



U.S. Citizenship
and Immigration
Services

(b)(6)

MAY 14 2013

DATE:

OFFICE: CALIFORNIA SERVICE CENTER

FILE:

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 a notice from the Administrative Appeals Office relating to 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 in accordance with the instructions on 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The director dismissed several motions and the Administrative Appeals Office (AAO) rejected an appeal and dismissed a motion. The matter is now before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner is a Buddhist temple. 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 rimpoche, which the petitioner compares to an archbishop. The director determined that the petitioner had not established that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits supporting exhibits and a short statement from counsel. Counsel also stated that a brief would follow within 30 days. Counsel later requested an extension until February 11, 2013. That date has passed and the AAO has no record of receiving any supplemental filing. Therefore, the record is complete.

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, 2015, 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, 2015, 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 USCIS regulation at 8 C.F.R. § 204.5(m)(11) reads:

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 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 record shows that the beneficiary entered the United States on February 23, 2009, as a B-2 nonimmigrant visitor for pleasure, a classification that does not permit employment. *See* 8 C.F.R. § 214.1(e).

The director denied the petition on January 6, 2010 because, as a B-2 nonimmigrant, the beneficiary could not have performed authorized, qualifying religious work in lawful immigration status throughout the two years immediately preceding the petition's filing date. On February 5, 2010, counsel mailed the petitioner's motion to reopen and reconsider the decision. The director received the motion on February 16, 2010, 11 days after its mailing and 41 days after the issuance of the decision.

The USCIS regulation at 8 C.F.R. § 103.5(a)(1)(i) requires motions to reopen or reconsider to be filed within 30 days of the USCIS decision that the motion seeks to reconsider or reopen. The USCIS regulation at 8 C.F.R. § 103.8(b) adds another three days to the response time when, as here, USCIS serves its notice by mail. The date of filing is not the date of submission, but the date of actual receipt with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On March 8, 2010, the director dismissed the motion due to its untimely filing. The petitioner, through counsel, filed a motion to reopen on April 2, 2010, asserting that the U.S. Postal Service, not the petitioner, was responsible for the delay in delivery of the first motion. The director dismissed the second motion on April 27, 2010, stating “the petitioner has not stated new or relevant facts in this motion or the prior motion . . . which might support a conclusion other than the one already reached by USCIS in this matter.”

Counsel signed a third Form I-290B, this time designating it as an appeal to the AAO. USCIS received the appeal on May 26, 2010. The appeal did not include a new Form G-28, Notice of Entry of Appearance as Attorney or Representative, as required by the USCIS regulation at 8 C.F.R. § 292.4(a).

On January 17, 2012, the AAO contacted counsel by facsimile, instructing counsel to submit a new, fully executed Form G-28 to the AAO. The AAO stated: “Failure to submit this required document will result in the rejection of the appeal as improperly filed,” as required by the USCIS regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(2). A transaction report in the record confirms that the AAO successfully transmitted the message to counsel’s facsimile number of record at 4:54 p.m. on January 17, 2012. The AAO received no response, and rejected the appeal on March 12, 2012.

The petitioner, through counsel, filed another motion to reopen and reconsider on April 13, 2012. In that motion, counsel claimed not to have received the AAO’s facsimile message of January 17, 2012. Counsel stated: “Had I received that fax, I could have sent the G-28 immediately since we have 2 extra Form[s] G-28 signed by the Petitioner.”

The requirement for a new Form G-28 exists to ensure that counsel still represents the petitioner. For this reason, the regulation at 8 C.F.R. § 292.4(a) specifically requires “a new form.” An old form, previously signed but newly dated, would not be “a new form.”

The AAO rejected the motion on September 27, 2012. The AAO noted that the record contains proof of successful transmission of the facsimile message. The AAO also stated that, because the AAO rejected the appeal, it rendered no decision either affirming or reversing any prior action, and therefore “there is no decision on the part of the AAO that may be reopened or reconsidered in this proceeding.” The AAO further stated:

According to 8 C.F.R. § 103.5(a)(1)(ii), jurisdiction over a motion resides in the official who made the latest decision in the proceeding. The AAO did not enter a decision on this matter. Because the disputed decision was rendered by the director, the AAO has no jurisdiction over the instant motions and the motions must be rejected.

On October 26, 2012, the petitioner, through counsel, filed another motion to reopen and reconsider that returned to the merits of the petition and disputed the director’s initial denial notice of January 6, 2010. Counsel also recounted the history of the proceeding, stating that the AAO “allegedly” requested a new Form G-28. Counsel also repeated the assertion that the initial motion was mailed on a timely basis, and that the delay in its delivery was beyond the petitioner’s control.

On November 26, 2010, the director dismissed the motion. The director stated:

The beneficiary entered the United States on February 22, 2009 as a B2 nonimmigrant valid to August 22, 2009. . . . Therefore, the petitioner has not established that the beneficiary has been employed as a religious worker for at least the two year period immediately preceding the filing of the petition.

The petitioner has not stated new facts that are supported by affidavits or other documentary evidence. Furthermore, the petitioner has not stated reasons for reconsideration that are supported by precedent decisions. As such, this filing does not meet the definition of either a motion to reopen or motion to reconsider.

The petitioner, through counsel, filed another appeal on December 27, 2012.

