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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

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[redacted]

DATE: JAN 3 1 2012 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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, ("the director") 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 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 Religious Youth Education Director and a Religious Youth Instructor. The director determined that the petitioner had not established that the beneficiary held lawful status and employment authorization during the two year period immediately preceding the filing of the petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 under consideration concerns the beneficiary's lawful immigration status, or lack of it, during the two-year qualifying period. The regulation at 8 C.F.R. § 204.5(m)(4) states that:

> (m) *Religious workers.* This paragraph governs classification of an alien as a special immigrant religious worker as defined in section 101(a)(27)(C) of the Act and under section 203(b)(4) of the Act. To be eligible for classification as a special immigrant religious worker, the alien (either abroad or in the United States) 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.

Furthermore, the regulation 8 C.F.R. § 204.5(m)(11) states that:

> (11) *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 documentation that the alien received a salary, such as an IRS Form W-2 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.

The regulation at 8 C.F.R. § 204.5(m)(11) requires that the beneficiary's two years of qualifying employment in a religious occupation must have been authorized under United States immigration law, if performed in the United States.

In the present case, the petitioner's initial submission showed that she held R-1 status from May 26, 2004 to May 25, 2007 allowing her to work for the petitioner. The petitioner filed the Form I-360 petition for the beneficiary on November 6, 2007. Therefore, the beneficiary was out of status when the Form I-360 petition was filed by the petitioner. Because the beneficiary was working out of status, she did not satisfy the regulation of 8 C.F.R. § 204.5(m)(11) which required her to work under lawful immigration status during the two years immediately preceding the filing of the petition.

On appeal, counsel argues that the reason why the beneficiary was out of status was due to extraordinary circumstances beyond the control of the petitioner. Counsel states that the petitioner's prior attorney attempted to file an extension of the beneficiary's R-1 status in a timely matter, but sent it to the wrong Service Center, and thus the petition was rejected. Counsel then states that, "[the prior attorney] resubmitted the R-1 extension petition to the correct Service Center on or about June 8, 2007[1], and the extension petition was accepted." In support of this, counsel submits a copy of the United States Citizenship and Immigration Services ("USCIS") case status page for the R-1 extension that she marked as Exhibit A with the receipt number, [redacted] Counsel explains the two week lapse was due to extraordinary circumstances due to the prior attorney who filed an extension application two weeks late due to a mailing error. Counsel further states: "According to 8 C.F.R. § 248.1(b), the mailing mistake by the petitioner's attorney should be deemed to be an extraordinary circumstance beyond the control of the petitioner." The AAO disagrees. The filing by the attorney for the petitioner is attributable to the petitioner; any mistake made by its attorney is not beyond the petitioner's control.[2]

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[1] The AAO notes that the extension petition was filed two weeks after the beneficiary's status had expired.

[2] Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In the present case, present counsel followed none of the steps set forth

Further, USCIS denied the extension request (Receipt Number) on November 18, 2010. Therefore, the beneficiary was not working in lawful authorized employment during the two years immediately preceding the filing of the petition, having been out of status from May 2007 until the time the petition was filed on November 6, 2007.

In addition, counsel argues that according to 8 C.F.R. § 274a.12(b)(20), the beneficiary was authorized to continue employment with the petitioner for 240 days after May 26, 2007 because the application to extend the beneficiary's R-1 status was "timely" filed. That provision provides:

> (b) *Aliens authorized for employment with a specific employer incident to status.* The following classes of nonimmigrant aliens are authorized to be employed in the United States by the specific employer and subject to the restrictions described in the section(s) of this chapter indicated as a condition of their admission in, or subsequent change to, such classification. An alien in one of these classes is not issued an employment authorization document by the Service:
>
> (20) A nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (b)(5), (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), (b)(13), (b)(14), (b)(16), and (b)(19) of this section whose status has expired but who has filed a timely application for an extension of such stay pursuant to Sec. Sec. 214.2 or 214.6 of this chapter. These aliens are authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay. Such authorization shall be subject to any conditions and limitations noted on the initial authorization. However, if the district director or service center director adjudicates the application prior to the expiration of this 240 day period and denies the application for extension of stay, the employment authorization under this paragraph shall automatically terminate upon notification of the denial decision.

As noted above, there was already a lapse in the beneficiary's employment authorization when the extension request was filed. As the extension request was not timely filed, the beneficiary is not entitled to favorable consideration under this regulation.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented. The evidence submitted does not establish that the beneficiary's employment during the two-year qualifying period was authorized. Thus, the appeal must be dismissed.

Beyond the decision of the director, the record contains no attestation clause as required by 8 C.F.R. § 204.5(m)(7). In the present case, the AAO does not fault the petitioner for not including the attestation in the record, as the Service Center did not request it. As required under section 2(b)(1)

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in and cannot accept the argument that there were extraordinary circumstances in this case based on ineffective assistance of counsel.

of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008), USCIS promulgated a rule setting forth new regulations for special immigrant religious worker petitions. 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). Section 557(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 557(b), provides that an initial agency decision is not final if "there is an appeal to, or review on motion of, the agency within time provided by rule." Because there has been a pending appeal, USCIS has not issued a final decision on the instant proceeding. Accordingly, the matter is still pending and therefore subject to the new rule requiring an attestation clause. As the petition will be denied on other grounds, the AAO will not remand for the petitioner to submit an attestation clause at this time.

As noted above, the petition must be denied as the record date does not establish that the beneficiary's employment was authorized during the two years immediately preceding the filing of the petition.

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.

ORDER: The appeal is dismissed.