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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

**PUBLIC COPY**



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

[REDACTED]

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DATE: **MAY 31 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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 is a Pentecostal Christian 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 the pastor of one of the petitioner's constituent churches in Laurens, South Carolina. 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.

On appeal, the petitioner submits arguments from an attorney and several witness letters.

The AAO notes that a cover letter from the most recent attorney of record mentions the Form I-360 receipt number for this proceeding, but the name of a different beneficiary. Because the petitioner signed Form G-28, Notice of Entry of Appearance as Attorney or Representative, and that form shows only the receipt number, the AAO finds that the petitioner has associated this attorney with this petition. The name substitution, on a cover letter that the petitioner did not sign and may not even have seen, appears to be a clerical error. There is no evidence that the latest attorney of record has submitted anything of substance, such as a brief, in furtherance 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 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 August 17, 2009. On that form, the petitioner indicated that the beneficiary entered the United States on February 10, 2000. The petitioner left blank the lines intended for the beneficiary's current nonimmigrant status and the expiration date thereof. The record shows that the beneficiary entered the United States as a B-1 nonimmigrant visitor for business, and that his status as such expired on March 9, 2000. The record contains no evidence of any attempt to extend or change the beneficiary's nonimmigrant status after that point. Therefore, the record indicates that the beneficiary has lacked lawful immigration status since March 10, 2000.

Asked whether the beneficiary had worked in the United States without authorization, the petitioner answered "Yes." The petitioner submitted Form G-325A, Biographic Information, on which the beneficiary stated that he had served as the pastor in Laurens since November 2000.

The petitioner submitted copies of IRS Form W-2 Wage and Tax Statements, showing that the petitioner paid the beneficiary \$20,458.65 in 2007 and \$16,260.88 in 2008, with a \$4,200 housing allowance each year. The petitioner also submitted IRS Forms W-2 for earlier years, back to 2003, which fall outside the two-year qualifying period.

The director denied the petition on November 5, 2009, because "the beneficiary has been in the U.S. in an unlawful immigration status from March 10, 2000 until the present." On appeal, the petitioner's then-attorney, [REDACTED], stated that "the Service has before suggested that the two-year requirement is met where the beneficiary is a visitor overstay." In support of this argument, [REDACTED] cited an unpublished AAO appellate decision from 2003. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, the AAO issued the cited decision under an older version of the regulations. The current regulations, including the lawful status and authorized employment clauses, took effect upon the publication of 73 Fed. Reg. 72276 (Nov. 26, 2008).

[REDACTED] argued: "the Statute does not attach a status requirement to the two year period. Therefore, by relying solely on the regulation in lieu of the statute's direct language, the Service erred as a matter of law." This objection rests on the false assumption that USCIS employees, including the director and the AAO, have the authority to overturn or ignore controlling 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). The regulations at 8 C.F.R. §§ 204.5(m)(4) and (11) are binding on USCIS employees, including AAO officers, in their administration of the Act. See, e.g., *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).

USCIS published the current regulations at 8 C.F.R. § 204.5(m) on explicit instructions from Congress. The wording of the relevant legislation demonstrates Congress's interest in USCIS regulations and the agency's commitment to combating immigration fraud. 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.”

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.<sup>1</sup> 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). The AAO 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 submits several letters from members of the beneficiary's congregation and the surrounding community, attesting to the beneficiary's personal character and his abilities as a member of the clergy. These letters do not address or overcome the stated basis for the denial, the beneficiary's lack of lawful status or employment authorization during the two-year qualifying period.

The petitioner has not contested the director's finding that the beneficiary had no lawful immigration status or employment authorization during the two years immediately preceding the filing of the petition. The AAO rejects counsel's argument that the director should not have relied on the binding USCIS regulations when rendering the decision. The AAO agrees with the director's uncontested finding and the resulting denial decision.

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.

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<sup>1</sup> 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.