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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]

MAR 09 2011

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:

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, 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 seeks classification 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 pastor for the [REDACTED] Francisco, California. The director determined that the petitioner had not established that the alien had the required two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel.

Part 1 of the Form I-360 petition identifies [REDACTED] as the petitioner. Review of the petition form, however, indicates that the alien beneficiary is the petitioner. An applicant or petitioner must sign his or her application or petition. 8 C.F.R. § 103.2(a)(2). In this instance, Part 10 of the Form I-360, "Signature," has been signed not by any official of [REDACTED] but by the alien beneficiary himself. Thus, the alien, and not [REDACTED], has taken responsibility for the content of the petition. The petition was properly filed, because the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(6) allows the alien beneficiary to file the Form I-360 petition on his or her own behalf. Also, the attorney who filed the appeal represents the alien beneficiary, and therefore the appeal has also been properly filed.

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 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 an alien's 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 September 18, 2009. On Form I-360, asked to specify his "Current Nonimmigrant Status," the petitioner stated "Renewal of R1 visa de[nied]." The petitioner indicated that his nonimmigrant status had expired on February 2, 2009. The petitioner denied that he had ever worked in the United States without authorization. The petitioner was in the United States throughout the entire two-year qualifying period.

USCIS records show that the beneficiary initially entered the United States as a B-2 nonimmigrant visitor on February 10, 2005. In August 2005, [REDACTED] in [REDACTED] Florida (represented by [REDACTED]) filed a Form I-129 nonimmigrant religious worker petition on the alien's behalf. USCIS approved that petition, and granted the beneficiary R-1 nonimmigrant status from August 23, 2005 to August 23, 2007. The record contains no documentation from [REDACTED]. The petitioner's R-1 status authorizing him to work there expired more than two years before the Form I-360 filing date, and therefore outside the qualifying period.

On August 22, 2007, [REDACTED] filed a Form I-129 petition, seeking to "[e]xtend or amend the stay" of the beneficiary based on a "[c]hange in previously approved employment." USCIS denied that petition on February 2, 2009, as the petitioner admitted on Form I-360.

In a declaration dated August 17, 2009, Nelson Primo, Jr., treasurer of [REDACTED], stated that the petitioner "commenced in office . . . on September 22, 2006." Copies of processed paychecks show that [REDACTED] compensated the petitioner, albeit sometimes in irregular amounts at irregular intervals. The earliest paycheck documented in the record is a check for \$1,100, dated December 12, 2006.

The director denied the petition on June 17, 2010, stating:

The beneficiary's status expired on August 23, 2007, and the beneficiary has not been in a valid nonimmigrant status since the date of that expiration. The petitioner has not submitted any documentation to illustrate that the beneficiary has been in a valid nonimmigrant status that would authorize the beneficiary to be lawfully employed during the two years in question. In addition, the petitioner has not submitted any

documentation to show the beneficiary was issued authorization to be employed in the United States by the issuance of an Employment Authorization Document (EAD) during the two years in question.

On appeal, counsel acknowledges the denial of [REDACTED] Form I-129 petition on the alien's behalf, but argues that "because the denial of the application form I-129 was appealed within the permitted time for such filings, USCIS's decision denying extension of status and authorized employment did not become final on February 2, 2009."

Counsel does not cite any statute, regulation, or case law to support the claim that appealing a denied nonimmigrant petition entitles an alien to employment authorization while that appeal is pending. Counsel simply proceeds from that presumption. If that were the case, it would provide an obvious incentive for petitioners to file frivolous appeals for the sole purpose of obtaining or prolonging the respective beneficiaries' employment authorization. Counsel is correct that a decision on appeal is not "final" in the administrative sense, but that does not mean that USCIS treats a denied petition like an approval until the denial becomes "final."

The regulation at 8 C.F.R. § 274a.12, bearing the title "Classes of aliens authorized to accept employment," contains no mention of pending appeals. The regulation at 8 C.F.R. § 274a.12(b)(20) is in conflict with counsel's claim. Under that regulation, an R-1 nonimmigrant whose status has expired but who has filed a timely application for an extension of such stay is authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay. If, however, USCIS denies the extension application during that 240-day period, then the alien's employment authorization automatically terminates upon notification of the denial decision. The regulation includes no provision to reinstate employment authorization upon the filing of an appeal. Even then, the 240-day period only authorizes the alien "to continue employment with the same employer." In this instance, the alien sought to work for a different employer, and therefore he would not have received even the 240 days of employment authorization upon the filing of the petition. (We need not explore, here, the procedural irregularities that led to the denial of that petition.)

Furthermore, counsel's arguments presume that the beneficiary maintained his R-1 status through its August 23, 2007 expiration. The record, however, refutes that presumption on its face. The USCIS regulation at 8 C.F.R. § 274a.12(b)(16) allows an R-1 nonimmigrant to work only for the religious organization that obtained R-1 status for the alien. A nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act. 8 C.F.R. § 214.1(e).

In 2006, the regulation at 8 C.F.R. § 214.2(r)(6) read, in part:

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. . . . 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.

As we have noted, the petitioner's R-1 nonimmigrant status permitted him to work for [REDACTED] – and nowhere else – from August 23, 2005 to August 23, 2007. An [REDACTED] official, however, has claimed that the petitioner “commenced in office . . . on September 22, 2006.” The record contains copies of the petitioner's processed paychecks from [REDACTED] dating back to December 2006. There is no evidence that [REDACTED] filed any Form I-129 in 2006 seeking to authorize this change of status. Therefore, the record, on its face, demonstrates that the petitioner fell out of status no later than December 2006, when he worked for [REDACTED] at a time when he was authorized to work only for [REDACTED]

An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status. 8 C.F.R. § 214.1(c)(4). Because the record amply and conclusively shows that the alien failed to maintain his previously accorded R-1 status (by working for [REDACTED] without authorization), he was clearly not eligible for an extension of stay. If USCIS had, hypothetically, granted the extension, it would have done so in error; but in point of fact, USCIS denied the extension.

Having failed to maintain his R-1 nonimmigrant status, the petitioner was out of status before the qualifying period began in September 2007, and nothing happened during the following two years that would have accorded him lawful status or employment authorization during any part of that period. We agree with the director's finding that the petitioner has not established the required two years of lawful, authorized employment immediately preceding the petition's filing date.

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.