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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

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAR 25 2011**

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 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 again remanded the petition for further action and consideration. The director again denied the petition and certified its latest decision to the AAO for review. The AAO will affirm the director's decision to deny the petition.

The petitioner is a Sunni Islamic center that operates a mosque and a school. 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 an imam/chaplain and instructor. The director determined that the petitioner had not established that the beneficiary had two years of continuous work experience in the same position immediately preceding the filing date of the petition.

In response to the certified decision, the petitioner submits a brief from counsel and witness letters.

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 petitioner filed the Form I-360 petition on March 12, 2007. The director denied the petition on July 9, 2008, and the petitioner filed an appeal on August 6, 2008. The appeal was still pending when, on November 26, 2008, U.S. Citizenship and Immigration Services (USCIS) published new regulations that substantially revised the previous regulations governing 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. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). In keeping with the above instructions, the AAO remanded the petition on January 15, 2009, instructing the director to issue "a new decision in accordance with the requirements of the new regulation[s]."

The director again denied the petition on May 11, 2010, in a decision that mostly repeated, word for word, the bulk of the original 2008 denial notice. The AAO remanded the petition to the director on July 15, 2010, with instructions to issue a new decision, based on current regulations, rather than simply reissue an older decision with a new date. In that remand order, the AAO stated:

At the same time, however, we cannot ignore disqualifying information in the record. The new USCIS regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has undertaken qualifying religious work, 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 prior history of the proceeding can be found in earlier AAO decisions, and we need not recapitulate that full history here.

The AAO found that the beneficiary had engaged in unlawful employment for 28 days during the two-year qualifying period, owing to the expiration of his prior H-1B nonimmigrant status and a subsequent automatic extension of employment authorization while an (ultimately unsuccessful) petition to extend that status was pending.

The latest certified denial notice from the California Service Center is undated. The AAO provided the petitioner with a copy of the certified decision on October 13, 2010, and we shall consider that to be the date of the decision. In that notice, the director concluded that the petitioner had not shown that the beneficiary engaged in continuous, lawful employment during the two-year qualifying period.

In response to the certified decision, counsel states:

The AAO seems concerned that the beneficiary allegedly worked 28 days without authorization, although it does not seem concerned that the 28 days which are at issue for the two-year qualifying period were caused by the excessive and purposeful delay by

the Service. This purposeful delay resulted in an H-1B extension that took more than two years to adjudicate.

Elsewhere, counsel alleges “purposeful delay and purposefully incorrect adjudications.” Counsel offers no evidence to support the repeated allegation of “purposeful” misconduct by USCIS adjudicators. The assertions of counsel do not constitute evidence. *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).

The petitioner previously filed a Form I-129 petition, with receipt number [REDACTED], on or about June 15, 2006, seeking to extend the beneficiary’s stay as an H-1B nonimmigrant worker. The director denied the petition on July 9, 2008, citing the lack of a credible job offer and the petitioner’s failure to meet the terms of employment previously stated on an earlier petition, with receipt number [REDACTED], filed on March 13, 2003. The petitioner appealed that decision to the AAO. The AAO dismissed the appeal on January 15, 2009, finding that the director had acted correctly in denying the extension petition. The petitioner then filed a motion to reopen and reconsider. The AAO dismissed the motion on July 6, 2010, on the grounds that the filing did not meet the regulatory requirements of either a motion to reopen or a motion to reconsider.

Over the course of three different decisions at two adjudicative levels, USCIS has never found the H-1B extension petition to be meritorious. Counsel does not explain how the beneficiary would have retained employment authorization if the director had denied the petition in 2006 instead of 2008. A great many of counsel’s arguments lay the blame for the beneficiary’s situation on the delay in adjudicating the H-1B extension petition, and all of these arguments share the basic flaw that the petitioner never presented an adequate case for that extension. To analyze each of these individual arguments in detail would serve no useful purpose. Because the H-1B extension petition was ultimately not approvable, we will not find that the beneficiary’s failure to maintain status is the result of the director having taken too long to deny the requested extension.

Furthermore, even if adjudicative delay had caused the beneficiary’s H-1B nonimmigrant status to elapse, that delay did not cause the beneficiary to remain in the United States or to continue working. Whatever the cause of the delay, it was the beneficiary’s decision to continue working without authorization, and the petitioner’s decision to continue to employ him under those circumstances.

Counsel speculates that, had USCIS acted more quickly to adjudicate the H-1B extension petition, there would have been no unauthorized employment because the petitioner could have sought other means of relief before the beneficiary’s existing employment authorization expired. Counsel’s argument relies on the unproven presumption that the beneficiary would have been eligible for some other benefit. As it stands, the petitioner did not seek such benefits, and therefore the beneficiary did not receive them. We must base our conclusions on what happened, rather than speculation about what could have happened but did not.

Counsel discusses provisions that forgive past unauthorized employment, such as section 245(k) of the Act. The AAO, in its July 2010 decision, found that these provisions do not fully address the beneficiary's period of unauthorized employment. We will not repeat those arguments at length here. We will instead incorporate the earlier decision by reference.

Counsel protests that the AAO did not give sufficient consideration to the beneficiary's eligibility for retroactive employment authorization under section 245(k) of the Act, which reads:

An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 203(b) (or, in the case of an alien who is an immigrant described in section 101(a)(27)(C), under section 203(b)(4)) may adjust status pursuant to subsection (a) and notwithstanding subsection (c)(2), (c)(7), and (c)(8), if –

(1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;

(2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days –

(A) failed to maintain, continuously, a lawful status;

(B) engaged in unauthorized employment; or

(C) otherwise violated the terms and conditions of the alien's admission.

