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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

DATE: **JUN 04 2012** Office: CALIFORNIA SERVICE CENTER

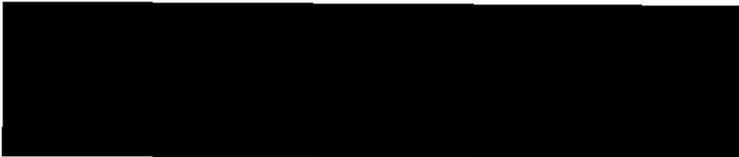


IN RE: Petitioner:  
Beneficiary:



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:

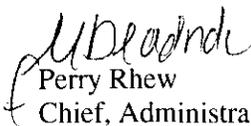


**INSTRUCTIONS:**

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 with the field office or service center that originally decided your case by filing a 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 and it 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 pastor. The director determined that the petitioner had not established that the beneficiary worked continuously in a qualifying religious occupation or vocation in a lawful immigration status for two full years prior to the filing of the petition.

Counsel argues on appeal that the Act “contains no language that would indicate that the work performed by the alien, whether in the United States or abroad must be authorized by the immigration authorities.” Counsel submits a brief in support of the 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, 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 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 petition was filed on November 18, 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 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 petitioner indicated on the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, that the beneficiary entered the United States on September 24, 2004 as a nonimmigrant visitor and that his period of authorized stay expired on March 23, 2005. In its October 13, 2009 letter submitted in support of the petition, the petitioner, through its pastor-in-charge, [REDACTED] stated that the beneficiary has been a member of its religious ministry since 2004 and "has served in different capacities." The petitioner further stated:

Following his ordination on May 8, 2006, he became one of the Pastors of [REDACTED] and was officially assigned to that Church on April 1, 2007. He continued to officiate in this capacity until he was reassigned to [REDACTED] on June 1, 2009.

The petitioner submitted programs for the [REDACTED] in Hyattsville, Maryland, on which the beneficiary was listed as associate pastor and other brochures indicating that he served as secretary of the [REDACTED]. The petitioner submitted no other documentation to establish the beneficiary's qualifying work experience.

In a February 16, 2010 request for evidence (RFE), the director instructed the petitioner to submit additional documentation to establish that the beneficiary worked in qualifying religious work during the statutory period. Specifically, the director instructed the petitioner to:

Provide experience letters written by the previous and current employers that include a breakdown of duties performed in the religious occupation for an average week. Include the employer's name, specific dates of employment, specific job duties, number of hours worked per week, form and amount of compensation, and level of responsibility/supervision. In addition, submit evidence that shows monetary payment, such as pay stubs or other items showing the beneficiary received payment. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported himself during the two-year period or what other activity the beneficiary was involved in that would show support. If any of the experience was gained while working in the United States provide evidence that the beneficiary was employed while in lawful status.

In a March 7, 2010 letter submitted in response, Pastor [REDACTED] senior pastor and chairman of the [REDACTED] stated:

[The beneficiary] was ordained in this church on August 5, 2006 after he satisfied [REDACTED] requirements for ordination and officially became one of the Pastors of [REDACTED] on May 1, 2007 through June 1, 2009. . . .

[His] voluntary vocational service with [REDACTED] was rendered under my close supervision. He gave selfless service to church for over two years, though he was not a salaried minister. His character was so distinguishing that members of the organization constantly reward him in gifts and free boarding.

Furthermore, in consideration of his noble, self-sacrificing, and dedicated service to the congregation, the Board of Trustee[s] of [REDACTED] and the congregation unanimously began to compensate him with a stipend of \$750.00 beginning from November 2009.

The petitioner provided a copy of the beneficiary's Form I-94, Departure Record, which reflects that he entered the United States on September 24, 2004 as a B-2, nonimmigrant visitor, for a period of authorized stay to March 23, 2005. The petitioner also submitted a list of what it identifies as a "record of compensations" for the beneficiary beginning in June 2007, including "rent & board" provided by [REDACTED] and cash from other sources. The petitioner provided a copy of an apartment lease dated July 2007 on which the beneficiary is listed as an authorized tenant with [REDACTED]. The petitioner submitted no documentation of the cash that the beneficiary allegedly received. 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 also provided uncertified copies of the beneficiary's unsigned and undated IRS Form 1040, U.S. Individual Income Tax Return, for 2007, 2008 and 2009 on which he identified self-employment income from his job as a minister. The forms indicate that the beneficiary filed the form jointly with his wife and that they had a daughter. The address is the address listed on the lease agreement; however, the authorized tenants on the lease did not include the beneficiary's wife and daughter.

The director denied the petition, finding that "the evidence is insufficient to establish that the beneficiary had been performing full-time work as a pastor for at least the two-year period immediately preceding the filing of the petition in lawful immigration status."

On appeal, counsel does not dispute the beneficiary's unauthorized status in the United States. Instead, counsel argues:

The Act contains no language that would indicate that the work performed by the alien, whether in the United States or abroad must be authorized by the immigration authorities. Subsection (iii) merely reads that the alien "has been

carrying on such vocation, professional work, or other work continuously for at least the two-year period described in clause (i).”

