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

U.S. Citizenship
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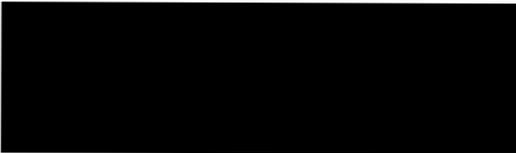
FILE: WAC 06 199 50461 Office: CALIFORNIA SERVICE CENTER Date: SEP 21 2009

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the application for change of status. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will reject the appeal and remand the petition for a decision on its merits.

The U.S. Citizenship and Immigration Services regulation at 8 C.F.R. § 248.3(a) states that an employer seeking the services of an alien as an R-1 nonimmigrant religious worker, 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. Thus, the petition form is also the application form for change of status, but the petition and the application are separate proceedings.

There is no appeal from the denial of an application for change of status. 8 C.F.R. § 248.3(g).

The director, in the denial notice, did not address the merits of the R-1 nonimmigrant petition. The director found only that the beneficiary is not eligible for change of status under 8 C.F.R. § 248. More specifically, the director found that the beneficiary had failed to maintain her previous B-2 status. This issue is not a valid basis for denying a petition for R-1 classification; it is only a ground for denying the concurrent application for change of status.

When the director denied the Form I-129 petition on January 23, 2009, the director provided instructions on how to appeal the decision to the AAO. This language was included in error, because the denial of an application for change of status cannot be appealed. The director's erroneous inclusion of appeal instructions in the denial notice does not supersede the regulations or give the AAO the authority to accept such appeals.

The regulation is binding on U.S. Citizenship and Immigration Services (USCIS) employees in their administration of the Act, and USCIS employees do not have the authority to allow for appeal rights where none exist. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound 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).

Even if a service center director incorrectly advised the petitioner that it had appeal rights, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Because 8 C.F.R. § 248.3(g) states that a denial of a change of status application cannot be appealed, we cannot accept, and therefore must reject, the appeal.

The above discussion concerns the application for change of status. Turning to the separate matter of the petition, the director did not issue any decision regarding the merits of the petitioner's claim that the beneficiary qualifies for R-1 classification. As we have already observed, the allegation that the beneficiary violated her B-2 status would affect her eligibility for change of status, but it does not directly address the merits of the underlying R-1 petition. Because an alien can obtain a nonimmigrant visa without an approved application for change of status (by traveling overseas and receiving the visa at a consulate), the director cannot simply assert that the beneficiary is ineligible for change of status and leave it at that.

The director must issue a decision on the merits of the R-1 petition. We hereby remand the matter to the director for that purpose.

ORDER: The appeal of the denial of change of status is rejected. The matter is remanded to the director for the purpose of a decision on the merits of the R-1 petition. If the director's R-1 decision is unfavorable to the petitioner, the director must certify that decision to the Administrative Appeals Office for review.