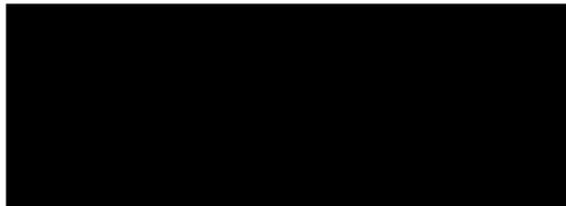


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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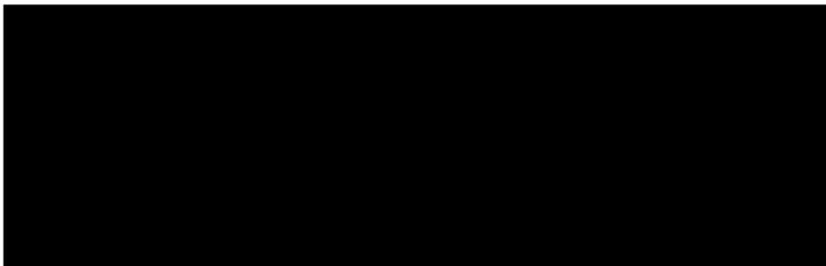
DATE: Office: CALIFORNIA SERVICE CENTER
AUG 09 2012

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:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 appeal will be dismissed.

The petitioner is a Christian organization. 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 minister. The director determined that the petitioner failed to establish the beneficiary had two years of continuous employment immediately prior to the filing of the petition as it failed to establish the beneficiary's lawful immigration status.

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 on appeal is whether the beneficiary possessed two years of continuous, lawful employment immediately prior to the filing of the petition.

The U.S. Citizenship and Immigration Services (USCIS) 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 petitioner filed the Form I-360 on September 21, 2010. Accordingly, the petitioner must establish that the beneficiary was continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

The regulation at 8 C.F.R. § 204.5(m)(11) provides:

Evidence relating to the alien's prior employment. Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:

- (i) Received salaried compensation, the petitioner must submit IRS [Internal Revenue Service] documentation that the alien received a salary, such as an IRS Form W-2 [Wage and Tax Statement] or certified copies of income tax returns.
- (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.
- (iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional

documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.

If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

On the Form I-360 petition, the petitioner indicated that the beneficiary last arrived in the United States on October 18, 2008. The record reflects that the beneficiary began working for the petitioner's organization in November of 2005. On the Form I-360, under "Current Nonimmigrant Status," the petitioner indicated "R-1" with an expiration date of October 6, 2009.

In her September 9, 2011 decision, the director found that the beneficiary had engaged in unauthorized employment following the expiration of his R-1 nonimmigrant status on October 6, 2009, which fell during the two-year qualifying period prior to the petition's filing date. The director noted that USCIS denied the beneficiary's September 21, 2009 Form I-129 extension request (WAC 09 251 50205) on March 15, 2011.

On appeal, counsel asserts that the beneficiary was eligible to extend his R-1 nonimmigrant status until November of 2010, which was five years after he first received his R-1 nonimmigrant status in November of 2005. Counsel claims that, because the petitioner filed a new Form I-129 on September 21, 2009 so as to extend the beneficiary's R-1 nonimmigrant status, 8 C.F.R. § 274a.12(b)(20) would have granted the beneficiary an additional 240 days of authorized work while his petition remained pending. The AAO finds that the beneficiary's R-1 nonimmigrant status expired on October 6, 2009 and that 240 days from that date was June 3, 2010. However, the petitioner did not file the instant petition until September 21, 2010.

Counsel asserts that USCIS failed to adjudicate the beneficiary's September 21, 2009 Form I-129 petition until March 15, 2011 even though the petitioner had filed this petition more than a year before the expiration of the beneficiary's five-year religious worker visa limit. Counsel claims that USCIS only denied the Form I-129 petition because of the five-year limit.

Counsel concedes that the beneficiary was unable to work legally between June 4, 2010 and the petition's filing date, but claims that the work that he performed then was permissible, as his lack of employment authorization was beyond his control because USCIS had delayed its adjudication of the beneficiary's September 21, 2009 Form I-129 petition. Counsel cites to a 1992 legacy INS memo and a 1995 AAO case and argues that because the beneficiary's break was beyond his control, his employment should not be construed to interrupt the continuity of his employment. Counsel's argument is not persuasive. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The memo and the

decision also predate the regulations promulgated on November 26, 2008, which provided a new definition for what constitutes a break.

The AAO finds that, although some breaks in employment may not affect the alien's continuous employment, the petitioner has not demonstrated that the beneficiary meets the requirements of 8 C.F.R. § 204.5(m)(4). The beneficiary was not authorized to work between June 4, 2010 and September 21, 2010.

The regulation at 8 C.F.R. § 204.5(m)(4) prohibits USCIS from considering work that was not "in lawful immigration status" and any "unauthorized work in the United States." The regulation at 8 C.F.R. § 204.5(m)(11) requires that "qualifying prior experience . . . must have been authorized under United States immigration law." Therefore, the regulations, separately and together, require that USCIS must have affirmatively authorized the beneficiary to perform any claimed religious employment while in the United States. The record reflects that the beneficiary was not in an authorized immigration status allowing him to work throughout the two-year period immediately preceding the filing of the visa petition.

Under 8 C.F.R. §§ 204.5(m)(4) and (11), the petition cannot be approved, because the beneficiary's religious employment in the United States during the qualifying period was not authorized under United States immigration law.

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.