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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

C1

[Redacted]

DATE: **JAN 24 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
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 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 musical director. The director determined that that the beneficiary had engaged in unauthorized employment and that 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.

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 issues presented on appeal are whether the beneficiary had engaged in unauthorized employment and whether the petitioner has established that the beneficiary 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 August 31, 2009. 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 arrived in the United States on August 16, 2004. 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 "R2." The record shows that the beneficiary's nonimmigrant religious worker status expired on March 8, 2005. On March 14, 2007, the beneficiary submitted a Form I-539 Application to Extend/Change Nonimmigrant Status, which USCIS denied in June of 2009.

In its August 28, 2009 letter accompanying the Form I-360, the petitioner stated that the beneficiary had been born into the Assemblies of Church and has been an active member since the age of 12. The petitioner claimed that the beneficiary is a versatile musician who has mastered the guitar, keyboard, and percussion instruments. The petitioner states that the beneficiary volunteered his time to teach music to church member children in both Brazil and the United States. The petitioner submitted copies of cds that the beneficiary purportedly produced in 2007 and 2008. The petitioner concluded in its letter that the beneficiary completed more than two years of experience within the denomination prior to the filing of the petition on August 31, 2009. However, the petitioner failed to submit evidence substantiating this claim with its letter or at any point during these proceedings.

On appeal, counsel asserts that the beneficiary has not been out of status since March 8, 2005 as the director had indicated in her March 4, 2010 decision. Rather, counsel asserts that the beneficiary's mother included him within her Form I-539 Application to Extend/Change Nonimmigrant Status. Counsel then claims that USCIS never adjudicated this Form I-539 or one that she filed subsequently, so the beneficiary was never out of status. Counsel does not address the director's contention that 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. Contrary to counsel's assertions, USCIS records indicate that it sent the beneficiary's mother a denial notice regarding her Form I-539 in June of 2009.

The AAO further notes that the beneficiary did not list his work for the petitioner on his August 28, 2009 Form G-325A accompanying his Form I-485. Furthermore, on his Form I-485, the beneficiary claimed that he last entered the United States as an R-1 nonimmigrant religious worker rather than an R-2 as he claimed on the Form I-360. *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.

Whether the beneficiary possessed R-1 or R-2 status is inconsequential to the matter at hand. The petitioner has failed to submit information demonstrating that the beneficiary was engaged in authorized work for its organization or for another organization within the same denomination for the full two-year period prior to the filing of the Form I-360 on August 31, 2009 as required by 8 C.F.R. § 204.5(m)(11). The petitioner did not submit evidence of its compensation for the beneficiary's work during the relevant two-year period, nor did it provide evidence of the beneficiary's self-support or work for another employer. The petitioner merely submitted copies of cds that the beneficiary purportedly produced in 2007 and 2008. Furthermore, as previously noted, the beneficiary indicated to USCIS on his August 28, 2009 G-325A that he had not been employed in the last five years.

The AAO notes that, under 8 C.F.R. § 214.1(e), a nonimmigrant may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status. The regulations at 8 C.F.R. §§ 204.5(m)(4) and (11) require the beneficiary's prior employment to have been lawful and authorized. R-2 visa holders are not permitted to accept employment in the United States. 8 C.F.R. § 214.2(r)(4)(ii)(B). Furthermore, the beneficiary's nonimmigrant religious worker status expired on March 8, 2005. Thus, the petitioner has failed to provide evidence demonstrating that the beneficiary completed two years of qualifying experience immediately prior to the filing of the petition according to 8 C.F.R. § 204.5(m)(11).

As previously stated, the beneficiary has not been in lawful status since March 8, 2005. 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 functions while in the United States. The record therefore reflects that the beneficiary was not in an authorized immigration status during the two years immediately preceding the filing of the visa petition. Accordingly, any work that he may have performed in an unauthorized status would interrupt the continuity of the qualifying work experience.

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.