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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

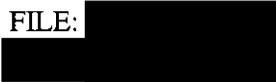
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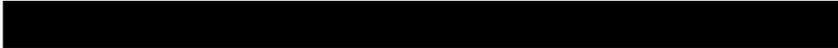


**U.S. Citizenship
and Immigration
Services**



C,

DATE: **MAY 19 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
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:

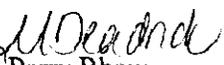
SELF-REPRESENTED

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 is an organization of the Church of Scientology. 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 member of the Sea Organization, the Church of Scientology's religious order. The director determined that the petitioner had not established that the beneficiary 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 and various exhibits.

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 U.S. Citizenship and Immigration Services (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 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 December 4, 2009. On that form, the petitioner provided the following information:

Current Nonimmigrant Status: Pending Adjust[ment] of Status
Expires on: [left blank]
Has [the beneficiary] ever worked in the U.S. without permission? Yes

To explain the last answer above, the petitioner stated:

Petitioner filed a Form I-129 Petition for a Nonimmigrant Worker on behalf of [the beneficiary] in June 2009, requesting an extension of his R-1 status. . . . A denial decision was issued on 10/27/2009, which contains errors of law and fact, however rather than filing a Form I-290B, we are addressing the denial reasoning herein, while filing a concurrent Form I-360 petition and I-485 application.

In general, the proper forum in which to contest the denial of a petition is an appeal or motion from that denial. Under the regulation at 8 C.F.R. § 214.1(c)(5), there is no appeal from the denial of an application for extension of stay, but the regulation at 8 C.F.R. § 214.2(r)(17) allows for the appeal of the denial of a petition for a nonimmigrant religious worker. Here, the petitioner has acknowledged that it deliberately rejected the option to appeal the denial of the petition.

Having chosen not to appeal the denial of the nonimmigrant petition, the petitioner now seeks to contest that denial in the context of a new, immigrant petition. In essence, the petitioner seeks, through the payment of a single filing fee, two separate adjudications: one for the new immigrant petition, and the other a re-hearing – an appeal in all but name – of the nonimmigrant petition.

Section 286(m) of the Act, 8 U.S.C. § 1356, requires USCIS to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.¹ The petitioner's Form I-360 filing fee covers the costs of adjudicating the Form I-360 petition, not the separate and additional costs of reviewing the denied Form I-129 petition. The petitioner has not appealed the denial of the nonimmigrant petition, and therefore, the petitioner has not placed the denied petition under the AAO's appellate jurisdiction. We cannot and will not consider the merits of the denied nonimmigrant petition in the present proceeding.

The director denied the instant petition on September 30, 2010, stating: "the beneficiary's status expired on June 28, 2009. The beneficiary has been out of status for 161 days prior to the filing of

¹ See <http://www.whitehouse.gov/omb/circulars/a025/a025.html>.

the I-360 petition.” The director concluded that the beneficiary’s lack of lawful status during the final months of the qualifying period disqualified him for classification as a special immigrant religious worker.

We note that the director, in calculating the length of the beneficiary’s lapse of status, began counting on the expiration date of the beneficiary’s R-1 status. The petitioner’s filing of an extension application, however, triggered an automatic extension of the beneficiary’s employment authorization. The regulation at 8 C.F.R. § 274a.12(b)(20) allows the alien to continue employment with the same employer for up to 240 days after the date of expiration, while the extension application is pending. If USCIS denies the application for extension of stay during that 240-day period, the employment authorization automatically terminates upon notification of the denial decision. In this instance, the director denied the extension application on October 27, 2009. The beneficiary’s employment authorization ended that day, not on the original expiration date of his R-1 nonimmigrant status. This correction does not alter the director’s fundamental finding that the beneficiary unlawfully continued his employment after his work authorization ended.

On appeal, the petitioner argues that “the new regulations . . . go far beyond the least restrictive means to further the government’s interest” and, therefore, violate the Religious Freedom Restoration Act of 1993 (RFRA). USCIS anticipated this argument in the preamble to the latest version of the religious worker regulations:

USCIS disagrees with the specific notion that the final rule violates the RFRA. The RFRA provides:

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except * * * if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

Public Law 103–141, sec. 3, 42 U.S.C. 2000bb–1. The final rule is intended to permit religious organizations to petition for admission of religious workers under restrictions that have less than a substantial impact on the individual’s or an organization’s exercise of religion. A petitioner’s rights under RFRA are not impaired unless the organization can establish that a specific provision of the rule imposes a significant burden on the organization’s religious beliefs or exercise. Further, this rule is not the sole means by which an organization or individual may obtain admission to the United States for religious purposes, and DHS believes that the regulation, and other provisions of the INA and implementing regulations, can be administered within the confines of the RFRA. An organization or individual who believes that the RFRA may require specific relief from any provision of this

regulation may assert such a claim at the time they petition for benefits under the regulation.

Nor does this final rule impose a “categorical bar” to any religious organization’s petition for a visa or alien’s application for admission. Instead, the rule sets forth the evidentiary standards by which USCIS will adjudicate nonimmigrant and immigrant petitions.

