

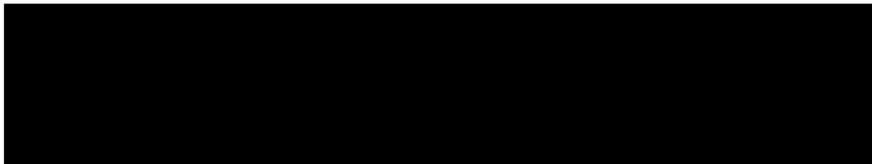
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
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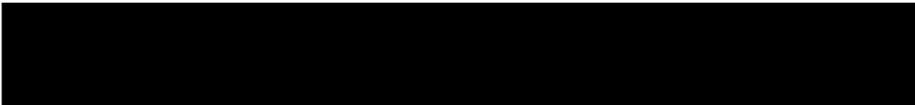
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Date: **MAY 09 2012**

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 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 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 pastor. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

The petitioner submits no additional evidence on 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 U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or 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 petition on February 11, 2010. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work in lawful immigration status throughout the two-year period immediately preceding that date.

The USCIS 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.

On the Form I-360 petition and in an accompanying letter, the petitioner asserted that it has employed the beneficiary as a full time pastor throughout the two-year period immediately preceding the filing date of the petition. The petitioner did not provide the information requested on the Form I-360 petition regarding the beneficiary's date of arrival, I-94 #, current nonimmigrant status or the expiration of such status, and the petitioner did not submit any evidence regarding the beneficiary's immigration status. Service records do not indicate that the beneficiary held any lawful status in the United States that would have authorized him to work for the petitioner during the qualifying two-year period. Accordingly, any work performed by the beneficiary during that time is not considered qualifying prior experience under 8 C.F.R. § 204.5(m).

On August 24, 2010, USCIS issued a Request for Evidence, in part instructing the petitioner to submit evidence to establish that the beneficiary was maintaining lawful immigration status during the two years immediately preceding the filing date of the petition. In response to the notice, the petitioner again asserted that the beneficiary had been employed by the petitioning church as a full time pastor throughout the qualifying period, but did not address the issue of the beneficiary's immigration status.

In the decision, issued on October 22, 2009, the director stated the following:

The petitioner submitted Form W-2, Wage and Tax Statements for 2008 and 2009. However, the petitioner failed to submit evidence establishing that the beneficiary was in lawful status from 2008 to the date of the filing of the petition.

Therefore, the evidence is insufficient to establish that the beneficiary has been performing full-time work for at least the two-year period immediately preceding the filing of the petition in lawful immigration status.

On appeal, the petitioner does not argue that the beneficiary maintained lawful status during the qualifying period. Rather, counsel for the petitioner argues that the requirement of lawful status and work authorization during the qualifying period violates the petitioner's constitutional rights. Counsel states, in part:

The Service correctly points out that 8 CFR 204.5(m)(11) states that "qualifying prior experience during the two years immediately preceding the petition... must have occurred after the age of 14, and if acquired in the U.S., must have been authorized under U.S. immigration law."

However, under 8 CFR 204.5 ("Petitions for employment-based immigrants"), where the regs list all the requirements for qualifying experience for employment-based petitions, **ONLY RELIGIOUS WORKERS** of all the employment-based immigrants have the requirement that they "must have been authorized under U.S. immigration law" for the prior-experience requirement.

By adding an extra requirement to immigrant petitions for **RELIGIOUS WORKERS**, the USCIS policy violates the petitioner's Constitutional rights under the First Amendment. Under accepted principles of law, any abridgement of a U.S. citizen's first amendment rights must be narrowly tailored to further a vital national interest. Furthermore, any abridgement of a U.S. citizen's first amendment right must receive **STRICT SCRUTINY**, to insure that restrictions of religious liberty are narrowly tailored to advance a vital national interest.

(Emphasis in original). Counsel goes on to argue that the requirement of lawful status "has no rational basis" and "serves no purpose in verifying the bona fides of a religious worker petition."

USCIS revised its special immigrant religious worker regulations effective November 26, 2008 based on instructions from Congress. The wording of the relevant legislation demonstrates Congress' interest in USCIS regulations and the agency's commitment to combating immigration fraud in the religious worker context. 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))

In proposing the requirement that all prior qualifying employment 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 promulgate, 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.

The beneficiary lacked employment authorization and lawful immigration status during the two years immediately preceding the filing of the petition. Therefore, the petition does not meet the regulatory requirements of 8 C.F.R. §§ 204.5(m)(4) and (11). The director properly denied the petition on that ground and the AAO will affirm that decision and dismiss the appeal for that reason.

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. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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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.