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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

[REDACTED]

C1

DATE: **FEB 23 2012** 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*  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based immigrant visa petition on June 2, 2008. The petitioner filed a motion to reopen on June 30, 2008, which the director approved on September 4, 2008. The director denied the petition on April 2, 2010, and the petitioner appealed the decision to the Administrative Appeals Office (AAO) on April 30, 2010. The appeal will be dismissed.

The petitioner is a church. 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 deacon. The director determined that, as the beneficiary had engaged in unauthorized employment, the petitioner had failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the visa petition.

On appeal, counsel asserts that the beneficiary maintained continuous lawful immigration status by means of a pending asylum application that he filed over 15 years ago. On appeal, counsel also contends that the retroactive application of the November 2008 regulation under 8 C.F.R. § 204.5(m) regarding religious workers was impermissible.

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 had engaged in unauthorized employment and therefore failed to establish that he worked continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the visa petition.

The 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 January 23, 2008. 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, which the petitioner filed on January 23, 2008, the petitioner indicated that the beneficiary arrived in the United States on February 9, 1990. Therefore, the beneficiary was in the United States throughout the entire two-year qualifying period. On the Form I-360, under "Current Nonimmigrant Status," the petitioner wrote [REDACTED]. The record, however, shows that the beneficiary purportedly entered the United States without inspection and never overstayed any type of U.S. immigration visa. Contrary to what the petitioner had listed on the Form I-360, counsel also states in a March 8, 2010 letter submitted in response to the director's January 26, 2010 Request for Evidence (RFE) that the beneficiary entered the United States without inspection.

The record of proceeding contains letters from the petitioner dated March 19, 2007 and November 25, 2008, which document the beneficiary's past work experience. Each letter states that the beneficiary began working for the petitioner's church in 1997 as the superintendent of its Christian Education Department and that the beneficiary transitioned to work there as a deacon in June of 1999. Furthermore, the petitioner has submitted copies of what purports to be the beneficiary's Internal Revenue Service (IRS) Forms 1040 for 2006 to 2009 and Form 1099-MISC for 2006, which indicate that the petitioner paid the beneficiary the full proffered wage of \$19,000.00 for those years.

On appeal, counsel asserts that the beneficiary maintained continuous lawful immigration status by means of a pending asylum application that he filed over 15 years ago. The AAO notes that counsel stated that she would be submitting a brief and/or additional evidence within 30 days of the April 30, 2010 appeal. She failed to submit any further argument or evidence. U.S. Citizenship and Immigration Services (USCIS) records indicate that the beneficiary applied for asylum status on February 26, 1993 and filed a series of Forms I-765 for employment authorization. As it relates to the relevant period, records reflect that the beneficiary did not possess work authorization from January 23, 2006 to October 4, 2006 or from January 5, 2007 to

February 8, 2007. Specifically, the beneficiary's November 16, 2005 approved Form I-765 granted him work authorization from October 5, 2006 to January 4, 2007 and his December 26, 2006 approved Form I-765 granted him work authorization from February 9, 2007 to February 8, 2008. Thus, the beneficiary was not employed lawfully during the full two-year period preceding the petition's filing date.

On appeal, counsel also contends that the retroactive application of the November 2008 regulation under 8 C.F.R. § 204.5(m) regarding religious workers was impermissible. The wording of the relevant legislation demonstrates Congress' interest in USCIS regulations. 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))

When USCIS published the new rule in November 2008, it did so in accordance with explicit instructions from Congress. 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). Furthermore, 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 requested, 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' interpretation and application of those regulations.

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<sup>1</sup> P.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.

As previously stated, the beneficiary did not possess work authorization throughout the entire two-year qualifying period. 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.”

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.

Beyond the decision of the director, the AAO finds that the petitioner has failed to demonstrate sufficiently the beneficiary’s qualifications to perform the duties of a deacon. The USCIS regulation at 8 C.F.R. § 204.5(m)(7)(ix) requires an official of the intending employer to attest that the beneficiary is qualified for the position offered. The USCIS regulation at 8 C.F.R. § 204.5(m)(9) states:

*Evidence relating to the qualifications of a minister.* If the alien is a minister, the petitioner must submit the following:

- (i) A copy of the alien’s certificate of ordination or similar documents reflecting acceptance of the alien’s qualifications as a minister in the religious denomination; and
- (ii) Documents reflecting acceptance of the alien’s qualifications as a minister in the religious denomination, as well as evidence that the alien has completed any course of prescribed theological education at an accredited theological institution normally required or recognized by that religious denomination, including transcripts, curriculum, and documentation that establishes that the theological institution is accredited by the denomination, or
- (iii) For denominations that do not require a prescribed theological education, evidence of:
  - (A) The denomination’s requirements for ordination to minister;
  - (B) The duties allowed to be performed by virtue of ordination;
  - (C) The denomination’s levels of ordination, if any; and
  - (D) The alien’s completion of the denomination’s requirements for ordination.

The petitioner submitted the beneficiary's certificate of successful completion of the [REDACTED] [REDACTED]' dated January 18, 2001. However, the beneficiary purportedly began working for the petitioner as the superintendent of its [REDACTED] as early as 1997 and then as a deacon in June of 1999. Within the attestation section of the petition, the petitioner merely states that the beneficiary has been a member of its church since 1990 and that he underwent a six month internship in the office of the deacon to be qualified for that position. The petitioner has not submitted further evidence regarding the beneficiary's specialized training, ordination, or educational achievements. The AAO accordingly finds that the petitioner has not demonstrated that the beneficiary's position requires any religious training or qualifications.

Beyond the decision of the director, the AAO additionally notes that the beneficiary's tax return transcript for 2007 reflects that he was working for a taxi services business for that year rather than as a deacon. The NAICS code for this business, listed on the transcript, is [REDACTED]. However, the beneficiary's Form 1040 instead reflects that he was working as a deacon that year. The beneficiary's 2006 transcript, although it does not list the description of the beneficiary's business or profession, lists the same NAICS code as the 2007 transcript for the taxi service. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

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 (9<sup>th</sup> 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.