO on a motion to reconsider. The AAO will grant the motion and affirm its prior decision.

The petitioner is a mosque of the Shia Muslim denomination. 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 minister. The director determined that the petitioner had not established that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established that it had made a qualifying job offer to the beneficiary.

The AAO disagreed with the director's findings regarding the job offer, but upheld the director's finding with respect to the beneficiary's prior experience.

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 AAO's previous decision, dated January 4, 2011 and incorporated here by reference, includes a detailed history of this proceeding. For the purposes of the petitioner's motion, a capsule summary will suffice. The petitioner filed the Form I-360 petition on June 1, 2007. On that form, the petitioner acknowledged that the beneficiary had worked in the United States without authorization, because the beneficiary continued working for the petitioner after his R-1 nonimmigrant religious worker status expired on January 1, 2007, five months before the petition's filing date.

The director initially denied the petition on November 26, 2007, quoting the then-current U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(1), which required that the beneficiary "must have been performing [qualifying religious work] continously . . . for at least

the two year period immediately preceding the filing of the petition." While the petitioner's appeal was pending, USCIS published revised regulations for special immigrant religious worker petitions, with the instruction that these regulations apply to all petitions pending on the regulations' publication date. *See* 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

Under section 557(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 557(b), an initial agency decision is not final if "there is an appeal to, or review on motion of, the agency within time provided by rule." As of November 26, 2008, the appeal was still pending and therefore subject to the new rule.

The AAO remanded the petition to the director on December 16, 2008, with instructions to request any newly-required evidence and issue a new decision under the revised regulations. On April 22, 2010, the director requested the necessary evidence, and the petitioner responded to that request. The petitioner's response included another acknowledgement that the beneficiary "lacked work authorization" in 2007. The director denied the petition on November 10, 2010, for the same grounds as the 2007 decision.

In its decision of January 4, 2011, the AAO stated:

> The new 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 new regulation at 8 C.F.R. § 204.5(m)(11) requires that the beneficiary's qualifying prior experience, if acquired in the United States, must have been authorized under United States immigration law. . . .
>
> As we have noted above, the petitioner admitted on Form I-360 that the beneficiary worked without employment authorization during the final months of the qualifying period in the first half of 2007. The petitioner repeated this assertion on its 2010 employer attestation. The beneficiary's unauthorized employment in early 2007 is, on its face, a disqualifying factor that the petitioner cannot now dispute without contradicting its own repeated prior claims.
>
> The petitioner has acknowledged, on more than one occasion, that the beneficiary worked without authorization during the two-year qualifying period. Under the regulations now in effect at 8 C.F.R. §§ 204.5(m)(4) and (11), we must find that the beneficiary's admittedly unlawful employment cannot qualify him for the classification sought in the present petition. We therefore affirm the director's core finding that the petitioner has not shown the beneficiary to possess the necessary experience, as the regulations define that experience.
>
> . . . [T]he beneficiary's admittedly unlawful employment in early 2007 is an insurmountable obstacle to approval of the petition.

On motion, counsel argues that the lawful employment requirement "did not exist at the time [the petitioner] filed the petition more than a year before the rule took effect." Counsel asserts:

> The law is well established that a new regulation may not be applied retroactively if it would, as in this case, "alter the legal consequences of acts completed before its effective date." Camins v. Gonzales, 500 F.3d at 880 (citing Chang v. United States, 327 F.3d 911, 920 (9th Cir. 2004)); see also, Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994). Because [the] petition was approvable when filed on June 1, 2007 and because the November 2008 rule cannot be applied to [the] petition without resulting in an unfair and impermissibly retroactive effect, the decision denying [the] petition must be reconsidered and the petition should be approved.

A single paragraph from the *Camins* decision encompasses all three of the above citations:

> The application of a statute is retroactive "if it alters the legal consequences of acts completed before its effective date." Chang v. United States, 327 F.3d 911, 920 (9th Cir. 2003). Such "[r]etroactive application of statutes is disfavored in the absence of clear contrary Congressional intent." Id. This is true because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Landgraf v. USI Film Prods., 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

Camins v. Gonzales, 500 F.3d 872, 880 (9th Cir. 2007). The cited cases do not establish a blanket prohibition on retroactive application of changes to the law. Rather, they take Congressional intent into consideration. In this context, the legislative history is instructive, and we will examine this issue below. First, we note that counsel's resort to *Landgraf* – protesting that the revised regulations "impose[d] new duties" – is empty when we consider that the petitioner and the beneficiary did not "conform their conduct" even to the "duties" already in effect at the time. Their disregard for the then-existing regulations is clear from the petitioner's continued employment of the beneficiary after his nonimmigrant status had expired. This violation of the beneficiary's status nullifies any hypothetical argument that the petitioner and the beneficiary would have complied with the law in good faith, had they known that a change in the regulations was forthcoming.

The wording of the relevant legislation demonstrates Congress's interest in USCIS regulations. 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))

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." Neither the regulations nor the statute that called for the final rule included any "grandfather clause" for pending petitions.

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.[1] On any of those occasions, Congress could have made substantive changes in response to the regulations they ordered USCIS to publish (or to USCIS's interpretation of its own regulations), 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). This is even more true when, as here, Congress has so clearly stated its interest in the agency's regulations. We may therefore presume that Congress has no objection to the new regulations as published, or to USCIS's interpretation and application of those regulations.

