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

(b)(6)

U.S. Citizenship and Immigration Services

Date: OCT 0 8 2013 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 the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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 minister to internationals. The director determined that the petitioner failed to establish that it qualifies as a bona fide non-profit religious organization in the United States and that the beneficiary had the requisite two years of continuous, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel, copies of two letters from the Internal Revenue Service (IRS) to the Executive Committee of the Baptist Convention of Georgia, printouts from the IRS website, and a document entitled "Group Ruling for United Methodist Churches."

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;
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> (ii) seeks to enter the United States –
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> > (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
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> (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 United States Citizenship and Immigration Service (USCIS) regulation at 8 C.F.R. § 204.5(m)(3) provides that in order to be eligible for classification as a special immigrant religious worker, an alien must be coming to work for a bona fide non-profit religious organization in the United States, or a bona fide organization which is affiliated with the religious denomination in the

United States. The regulation at 8 C.F.R. § 204.5(m)(5) states, in pertinent part:

> (5) Definitions. As used in paragraph (m) of this section, the term:
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> *Bona fide non-profit religious organization in the United States* means a religious organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the IRS confirming such exemption.
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> *Bona fide organization which is affiliated with the religious denomination* means an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code and possessing a currently valid determination letter from the IRS confirming such exemption.

The regulation at 8 C.F.R. § 204.5(m)(8) states:

> *Evidence relating to the petitioning organization.* A petition shall include the following initial evidence relating to the petitioning organization:
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> (i) A currently valid determination letter from the Internal Revenue Service (IRS) establishing that the organization is a tax-exempt organization; or
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> (ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or
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> (iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, as something other than a religious organization:
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> (A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;
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> (B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;

(C) Organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization; and

(D) A religious denomination certification. The religious organization must complete, sign and date a religious denomination certification certifying that the petitioning organization is affiliated with the religious denomination. The certification is to be submitted by the petitioner along with the petition.

The petitioner filed the Form I-360 petition on June 21, 2012. Accompanying the petition, the petitioner submitted an April 23, 2012 letter from the to the petitioning church, stating that "[a]ll churches and associations that are affiliated with the are covered by the tax exemption of The Executive Committee (*Group Exemption Number 1702*)" and listing examples of instances in which the petitioner may need proof of the exemption. The letter to the petitioner stated that a copy of the tax exemption letter was enclosed, but a review of the record indicates that the tax exemption letter was not submitted with the petition.

On August 29, 2012, USCIS issued a Request for Evidence (RFE) which, in part, instructed the petitioner to submit documentary evidence that it qualifies as a non-profit organization in accordance with 8 C.F.R. § 204.5(m)(8), including a determination letter from the IRS confirming that it is a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code.

In a letter responding to the notice, the petitioner stated: "We have already filed with you a copy of our Bona Fide Non-Profit Religious Organization Status in the United States (501(c)(3)) and the religious denominational affiliation certificate from the "

The director denied the petition on February 15, 2013, noting that the petitioner was specifically requested to provide a currently valid determination letter from the IRS confirming its exemption from taxation as described in section 501(c)(3) of the Internal Revenue Code but failed to provide such evidence. The director noted that the petitioner submitted a letter from the indicating that its subordinates were covered by a group exemption, but found that the "petitioner failed to show that it is in possession of a currently valid determination letter from the IRS confirming such exemption." The director therefore found that the petitioner had not established that it qualifies as a bona fide nonprofit religious organization in the United States.

On appeal, the petitioner submits a December 28, 1964 determination letter from the IRS to the stating that the organization was granted a group exemption under 501(c)(3). The petitioner additionally submits a March 20, 2007 letter from the IRS to the confirming the group exemption. On the Form I-290B, Notice of Appeal, counsel for the petitioner asserts the following:

provided a copy of a letter from the Internal Revenue Service to the Georgia Baptist Convention to establish s tax-exempt status; the letter from the IRS is dated July 20, 2011 and references a determination letter from December 1964, granting tax-Exempt status.

Counsel asserts that a determination letter from the IRS was provided at the time of filing. However, as discussed above, the record indicates that no such letter was provided. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

At issue on appeal is whether the director erred based upon the record that was him. At the time the petition was filed, the petitioner submitted no evidence of a currently valid determination letter from the IRS. In response to the RFE, the petitioner again failed to submit qualifying documentation of its federal tax-exempt status. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971). The petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. The AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The AAO finds no error on the part of the director in determining that the petitioner failed to establish that it qualifies as a bona fide nonprofit religious organization.

Counsel for the petitioner argues on the Form I-290B, Notice of Appeal or Motion, that "the position of USCIS violates the freedom of religion of , a freedom protected in the Constitution." In a brief submitted in support of the petition, counsel argues as follows:

> There are also constitutional issues: Churches that do not have qualifying federal tax exempt status are discriminated against. The Internal Revenue Service allows churches the status of being tax exempt, even where churches have not filed for tax exempt status. USCIS and its most current regulations make a distinction between churches with a legal tax exempt status and churches who are tax exempt but have not requested formal tax exempt status.

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 the preamble to the final regulations, USCIS acknowledged that the IRS does not require all churches to apply for a determination letter, but stated that the requirement is included in the final rule because it is a "valuable fraud deterrent" and an IRS determination letter provides "verifiable documentation that the petitioner is a bona fide tax-exempt organization or part of a group exemption." *See* 73 Fed. Reg. 72280, 72281 (Nov. 26, 2008). Accordingly, the adoption of the final rule requiring that all churches possess a determination letter 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 four times.[1] 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 petitioner cites no judicial finding that any of the current regulations violate the Constitution. Absent such a finding, the regulations remain binding on all USCIS employees, and neither the director nor the AAO has any discretion to set aside any provision of those 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). *See also Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission,* 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound

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[1] 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. Pub. L. No. 112-176 § 3245 (September 28, 2012) extended the program to September 30, 2015.

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); *Morton v. Ruiz*, 415 U.S. 199 (1974) (where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures).

The law requires USCIS to abide by its own regulations, and the AAO has no authority to overturn USCIS regulations.

As an additional ground for denial, the director found that the petitioner had not established that the beneficiary had the requisite two years of continuous, qualifying work experience immediately preceding the filing of the petition. The 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. 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 June 21, 2012.

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.

According to the Form I-360 petition and accompanying evidence, the beneficiary held H-4 nonimmigrant status throughout the two year qualifying period immediately preceding the filing of the petition. Pursuant to the regulation at § 214.2(h)(9)(iv), an individual holding such status may not "accept employment unless he or she is the beneficiary of an approved petition filed in his or her half and has been granted a nonimmigrant classification authorizing his or her employment." Further, the regulation at 8 C.F.R. § 214.1(e) provides that a nonimmigrant may engage only in such employment as has been authorized. Any unlawful employment by a nonimmigrant constitutes a failure to maintain status. The petitioner has not claimed and the record does not show that the beneficiary held employment authorization during the two year qualifying period. Accordingly, any work performed by the beneficiary in the United States during that time would not be considered qualifying experience under § 204.5(m)(11).

Accompanying the petition, the petitioner submitted a Certificate of Ordination indicating that the beneficiary was ordained as a minister by the petitioning church on March 7, 2010. In a job description for the proffered position, the petitioner asserted that it "has resolved to regularize the voluntary services of [the beneficiary]," and that the beneficiary "served as an 'Advisor' for for the past 3 years." The petitioner also submitted an uncertified copy of a 2011 tax return for the beneficiary and his wife, which listed the beneficiary's occupation as "Dependent" and his wife's occupation as "Teacher."

The August 29, 2012 RFE requested additional evidence regarding the beneficiary's work history during the two-year qualifying period immediately preceding the filing of the petition, including evidence of compensation received, and, if the experience was gained in the United States, evidence that the beneficiary was authorized to accept employment.

In a letter responding to the RFE, the petitioner stated that the beneficiary had served in the church ministry on a "voluntary" basis since 2007, with the church offering the beneficiary's family non-monetary "support."

On October 25, 2012, USCIS issued a Notice of Intent to Deny the petition (NOID) in which the petitioner was again instructed to submit documentation pursuant to the regulation at 8 C.F.R. § 204.5(m)(11) to show that the beneficiary was engaged in compensated, lawful qualifying employment during the two years prior to the filing of the petition. The notice stated in part:

> The petitioner has not shown any evidence to reflect that the beneficiary was engaged in qualifying work during the two years immediately preceding the filing of the instant petition on 6/21/2012. In fact, nothing in the record establishes that the beneficiary has been working full time for the petitioner with compensation.

In a letter responding to the NOID, the petitioner stated that the beneficiary "has not been salaried or remunerated by the Church since [he] does not yet have the necessary visa or documentation to earn a salary or other compensation," and that the beneficiary was supported by his wife while he "participated in the ministry of the Church." The petitioner submitted copies of tax returns for the beneficiary and his wife for the years 2009 through 2011, which indicated that the beneficiary received no income during those years. The petitioner also submitted an affidavit signed by the beneficiary and his wife, stating that the beneficiary worked full-time as an ordained minister for the petitioner "without remuneration."

In her February 15, 2013 decision denying the petition, the director found that the petitioner failed to establish that the beneficiary had the requisite two years of qualifying religious work immediately preceding the filing of the petition, noting that the petitioner's evidence did not show that the beneficiary was compensated or that he was authorized to accept employment under immigration law.

On appeal, the petitioner again asserts that the beneficiary worked as a full-time volunteer for the church and was supported by his wife during the qualifying period. The petitioner, through counsel, emphasizes that the beneficiary never engaged in unauthorized employment, and therefore maintained his lawful nonimmigrant status. In his brief, counsel for the petitioner states:

> There is no question but that Rev. had the right to volunteer his services as a minister at His work had been authorized by his Church. All the parties understood that Rev. could not be reimbursed for his services, but gladly performed services *gratis* for the Church.
>
> The Church has the right to determine if a person has been working full-time in the ministry of the Church. ...
>
> Where an organization "holds itself out publically as a religious institution, '[w]e cannot doubt that [it] sincerely holds this view.'" *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000). One might follow the same analysis with respect to the government's accepting a Church's statements that Rev. had, in fact, served the Church as a minister for at least two years prior to the Church's filing its I-360 petition.

At issue here is not whether the petitioner sincerely holds the view that the beneficiary performed full-time religious work for the two years immediately preceding the filing of the petition, but whether his work can be considered qualifying experience under USCIS regulations.

Regarding the petitioner's claim of the beneficiary's volunteer work within the United States, such work is not considered to be qualifying experience. 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 nonimmigrant 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.

Pursuant to the regulation at 8 C.F.R. § 204.5(m)(11), "Qualifying prior experience ... if acquired in the United States, must have been authorized under United States immigration law." As mentioned above, because the beneficiary held no employment authorization during the qualifying period, any work he performed in the United States during that time is not considered qualifying under the regulations.

In his brief, counsel additionally cites *Shia Association of Bay Area v. United States*, No. 11-1369 SC (N.D. Cal. Feb. 1, 2012), in which the United States District Court for the Northern District of California found that 2008 amendments to 8 C.F.R. §204.5(m)(4) requiring lawful status and employment authorization are ultra vires to the Immigration and Nationality Act. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Accordingly, the cited decision is not a relevant precedent decision. Regardless, *Shia* only relates to the issue of lawful status and employment authorization. As discussed above, the petitioner also failed to establish that the beneficiary's religious work was compensated.

For the reasons discussed above, the AAO agrees with the director's finding that the petitioner failed to establish that the beneficiary had the requisite two years of qualifying experience immediately preceding the filing of the petition.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.