

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]

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DATE: **DEC 18 2012** Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]
[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 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,


Ron Rosenberg
Acting 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 Hindu 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 religious priest and spiritual leader. The director determined that the beneficiary reached the five-year limit on his stay as an R-1 nonimmigrant.

The petitioner, through counsel, filed a timely 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, 2015, 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, 2015, 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) 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 December 14, 2010. Accordingly, the petitioner must establish that the beneficiary was continuously and lawfully 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. . . .

Regarding eligibility as an R-1 nonimmigrant, section 101(a)(15)(R)(1) of the Act, 8 U.S.C. § 1101(a)(15)(R)(1) pertains to an alien who:

- (i) for the 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; and
- (ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii).

Finally, the regulation at 8 C.F.R. § 214.2(r)(6) states:

Limitation on total stay. An alien who has spent five years in the United States in R-1 status may not be readmitted to or receive an extension of stay in the United States under the R visa classification unless the alien has resided abroad and has been physically present outside the United States for the immediate prior year.

The limitations in this paragraph shall not apply to R-1 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of six months or less per year. In addition, the limitations shall not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, transcripts of processed income tax returns, and records of employment abroad.

In her September 16, 2011 decision, the director cited to the regulations related to R-1 nonimmigrants at 8 C.F.R. 214.2(r) and found that the beneficiary reached the five-year limit on September 20, 2008. The director also noted that the petitioner had not submitted any information to demonstrate that the beneficiary met any exceptions to the limitation.

On appeal, counsel does not contest that the beneficiary had reached the statutory limitation or provide any argument regarding the beneficiary's eligibility for an exception to the limitation. Rather, counsel argues the beneficiary should be considered as having entered, stayed in, and reentered the United States legally as USCIS had never previously determined that the beneficiary was illegally in the United States or that he had committed any type of fraud with regard to his U.S. immigration proceedings. Counsel asserts that the beneficiary made a number of trips outside of the United States before renewing his visa and states that the beneficiary last arrived in the United States on a properly issued R-1 visa.

The AAO concurs with the director's ultimate determination that the beneficiary reached the five-year statutory limitation, although the AAO finds that the director's calculation regarding that limit was incorrect. The record demonstrates that the beneficiary's first R-1 visa was issued with validity dates from September 16, 2003 until September 15, 2005 and that his second visa was issued with validity dates from September 16, 2005 to September 15, 2010. The director's determination that the beneficiary reached the five-year limit on September 20, 2008 appears to have taken only the visa issuance and expiration dates into account. However, the more relevant calculation is the time the beneficiary actually spent in the United States in R-1 status. As cited above, the regulation at 8 C.F.R. § 214.2(r)(6) states that an alien who has spent five years in the United States *in R-1 status* may not be readmitted to or receive an extension of stay in the United States under the R visa classification unless the alien has resided abroad and has been physically present outside the United States for the immediate prior year. When calculating the time the beneficiary spent in the United States in R-1 status beginning on September 21, 2003, his five-year limit in R-1 status was reached in January 2010. As there was not a valid basis upon which the beneficiary could reenter or lawfully remain in the United States, the time the beneficiary remained in the United States beyond the statutory limit cannot be considered time spent in lawful status as an R-1 nonimmigrant. Although the AAO acknowledges that the beneficiary was permitted to reenter the United States and received a Form I-94 with a notation that he was authorized to remain beyond the statutory limit, such an action was clearly in error and was not

in compliance with the governing statutory and regulatory requirements. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). *See also Lazarescu v. United States*, 199 F.2d 898 (4th Cir. 1952) (fact that immigrant inspector admitted alien as a bona fide seaman did not make his entry lawful).

Under section 101(a)(15)(R)(1) an R-1 nonimmigrant's period of a stay cannot exceed five years. Once that statutory limit has been reached, the regulation at 8 C.F.R. § 214.2(r)(6) stipulates that the alien may not be readmitted to or receive an extension of stay in the United States unless the alien has resided abroad and has been physically present outside the United States for the immediate prior year. Therefore, as it relates to the regulations at 8 C.F.R. 204.5(m)(4) and (11), during the requisite two-year period in which the petitioner was required to establish the beneficiary's lawful and continuous employment, the record demonstrates that the beneficiary reached the five-year statutory limitation on his stay as an R-1 nonimmigrant. The AAO accordingly finds that the beneficiary was not authorized to work throughout the two-year qualifying period prior to December 14, 2010.

Additionally, the petitioner has failed to establish that the beneficiary worked continuously in qualifying religious work for two full years immediately preceding the filing of the petition. As previously cited, the regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to establish that the beneficiary had been continuously employed in qualifying religious work throughout the two-year period immediately preceding December 14, 2010.