It is unconstitutional (and in violation of the separation of powers) for an administrative agency to issue a regulation that is directly contrary to the statute enacted by Congress. *Chevron, USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

In *Chevron*, the Supreme Court stated:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulations. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometime the legislative delegation to an agency on a particular question is implicit rather than explicit. IN such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. *Chevron* at 842-844 (footnotes omitted).

Counsel asserts:

The portion of the regulation at issue here, that requires legal status for the qualifying employment, fails all three steps of the *Chevron* analysis. First, in INA 101(a)(27)(C), Congress described precisely the type of employment that qualifies for classification as an immigrant religious worker. The statute is limited to making sure that the religious worker has sufficient experience. It does not seek to ensure that the qualifying employment is authorized.

Counsel then argues that:

Congress has enumerated all of the grounds of inadmissibility in INA 212, including unlawful presence in the United States. Even INA 212, however, does not include unauthorized employment or violation of nonimmigrant status. Instead the INA provides for penalties for unlawful employment and violation of nonimmigrant status in other sections, including 245(c) (barring adjustment of status), 248 (barring change of nonimmigrant status), and 237(a)(1)(C) (providing for removal of nonimmigrants who violate their status). By attempting to add violation of nonimmigrant status as a bar to approval of an immigrant visa petition – in effect adding another ground of inadmissibility to INA 212 – the USCIS clearly exceeds its authority and acts in direct violation of the statutory scheme.

Counsel's arguments are without merit. Section 101(a)(27)(C)(iii) of the Act, 8 U.S.C. § 1101(a)(27)(C), 203(b)(4)(iii), contains no explicit language permitting aliens who had worked in the United States to meet the qualifying work experience without regards to their lawful immigration status. Accordingly, as Congress has not explicitly spoken to this issue, USCIS has properly exercised its authority in its implementing regulations for section 101(a)(27)(C)(iii) of the Act. Counsel's argument regarding section 212 of the Act is inapplicable as a failure to qualify for an immigrant visa under section 203(b)(4) of the Act does not, by itself, make an individual inadmissible for entry into the United States.

Counsel also asserts that even if the regulation at 8 C.F.R. § 204.5(m)(iii) "could surmount step one of the Chevron analysis . . . it could not survive step two." Counsel states:

Step two would permit an interpretation of the statute if it were ambiguous or silent as to the nature of the qualifying employment. However, even then, the regulation must be a reasonable construction of the statute [sic]. . . . [E]ven if it were ambiguous, the interpretation is not reasonable because it conflicts with the entire statutory scheme as discussed above. Also, the regulation purports to add to (and therefore violates) the purpose of the statute, which is to ensure that a religious worker is properly qualified.

Finally, step three provides for broad deference to the agency regulations if it has been given explicit statutory authority to modify the statute. In this case the statute providing for the religious worker category . . . does not invite USCIS to add additional requirements by regulation.

Counsel's argument assumes that that the AAO has the authority to overturn or ignore controlling regulations.

It is well settled that the regulations which the Service [now USCIS] promulgates have the force and effect of law and are binding on the Service. *Bridges v. Wixon*,

326 U.S. 135, 153 (1945); *Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923); *Matter of A-*, 3 I&N Dec. 714 (BIA 1949); cf. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984); *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980).

*Matter of L-*, 20 I&N Dec. 553, 556 (BIA 1992). The regulations at 8 C.F.R. § 204.5(m)(4)(11) is binding on USCIS employees, including AAO officers, in their administration of the Act. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C., 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). An agency is not entitled to deference if it fails to follow its own regulations. *U.S. v. Heffner*, 420 F.2d 809, (C.A. Md. 1969) (government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down).

USCIS published the current regulations at 8 C.F.R. § 204.5(m) on explicit instructions from Congress. The wording of the relevant legislation demonstrates Congress' interest in USCIS regulations and the agency's commitment to combating immigration fraud. 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 –

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).

In proposing the requirement that all prior qualifying employment must have been authorized and “in conformity with all other laws of the United States” such as the Fair Labor Standards Act of 1938 and “tax laws,” USCIS explained that “[a]llowing periods of unauthorized, unreported employment to qualify an alien toward permanent immigration undermines the integrity of the United States immigration system.” 72 Fed. Reg. 20442, 20447-48 (April 25, 2007). Accordingly, the adoption of the final rule requiring that all prior qualifying employment have been lawful clearly comports with the explicit instructions from Congress to “eliminate or reduce fraud.”

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 ordered USCIS to publish, 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's interpretation and application of those regulations.

The regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to establish that the beneficiary was in a lawful immigration status and authorized to work in the United States during the qualifying period of November 18, 2007 to November 18, 2009. The petitioner submitted no documentation to establish that the beneficiary was in a lawful immigration status and authorized to work in the United States during this period. Additionally, USCIS records do not indicate that the beneficiary was authorized to work.

Beyond the decision of the director, the petitioner submitted no documentation to establish that the beneficiary received cash donations for his support while he worked for the petitioning organization. The petitioner also submitted none of the documentation outlined in the regulation at 8 C.F.R. § 204.5(m)(11) to establish that the beneficiary worked in any qualifying capacity during the statutorily required period.

Accordingly, the petitioner has failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the visa petition.

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).

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.

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<sup>1</sup> Pub. 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.