73 Fed. Reg. 72276, 72283-84 (November 26, 2008). With respect to the provision that “[a]n organization or individual who believes that the RFRA may require specific relief from any provision of this regulation may assert such a claim at the time they petition for benefits under the regulation,” we note that the petitioner raised no RFRA concerns until the appellate stage. Also, the above language does not require USCIS to comply with every request for relief under RFRA.

USCIS revised its regulations under express instructions from Congress. Section 2(b)(1) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391 (Oct. 10, 2008), required the Department of Homeland Security to “issue final regulations to eliminate or reduce fraud” related to religious worker 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.² On any of those occasions, Congress could have made substantive changes in response to the regulations they ordered USCIS to publish, 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’s interpretation and application of those regulations.

The petitioner cites no judicial finding that any of the current regulations violate RFRA. Absent such a finding, the regulations remain binding on all USCIS employees, and neither the director nor the AAO has any discretion to set aside any provision of 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).

² 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.

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) (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); *Morton v. Ruiz*, 415 U.S. 199 (1974) (where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures).

Because the law indisputably requires USCIS to abide by its own regulations, and because the AAO has no authority to overturn USCIS regulations, we cannot entertain the petitioner's argument that the regulations are so flawed that we should disregard or discard them. Indeed, the petitioner acknowledges that RFRA questions are "up to the federal judiciary," not to executive branch entities such as the AAO.

The petitioner states: "The Church of Scientology (COS) has in the past utilized the benefit of § 245(k) of the INA, when one of their dedicated religious workers may have inadvertently become out of status." Section 245(k) of the Act 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.

Section 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 is not eligible to adjust status. Section 245(k) of the Act does not retroactively transform periods of unauthorized employment into qualifying employment for purposes of 8 C.F.R. §§ 204.5(m)(4) and (11) simply through the filing of a Form I-485 adjustment application

with a Form I-360 immigrant petition. An alien cannot claim adjustment-related benefits on the basis of a denied petition. *Cf. Matter of Al Wazzan*, 25 I&N Dec. 359, 366-67 (AAO 2010).

The petitioner alleges that “[r]eligious workers are discriminated against because religious workers are now the only workers that cannot claim the grace period allowed by §245(k).” This claim is a fallacy because the current regulations at 8 C.F.R. § 204.5(m)(4) and (11) do not apply to an alien’s entire history in the United States; they apply only to the two-year period immediately prior to the filing of the petition. Any unlawful presence or unlawful employment that the alien accrued before that two-year period would still be covered by section 245(k) of the Act, up to the 180-day limit.

Furthermore, we must weigh any claim of discrimination against religious workers with the observation that many statutory and regulatory provisions benefit only religious workers. For example, section 107 of the Internal Revenue Code exempts from income tax the value of housing provided to members of the clergy. Secular workers whose compensation includes housing receive no comparable consideration. In terms of immigration law, section 274 of the Act discusses criminal penalties for harboring certain aliens who lack lawful status, but section 274(a)(1)(C) of the Act carved out a loophole that applies only to religious institutions and to no one else. Some of these legal distinctions operate to the benefit of religious institutions and their alien workers, and others do not, but the existence of those distinctions is beyond doubt. To protest distinctions that work against the advantage of religious organizations and their alien workers, while quietly accepting those that favor such organizations and persons, is self-serving and inconsistent to say the least.

Moreover, the petitioner has not explained how the beneficiary “inadvertently bec[a]me out of status.” The petitioner does not claim that it never received the Form I-129 denial notice, or otherwise shown that the petitioner or the beneficiary were unaware of the denial of the extension application. If the petitioner and the beneficiary were aware of the denial, and knowingly continued the employment relationship anyway, there is nothing “inadvertent” about the situation.

The petitioner states: [REDACTED] when he was the Acting Assistant Commissioner of Adjudications, advised that breaks in religious employment may not cause a denial of an I-360 petition, especially if the break in employment was beyond the alien’s control.” The petitioner refers, here, to a May 8, 1992 letter from [REDACTED] to an immigration attorney, in which [REDACTED]. [REDACTED] stated that “breaks in religious employment . . . must be dealt with on a case-by-case basis.”

Letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer’s analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

Even then, the petitioner has not explained how the letter is relevant to the present matter. There has been no break in the beneficiary's religious employment, but rather a lapse in his legal status and employment authorization. The petitioner admitted as much on Form I-360, acknowledging that the beneficiary had worked without authorization after the denial of the application for extension of stay. Furthermore, the letter from 1992 was a comment on an interpretation of regulations in effect at that time; the 2008 revision of the regulations superseded the individual determination discussed in that letter.

The petitioner devotes the remainder of the appeal to arguments and evidence showing that the beneficiary is a member of the Sea Organization. The director, in the denial notice, did not dispute the beneficiary's membership in the Sea Organization, and therefore these materials are not relevant to the issue in dispute.

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.