



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **MAY 16 2013** 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:

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 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

(b)(6)

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion is granted. The AAO will reaffirm the denial of the petition.

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 an associate pastor of Hispanic ministries. 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 AAO, in its August 7, 2012 dismissal, agreed with the director's determination.

On motion, the petitioner submits a brief from counsel, a copy of the AAO's previous decision, and a copy of a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, authorizing representation of the petitioner on appeal by attorney [REDACTED]

In the decision dismissing the petitioner's original appeal, the AAO specifically and thoroughly discussed the petitioner's evidence and determined that the petitioner had not established that the beneficiary had the requisite two years of continuous qualifying work experience. The petition was filed on October 12, 2010. The petitioner submitted evidence that the beneficiary had applied for permanent residence and employment authorization based on a previously approved Form I-360 petition and was granted employment authorization with validity dates of November 16, 2009 to November 15, 2011. However, the AAO found that the employment authorization was terminated on June 18, 2010, when the Form I-360 petition was revoked and the Form I-485 application denied. The AAO found that the petitioner failed to establish that the beneficiary held any lawful status which would have authorized his employment prior to the approval of his employment authorization on November 16, 2009, or after the termination of that authorization on June 18, 2010. The AAO noted that any work performed during the qualifying period without lawful status and employment authorization is not considered qualifying experience under the regulations. The AAO acknowledged counsel's argument that, although the previous I-360 was approved on August 31, 2005, an approval notice was not provided at that time and "all participants involved were led to believe by USCIS that the case was still pending well after its approval," thereby causing a delay in the beneficiary's application for permanent residence and employment authorization. However, the AAO found that, regardless of whether the beneficiary had applied for and obtained work authorization earlier, he was nonetheless without lawful status or employment authorization following the termination of his work authorization on June 18, 2010. The AAO also determined that the petitioner failed to resolve discrepancies in the evidence regarding the beneficiary's employment history and compensation during the two-year qualifying period immediately preceding the filing of the petition.

The AAO discussed the argument, made by the petitioner and former counsel in response to a request for evidence and on appeal, that the beneficiary was entitled to protection from the accrual of unlawful presence and unauthorized employment under *Ruiz-Diaz v. United States of America*, No. C07-1881RSL (W.D. Wash. June 11, 2009). The AAO found that the court order in *Ruiz-Diaz* and the USCIS policy regarding that litigation do not waive or nullify the regulations at 8 C.F.R. § 204.5(m)(4) and (11), which require an alien's qualifying experience in the United States to have been authorized under United States immigration law. Rather, they waive the accrual of unlawful presence and

unauthorized employment in relation to adjustment applications. The AAO also noted the petitioner's argument on appeal that the director made errors in her statement of facts, but the AAO agreed with the director's conclusion 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.

On motion, counsel for the petitioner argues that the AAO made several errors in its adjudication of the appeal. First, counsel asserts that the AAO erroneously considered the petitioner to be self-represented on appeal, despite a Form G-28 indicating representation of the petitioner by an attorney. Counsel argues as follows:

As such, the entire argument of the attorney was erroneously ignored. The petitioner is entitled to the use of an attorney to represent him and this was not allowed by the USCIS, so a legal error has occurred, 8 CFR 292.1(a). This legal error has a prejudicial effect as none of the legal arguments presented by the attorney could be considered by the AAO.

Although the AAO acknowledges that a Form G-28 authorizing representation of the petitioner by [REDACTED] was overlooked on appeal, the AAO disagrees with the assertion that the error had a prejudicial effect. The arguments made by Ms. [REDACTED] in her brief accompanying the appeal were in fact discussed in the AAO's August 7, 2012 decision. On appeal, Ms. [REDACTED] noted errors in the director's statement of facts and argued that the beneficiary was delayed in applying for permanent residence and work authorization due to USCIS' failure to notify the parties of the approval of the Form I-360 petition. Additionally, Ms. [REDACTED] made an argument regarding the purported dates that the beneficiary was protected under *Ruiz-Diaz*. As discussed above, each of these issues was addressed by the AAO in its previous decision. As with any claim of a violation of due process, a violation of an immigration regulation will not render a decision unlawful unless the violation prejudiced the interests of the alien protected by the regulation. *United States v. Rangel-Gonzales*, 617 F.2d 529, 530 (9th Cir. 1980).