While section 245(k) of the Act forgives a limited amount of unauthorized employment at the adjustment stage, it does not require USCIS to ignore unauthorized employment at the earlier petition stage. We cannot rely upon an adjustment provision to waive an underlying petition requirement. The AAO, in its prior decision, stated:

[S]ection 245(k) of the Act relates to the adjudication of an adjustment application, applies to “[a]n alien who is eligible to receive an immigrant visa,” and therefore presumes the approval of an underlying immigrant petition. Here, the beneficiary has no approved petition, is not eligible to receive an immigrant visa, and therefore he is not eligible to adjust status. Section 245(k) of the Act does not relate to adjudication of a Form I-360 petition, nor does it retroactively transform periods of unauthorized employment into qualifying employment for purposes of 8 C.F.R. § 204.5(m)(11) simply through the filing of a Form I-485 adjustment application with a related Form I-360 immigrant petition.

Counsel does not answer this objection. Counsel observes that many aliens may file Form I-485 applications concurrently with immigrant petitions, but this does not prove or imply that section 245(k)

of the Act – a provision that specifically relates to adjustment of status – also applies to the petition process that must precede the adjudication (if not the actual filing) of Form I-485.

Furthermore, Congress enacted section 245(k) of the Act on November 26, 1997, under section 111(c)(2) of Public Law 105-119. Concurrent filing of Form I-485 applications did not exist until more than four years later, when what was then the Immigration and Naturalization Service published revisions to 8 C.F.R. § 245.2(a)(2)(i) in 67 Fed. Reg. 49561, 49563 (July 31, 2002). (Concurrent filing is entirely a regulatory construction, never directly authorized by Congress.) Therefore, it is futile to argue that Congress had concurrent filing in mind when it formulated section 245(k) of the Act. Furthermore, we return to the observation that, whether or not the beneficiary hypothetically could have obtained employment authorization through some alternative means, he did not in fact do so.

Counsel repeats a prior argument that the regulation at 8 C.F.R. § 274a.12(b)(20) automatically extended the beneficiary's employment authorization while the H-1B extension petition was pending. The plain language of that regulation limits the extension to "a period not to exceed 240 days," a period that did not cover all of the beneficiary's employment during the two-year qualifying period. Counsel acknowledges that 268 days elapsed between the filing of Forms I-129 and I-360, but claims that the spirit of the regulation is that an alien should not suffer adverse consequences arising from adjudicative delay. Nevertheless, the plain wording of the regulation authorizes the extension only for "a period not to exceed 240 days." Counsel, who elsewhere protests that USCIS has acted outside of its regulatory mandate, here relies on the contrary argument that USCIS is obliged to disregard the plain wording of the regulations. Counsel's position seems to be that USCIS must strictly adhere to the regulations, unless it would be to his clients' benefit to do otherwise.

Counsel criticizes USCIS's position as "hypertechnical," but sets forth no compelling argument to support the implied claim that binding regulations are optional or discretionary, to be set aside when an affected party claims to be the victim of deliberate, systematic misconduct. Counsel cites no source with the force of law to show that USCIS or any component thereof (including the AAO) has the discretion to disregard the regulations at 8 C.F.R. §§ 204.5(m)(4) and (11), which require qualifying past employment to have been lawful. We must therefore presume that those regulations have effect here. *See, e.g., 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); *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). 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).

Counsel states:

Recently, in response to [REDACTED] [REDACTED] [REDACTED] the United States military commander in Afghanistan, told the *Wall Street Journal* that the move "could endanger troops, and it could endanger the overall effort in

Afghanistan.” Adjudications[] that appear unjust or prejudiced[] can have the same undesirable effect. They could, in [REDACTED] words “endanger the lives of tens of thousands, hundreds of thousands of fellow citizens who are deployed around the world, conducting missions, with Islamic partners in freedom and justice.”

Counsel’s baseless and hyperbolic claim that denial of the petition may lead to widespread violence adds nothing to counsel’s legal argument. The outcome of the proceeding must rest on applicable standards of law, rather than (as counsel seems to suggest) the desire to placate international terrorists. Counsel offers other instances of exaggerated rhetoric which rely on accusation and emotional appeal rather than reasoned argument, but the above instance serves as an illustrative example.

The petitioner submits letters from various public figures based in Staten Island, including politicians, clergy, and a college president, attesting to the beneficiary’s personal character and asserting that the denial of the petition would harm the petitioning institution and the surrounding community. Some of the witnesses echo counsel’s allegations of deliberate misconduct by USCIS adjudicators, but none produce any evidence or claim direct knowledge of the adjudicators’ actions or motivations; they simply presume that the denial of the petition could only be the result of some ill-defined conspiracy against the beneficiary. We do not doubt the sincerity of these witnesses, but their concerns cannot and do not trump the plain wording of the binding regulations. There exists no special exemption for aliens who, though ineligible, would be missed in their communities.

Counsel asserts that the petitioner requested a copy of the record of proceeding under the Freedom of Information Act, and protests that USCIS provided “merely . . . documentation provided by the petitioner.” Counsel asks “[w]hy can’t [the beneficiary] be faced with the actual evidence against him as due process of law requires?” The beneficiary is not an affected party in this proceeding. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). More importantly for our purposes, counsel’s argument rests on the presumption that the record contains outside evidence that the director never disclosed to the petitioner, and which provided the basis for the denial of the petition. The decision, however, rests on the beneficiary’s unlawful employment, not on outside evidence that the director has deliberately withheld from the petitioner.

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 affirm the denial of the petition.

**ORDER:** The director’s decision of October 13, 2010 is affirmed. The petition is denied.