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.

In its November 10, 2010 letter submitted in support of the petition, the petitioner stated that it had employed the beneficiary as a priest and spiritual leader under an R-1 visa since September 9, 2004. Although the petitioner stated that it was submitting the beneficiary's IRS Forms W-2 for 2009 and 2008, a copy of the beneficiary's tax returns for the same period, and a copy of the beneficiary's three most recent pay statements, no such documentation is included in the record of proceeding. The petitioner submitted several flyers with dates from 2003 to 2009 advertising its activities, however, the beneficiary is not identified any in any of them. The petitioner submitted no other documentation to establish that the beneficiary worked continuously in qualifying occupation or vocation for the required period. Furthermore, as discussed above, the record reflects that the beneficiary was not in a lawful immigration status during the two-year qualifying period that he worked for the petitioning organization. Accordingly, any work performed by the beneficiary in the United States interrupts the continuity of his work experience for the purpose of this visa petition.

The petitioner has failed to establish that the beneficiary worked lawfully and continuously in a qualifying occupation or vocation for two full years immediately preceding the filing of the petition.

The petitioner also failed to establish how it will compensate the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(10) provides that the petitioner must submit:

Evidence relating to compensation. Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. If IRS documentation, such as IRS Form W-2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

The petitioner stated on the Form I-360 that the beneficiary would receive a base salary of \$8,500 "and other standard benefits of \$20,000 which totals to \$28,500 approximately per year." The petitioner identified the other benefits as health insurance (\$4,000), "lodging apartment" (\$12,000), utilities (\$1,000) and food (\$3,000). The petitioner submitted an unaudited copy of its profit and loss statement for January through December 2009 on which it reported net income of \$15,055.29. The document indicates payroll expenses of \$7,200. The petitioner indicated on the Form I-360 that it had one employee, presumably the beneficiary. Nonetheless, it submitted no other documentation to establish that it paid the beneficiary during 2009, and no documentation to establish that the information contained in the profit and loss statements is an accurate reflection of its income and expenses for 2009. The petitioner submitted no documentary evidence of the lodging that it would provide to the beneficiary and no evidence of its payment of the beneficiary's utilities and food. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner has submitted none of the documentation required by the above-cited regulation, and therefore has failed to establish how it intends to compensate the beneficiary.

Finally, the petitioner has failed to establish that it is a bona fide nonprofit religious organization.

The regulation at 8 C.F.R. § 204.5(m)(5) provides, in pertinent part:

Tax-exempt organization means an organization that has received a determination letter from the IRS establishing that it, or a group that it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the IRC [Internal Revenue Code] of 1986 or subsequent amendments or equivalent sections of prior enactments of the IRC.

Additionally, the regulation at 8 C.F.R. § 204.5(m)(8) provides:

Evidence relating to the petitioning organization. A petition shall include the following initial evidence relating to the petitioning organization:

- (i) A currently valid determination letter from the [IRS] establishing that the organization is a tax-exempt organization; or
- (ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or
- (iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under

section 501(c)(3) of the [IRC] of 1986, or subsequent amendment or equivalent sections of prior enactments of the [IRC], as something other than a religious organization:

- (A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;
- (B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;
- (C) Organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization; and
- (D) A religious denomination certification. The religious organization must complete, sign and date a religious denomination certification certifying that the petitioning organization is affiliated with the religious denomination. The certification is to be submitted by the petitioner along with the petition.

The petitioner submitted copies of the following letters from the IRS:

1. An August 11, 2003 letter acknowledging the petitioner's name change and stating that IRS "records indicate that by a determination letter issued on March 15, 2002 your organization was recognized as exempt from federal income tax under section 501(c)(3) of the [IRC]." The letter indicated that the petitioner had been granted an advance ruling that would end on December 31, 2005. The petitioner was advised, "According to this advance ruling, your organization will be treated as a publicly-supported organization and not as a private foundation until the end of the advance ruling period"
2. An August 18, 2003 letter advising the petitioner that "In March 2002 we issued a determination letter that recognized your organization as exempt from federal income tax."
3. A January 11, 2004 letter responding to the petitioner's request regarding its tax-exempt status. The letter advised the petitioner, "In February 2002 we issued a determination letter that recognized your organization as exempt from income tax."

The regulation requires the petitioner to submit a "currently valid determination letter from the IRS." The 2003 letters submitted by the petitioner reference an advance ruling letter from the IRS that was issued in March 2002. The 2004 letter references a February 2002 letter. The record

is not clear whether the petitioner has obtained a permanent ruling from the IRS and does not establish that the petitioner is a bona fide nonprofit religious organization as that term is defined by the regulation.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.