Counsel states:

> In the Supplemental Questions and Answers published on the U.S. Citizenship and Information [*sic*] Service's website in conjunction with the new rule, the DHS emphasizes that the new rule is <u>not</u> retroactive. <u>See</u>, . . . USCIS Supplemental Questions and Answers: Final Religious Worker Rule Effective November 26, 2008 at Question 13 ("[a]s the final rule is not retroactive") and Question 14 ("the final rule is not retroactive").

Counsel appears to argue that the preamble to the final rule is not binding on USCIS, but the "Supplemental Questions and Answers" from USCIS's web site are binding. More to the point, we must examine the context in which USCIS stated "the final rule is not retroactive." Here are the complete questions 13 and 14 and their respective answers:

> Q13. If a religious worker was issued an R-1 visa under the old regulations without an approved petition, will he/she be readmitted with that visa or must a petition be filed?

[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.

> A13. As the final rule is not retroactive, individuals who had been issued a valid R-1 visa under the previous regulations may be admitted for the duration of the visa's validity, provided they are otherwise admissible, and will not be required to have an approved I-129 for readmission in R-1 status. Upon application for extension, however, the new requirements must be met. Please see Q&A #11 above regarding visa-exempt individuals who have been approved for R-1 status prior to November 26, 2008.
>
> Q14. May an individual with a valid I-797 approval notice granted prior to the enactment of the new regulations apply for a new R-1 visa?
> A14. As previously mentioned above, the final rule is not retroactive. Hence, an individual may apply for an R-1 visa based on an I-129 R petition approved under the previous regulations as long as the prior approval has not been revoked under the new regulations.

Source: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?, included as an exhibit on motion. Clearly, USCIS stated that "the final rule is not retroactive" with respect to R-1 nonimmigrant visas *approved and issued before November 26, 2008*. This does not in any way contradict or compromise USCIS's position that the final rule applied to all petitions pending on that date, because a visa that has already been issued is no longer "pending." In applying the revised regulations to all petitions then pending, USCIS did not disturb any already-approved petition. The change to the regulations did not rescind any previously awarded benefits.

We also note that question 3 and its accompanying answer both cite "the preamble to the final rule," in the context of clarifying remarks in that preamble. Clearly the *Supplemental Questions and Answers* supplement, rather than contradict or repudiate, the preamble from the *Federal Register*.

Counsel asserts that the lawful employment requirement is a new substantive rule, which "must be subjected to notice and comment procedures." The requirement was, indeed, subjected to those procedures. As we have already noted, USCIS published a proposed rule on April 25, 2007. That proposed rule included references to the lawful employment requirement at 8 C.F.R. §§ 204.5(m)(2), (3)(iii) and (9). *See* 72 Fed. Reg. 20442, 20452-4 (April 25, 2007). This proposed rule appeared more than a month before the petitioner filed the present petition. The historical record irrefutably proves that the lawful employment requirement did not appear out of a vacuum on November 26, 2008.

When USCIS revised its regulations on Congressional orders in 2008, it did not invent a new violation and retroactively apply it to aliens who had acted in good faith under previous requirements. Rather, USCIS altered and narrowed the circumstances under which aliens could qualify for particular immigration benefits. The mandated intent for the revisions was to combat fraud, and the lawful employment requirement has no effect on aliens who had complied in good faith with prior immigration laws and regulations.

It is significant that, notwithstanding counsel's claims on motion, the AAO never made a definitive finding that the "petition was approvable when filed." Rather, the AAO, in its prior decision,

acknowledged that the director had understandable concerns about the credibility of the petitioner's claims and evidence, and that the petitioner had resolved "*some* of the director's credibility concerns" (emphasis added). The AAO noted that the director had found gaps in the record of the beneficiary's compensation in 2005 and 2007, and did not find that the petitioner had overcome these issues. The AAO did not find that the beneficiary's unauthorized employment was the only barrier to approval of the petition. Rather, because the unauthorized employment was facially disqualifying on its own, the petitioner could not establish eligibility even if we ignored the evidentiary and credibility issues.

After arguing at length that the preamble to the regulation has no effect because it is not part of the regulation itself, counsel now declares that it would make no difference if it was part of the regulation because the regulation itself is impermissible. Specifically, counsel contends that the regulatory requirements of lawful employment at 8 C.F.R. §§ 204.5(m)(4) and (11) are "beyond the statutory authority" and "should not be given any legal effect."

This last argument clearly fails, because the AAO is subject to USCIS regulations and has no power to strike down or disregard those regulations.

> It is well settled that the regulations which the Service [now USCIS] promulgates have the force and effect of law and are binding on the Service. Bridges v. Wixon, 326 U.S. 135, 153 (1945); Bilokumsky v. Tod, 263 U.S. 149, 155 (1923); Matter of A-, 3 I&N Dec. 714 (BIA 1949); cf. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Matter of Santos, 19 I&N Dec. 105 (BIA 1984); Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980).

Matter of L-, 20 I&N Dec. 553, 556 (BIA 1992). *See also 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).

On motion, counsel does not contest the factual basis for the AAO's last decision. Instead, counsel relies entirely on the claim that USCIS should not have applied a regulation that, in turn, should not exist in the first place. As we have explained above, we find that Congress has had numerous opportunities to modify the law if Congress had any concerns about USCIS's regulations or its interpretation of those regulations, but has taken no action except to extend, without change, the existing statutory provisions.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The AAO will affirm its prior decision that the petitioner has not met that burden.

ORDER: The AAO's decision of January 4, 2011 is affirmed. The petition is denied.