Counsel also argues that the AAO was incorrect in finding that the beneficiary's employment authorization terminated on June 18, 2010 upon the revocation of his Form I-360 petition and the denial of his I-485 application. Counsel correctly notes that, pursuant to 8 C.F.R. § 274a.14, USCIS was required to provide written notice of its intent to revoke the employment authorization with a "statement of the reasons indicating that revocation is warranted" and to provide the alien 15 days in which to submit evidence in opposition to the revocation. Counsel further argues that no such notice was provided and therefore the beneficiary's employment authorization remained valid "through to February 2012." The AAO finds that, as the director did not provide written notice of her intent to revoke employment authorization along with an opportunity to submit evidence, the beneficiary's employment authorization remained valid until its expiration on November 15, 2011. Accordingly, the AAO will withdraw its previous findings with regard to the beneficiary's lack of employment authorization during the qualifying period.

Finally, with regard to the noted discrepancies in the evidence regarding the beneficiary's employment history and compensation during the qualifying period, counsel argues that the beneficiary has more than two years of experience performing qualifying religious work immediately preceding the filing of the petition. Counsel acknowledges that the beneficiary was unpaid for a portion of the qualifying

period, but argues that “nothing in the statute or the regulations requires . . . that the beneficiary be paid, or that the beneficiary be in valid non-immigrant status” during the two-year qualifying period. In support of these interpretations, counsel cites the previous regulations regarding special immigrant religious workers, which are no longer in effect. USCIS revised its special immigrant religious worker regulations effective November 26, 2008 based on instructions from Congress to eliminate or reduce fraud in the religious worker context. Contrary to counsel’s assertions, the new regulations explicitly provide that any qualifying experience in the United States must have been performed in lawful immigration status and must have been authorized under immigration law. 8 C.F.R. § 204.5(m)(4) and (11).

The AAO disagrees with counsel’s assertion that the beneficiary’s unpaid religious work is qualifying experience under the regulations. In the preamble to the proposed rule, USCIS recognized that although “legitimate religious work is sometimes performed on a voluntary basis . . . allowing such work to be the basis for . . . special immigrant religious worker classification opens the door to an unacceptable amount of fraud and increased risk to the integrity of the program.” *See* 72 Fed. Reg. 20442, 20446 (April 25, 2007). The regulation at 8 C.F.R. § 204.5(m)(11) specifically requires that the alien’s prior experience have been compensated either by salaried or non-salaried compensation (such as room and board), but can also include self-support under limited conditions. In elaborating on this issue in the final rule, USCIS determined that the sole instances where aliens may be uncompensated are those aliens “participating in an established, traditionally non-compensated, missionary program.” *See* 73 Fed. Reg. at 72278. *See also* 8 C.F.R. § 214.2(r)(11)(ii). The petitioner has neither claimed nor established that the beneficiary was participating in such a program. Accordingly, any time the beneficiary may have spent in the United States “working” as a volunteer for the petitioner cannot be considered qualifying employment.

In support of his interpretations of the eligibility requirements for special immigrant religious workers, counsel additionally cites several Board of Immigration Appeals and court decisions as well as several unpublished AAO decisions. As all of the cited decisions predate the current regulations, the interpretations apply to regulations which are no longer in effect and are not relevant to the instant case. Additionally, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. As the beneficiary was an unpaid volunteer for a portion of the qualifying period, the AAO finds that the petitioner has not established that the beneficiary has the requisite two years of qualifying work experience immediately preceding the filing of the petition.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The AAO reaffirms the director’s decision of December 6, 2011. The petition remains denied.