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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]

C1

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

MAR 09 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
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 an association of churches. 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 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 prior to the filing of the petition.

On appeal, counsel asserts that the beneficiary's qualifying work experience "was completed in 2007" and the regulations requiring that the qualifying work experience must be in a lawful immigration status should not be applied retroactively. Counsel submits a brief and copies of previously submitted documentation in support of the appeal.

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 May 29, 2009. Accordingly, the petitioner must establish that the beneficiary was continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

On the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, the petitioner stated that the beneficiary entered the United States on July 23, 2003 in a B-2 nonimmigrant visitor's status that expired on January 22, 2004. The petitioner provided a copy of the beneficiary's Form I-94 confirming that the beneficiary entered the United States on July 23, 2003 in a B-2 status effective until January 22, 2004. In a May 1, 2008 letter, Dave Shelly, the petitioner's director of missions, stated that the beneficiary began working for the petitioning organization on June 21, 2005.

The director denied the petition, finding that the beneficiary was not in a lawful immigration status during the two-year period immediately preceding the filing of the petition. On appeal, counsel noted that regulations issued by U.S. Citizenship and Immigration Services (USCIS) on November 26, 2008 require the alien's qualifying work in the United States to be in a lawful immigration status. Counsel then argues that the beneficiary's "requisite work experience was completed in 2007, prior to finalization of the new regulation." Counsel's argument is not persuasive. The qualifying period is the two-year period prior to the filing of the petition and not two years experience in the religious occupation at any time. The beneficiary's two-year qualifying period began on May 29, 2007; therefore, he could not have completed the qualifying period in 2007.

Counsel concedes that the instant petition was filed subsequent to the November 2008 rule that set new requirements for establishing the qualifying work experience. Counsel argues, however, that as the beneficiary had completed the “requisite work experience,” the “petition should have been processed under the prior regulation that was in effect at the time of completion of the requisite work experience.” Although the beneficiary began work prior to the implementation of the November 2008 regulations, his qualifying period was not completed until after the new regulation was promulgated. Accordingly, counsel’s argument is without merit.

Citing *Landgraf v. USI Film Products*, 511 U.S. 244 (1991), counsel states that “a statute and/or regulation should have a retroactive effect only where it was the expressive intent of Congress.” As the petition was not filed prior to the implementation of the new regulations, we do not accept counsel’s argument that the current regulation has been retroactively applied to the instant petition. However, we note that 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).

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.¹ 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.

Relying on an article published in *Immigration Law Weekly*, counsel asserts that USCIS advised “stakeholders” that the 2008 regulation would not be retroactive. Counsel includes a copy of the article which states that “USCIS has just notified some of the stakeholder organizations that a worker who holds a valid R-1 issued before November 26th may travel on that visa for the duration of the visa. The regulation is NOT retroactive.” However, as previously noted, as the instant

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.

petition was not pending on the date of the regulation, retroactive application of the regulation is not at issue in this case.

Counsel asserts:

The new finalized rule places an undue burden on those individuals who otherwise have a bona fide I-360 petition submitted on their behalf, are not legally authorized to work, but are grandfathered under section 245(i) of the [Ac] and therefore eligible to adjust status through an approved petition.

Counsel does not explain how section 254(i) is applicable in the instant case. Section 245(i) of the Act, 8 U.S.C. § 1255(i) provides:

(i) Adjustment in status of certain aliens physically present in United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States –

(A) who –

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of –

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General [now the Secretary of Homeland Security] for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

Section 245(i) relief applies at the adjustment stage, not to the petition stage. The present proceeding is not an adjustment proceeding. Further, the record does not establish that a petition was filed on behalf of the beneficiary prior to April 30, 2001. In fact, the record does not establish that the beneficiary was present in the United States on that date. Therefore, even if the issue of section 245(i) of the Act was within the purview of the AAO, counsel has not shown the applicability of section 245(i) to the beneficiary.

Finally, counsel asserts:

[The beneficiary] began performing his requisite work experience in 2005 and has continued working until now. As such, he completed the two year requisite experience in 2007 while the prior regulation was still in force. When he chose to take the I-360 Religious Worker Visa path and completed the requirements for this path, he was technically qualified for it. His only fault was that he did not file the petition sooner than November 21, 2008 [*sic*] although he was already eligible to file before that time.

The qualifying work period for the beneficiary ended on May 28, 2009, not in 2007. Further, USCIS is not responsible for a petitioner's or beneficiary's failure to file a petition when first eligible. The statute and regulation require the petitioner to establish the beneficiary's eligibility for the visa at the time the petition is filed, not at any date prior to the filing date of the petition. Accordingly, counsel's argument is without merit.

As the petitioner has failed to establish that the beneficiary was in a lawful immigration status during his employment with the petitioner, it 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.