Since 2010, counsel has filed a total of six appeals and motions on the petitioner's behalf. Unless USCIS directs otherwise, the filing of a motion to reopen or reconsider or of a subsequent application or petition does not stay the execution of any decision in a case. 8 C.F.R. § 103.5(a)(1)(iv).

Counsel, in recent filings, has asserted that the motions and appeals have been necessary because the director erred in dismissing the first motion. Counsel has noted that the regulation at 8 C.F.R. § 103.5(a)(1)(i) permits the untimely filing of a motion to reopen "in the discretion of [USCIS] where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner."

The above regulatory provision applies only to motions to reopen, not to motions to reconsider. Therefore, any discretionary consideration given to the first motion would apply only insofar as the first motion met the requirements of a motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

The exhibits included with the petitioner's first motion consisted of a letter (not an affidavit) from [REDACTED] president of the petitioning entity, and partial photocopies of various books relating to religious practices in the petitioner's religious denomination. The temple official stated that the beneficiary

is considered to be a reincarnated Holy Being or Buddha. . . .

By virtue of his reincarnation as a Holy Being, the beneficiary is considered a Holy Being for life. Wherever he is, he performs his religious functions. The beneficiary does not receive any salary. He need not work as a religious worker as known in the Christian or Jewish religion, but members of the sect worship him as a Holy Being wherever he goes.

As a Holy Being, the beneficiary can not work in any secular occupation. His mere presence before the members is by itself a religious act.

Although the beneficiary has been in the United States as a visitor since February 22, 2009, he is considered to be performing religious functions not only since his physical birth but in his previous life as a Holy Being.

The photocopied documents included an explanation of the doctrine of reincarnation, and “[a] short biography of the beneficiary’s previous life under the name [REDACTED]”

It is counsel’s contention that, if the director had considered the above materials in the first motion, the five motions and appeals that followed would not have been necessary. This claim, however, presumes that the director would have found those materials sufficient to establish the beneficiary’s eligibility for the classification sought.

Counsel, in the latest appeal, states that the director “erred in not considering that the Beneficiary . . . does not cease to become a religious being just because he is visiting a foreign country.” At issue in this proceeding is not whether the petitioner considers the beneficiary to be “a Holy Being,” but whether the beneficiary meets eligibility requirements specified in the statute and regulations.

Determining the status or duties of an individual within a religious organization is one thing; determining whether that individual qualifies for status or benefits under our immigration laws is another. Authority over the latter determination lies not with the [petitioning religious organization] or any other ecclesiastical body but with the secular authorities of the United States.

Matter of Hall, 18 I&N Dec. 203, 207 (BIA 1982).

The petitioner contends that the beneficiary is, by his very nature, “a Holy Being” whose “mere presence before the members is by itself a religious act.” Section 101(a)(27)(C)(iii) of the Act, however, requires the beneficiary to have “been carrying on such vocation, professional work, or other work continuously for at least the 2-year period” preceding the filing date. Simply existing as an object of reverence is not “carrying on . . . work.” Similarly, the regulation at 8 C.F.R. § 204.5(m)(4) requires the beneficiary to “[h]ave been working in” a qualifying religious occupation or vocation during the two years immediately prior to the filing date. The same regulation permits a short break in active experience, provided “[t]he alien was still employed as a religious worker.” 8 C.F.R. § 204.5(m)(4)(i). The phrase “still employed” makes sense only if other references to “experience” are presumed to refer to employment. Likewise, the regulation at 8 C.F.R. § 204.5(m)(11) includes the phrase “employed in the United States” in reference to qualifying experience.

The Form I-360 petition included an employer attestation. Line 5 of that attestation included the following sections:

Detailed description of the alien’s proposed daily duties:

Give teachings, lead chanting, perform prayer ceremonies, guide those who are dying, counsel the congregation and direct pujas (meditative rituals) and healing ceremonies.

* * *

Description of the proposed salaried and/or non-salaried compensation:

In the Buddhist tradition, its religious workers do not receive salary but they are fully provided with free board and lodging and medical insurance, clothing and transportation allowance.

The petitioner, therefore, has indicated that there are duties for the beneficiary's position; his role is not simply to be worshipped. Furthermore, the petitioner has stated that the beneficiary would receive non-salaried compensation for his work. If, after his arrival in the United States, the beneficiary was performing the above functions, in exchange for room, board, and other benefits, then he was employed without authorization. The Board of Immigration Appeals has held that an individual who "receives compensation in return for his efforts on behalf of the Church" is "employed" for immigration purposes, even if that compensation takes the form of material support rather than a cash wage. *See Matter of Hall*, 18 I&N Dec. 205. Such unauthorized employment is disqualifying on its face.

In the alternative, if the beneficiary was in the United States purely as a tourist, as his B-2 nonimmigrant status permitted, and he did not perform religious duties in exchange for salaried or non-salaried compensation, then he was not "carrying on" qualifying religious work or accumulating qualifying "experience" while "employed in the United States." This, too, is a disqualifying circumstance. The claim that the beneficiary was born into his role as a rimpoché does not address or overcome either of these two alternative circumstances.

The regulation at 8 C.F.R. § 204.5(m)(11) requires the petitioner to submit evidence (including IRS documentation) to establish the beneficiary's material support during his time in the United States. The petitioner has failed to submit any evidence to satisfy this requirement. The same regulation states: "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 has failed to document qualifying religious work prior to the beneficiary's arrival in the United States.

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 sustained that burden. Accordingly, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed.