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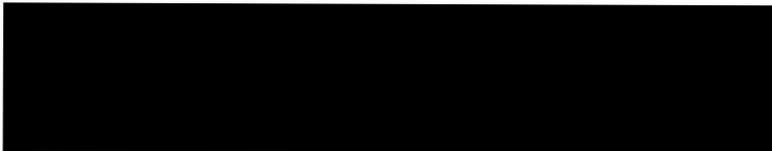
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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FILE: WAC 08 222 51057 Office: CALIFORNIA SERVICE CENTER Date: JUL 17 2009

IN RE: Petitioner:  
Beneficiary:



PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Buddhist temple. It seeks to classify the beneficiary as a nonimmigrant religious worker pursuant to section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1), to perform services as a monk. The director determined that the petition could not be approved because the beneficiary had no lawful immigration status at the time the petitioner filed the petition.

On appeal, counsel argues that the untimely filing was beyond the petitioner's control.

Section 101(a)(15)(R) of the Act pertains to an alien who:

(i) for the 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; and

(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

Section 101(a)(27)(C)(ii) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii), pertains to a nonimmigrant who seeks to enter the United States:

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) . . . 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) . . . 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.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.2(a)(1) requires that every application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form.

An employer seeking the services of an alien as an R-1 nonimmigrant must, where the alien is already in the U.S. and does not currently hold such status, apply for a change of status on Form I-129. 8 C.F.R. § 248.3(a).

The USCIS regulation at 8 C.F.R. § 248.1(b) states, in part:

*Timely filing and maintenance of status.* . . . [A] change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service, and without separate application, where it is demonstrated at the time of filing that:

- (1) The failure to file a timely application was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances.

The petitioner's submissions and USCIS records reveal the following timeline of events:

The beneficiary arrived in the United States under a B-1/B-2 nonimmigrant visitor visa on January 18, 2005. The beneficiary's B-1/B-2 status was valid through July 17, 2005. On March 3, 2005, seeking to work for the temple as an R-1 nonimmigrant religious worker, the beneficiary filed Form I-539, Application to Extend/Change Nonimmigrant Status (receipt number EAC 05 800 18309). The instructions accompanying that form, however, indicate that the form can only be used for certain listed classifications; it is not to be used for every conceivable change of nonimmigrant status. The instructions to the form do not include R-1 among the applicable classifications.

The director denied the Form I-539 application on April 22, 2005. In the denial notice, the director informed the beneficiary that his prospective employer "should file a Petition for a Nonimmigrant Worker (Form I-129)." The director also advised the petitioner of his right to file a motion to reopen or reconsider under 8 C.F.R. § 103.5.

On May 17, 2005, the beneficiary filed a motion to reopen the Form I-539 application. The director granted the motion and affirmed the denial of the application on August 12, 2005.

On July 17, 2005, the beneficiary's B-1/B-2 nonimmigrant status expired. Nearly a year later, on July 13, 2006, the petitioner filed an I-129 petition (receipt number WAC 06 225 52224) on the beneficiary's behalf, seeking to classify the beneficiary as an R-1 nonimmigrant religious worker. The director denied that petition on December 11, 2006 because 8 C.F.R. § 248.1(b) generally does not permit out-of-status aliens to change nonimmigrant status. At that time, the regulations did not permit appeals of denied R-1 petitions.

The petitioner filed the present Form I-129 on August 12, 2008. The director denied the petition on December 17, 2008, again because 8 C.F.R. § 248.1(b) does not permit its approval.

On appeal, the petitioner and counsel do not dispute any of the above circumstances. Counsel states:

It is true that Beneficiary was out of status when the I-129 petition was filed, but this was due to a good-faith error on part of Petitioner. When Petitioner first filed on behalf of Beneficiary on March 4, 2005, Beneficiary was in the United States under a valid B1/B2 status until July 17, 2005. If Petitioner had utilized the proper I-129 form, Beneficiary would have been able to change his status to R-1.

The assertion that the petition “would have been” approved if properly filed is not persuasive because, in reality, the petitioner did not properly file the petition. We must base our decision on what the petitioner did, rather than what the petitioner hypothetically could have done.

The language of 8 C.F.R. § 248.1(b)(1) is clear. An untimely application to change nonimmigrant status cannot be approved unless extraordinary circumstances beyond the control of the applicant or petitioner prevented a timely filing. Here, the circumstances were neither extraordinary nor beyond the petitioner’s control. The instructions to Form I-539 listed the applicable classifications, and R-1 was not among the classifications listed.

Counsel contends: “Petitioner was unable to act within the permitted time because of Petitioner’s inability to retain counsel and ignorance of the proper procedure, which led to the filing of the wrong form and consequently allowed Beneficiary to fall out of status.”

Counsel relies on an incomplete reading of events. The record shows that, on April 22, 2005, the director clearly stated that the petitioner “should file a Petition for a Nonimmigrant Worker (Form I-129).” When the director issued that decision, the beneficiary’s B-1/B-2 status was still valid, and would remain valid for almost another three months. Therefore, the petitioner had ample opportunity to file the proper form. The petitioner and the beneficiary, for whatever reason, chose not to do so, instead pursuing a motion to reopen the denied Form I-539 application, during which time the beneficiary’s nonimmigrant status expired.

Once the director identified the proper form, when ample time remained for the petitioner to file that form while the beneficiary’s status remained valid, the petitioner was no longer “ignorant of the proper procedure.” The petitioner’s failure to timely file Form I-129 was not beyond the petitioner’s control, and the petitioner has identified no extraordinary circumstances that prevented the petitioner from filing Form I-129 between April 22 and July 17, 2005.

Based on the above discussion, we find that the director properly denied the petition. The petitioner does not contest the factual grounds for the denial, and the regulations grant us no discretion to approve the petition despite those grounds. Accordingly, the AAO will dismiss the appeal.

**ORDER:** The appeal is dismissed.