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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



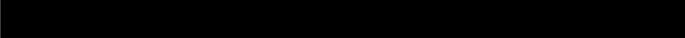
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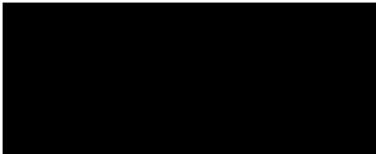
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FILE:  Office: CALIFORNIA SERVICE CENTER Date: SEP 10 2010

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based nonimmigrant visa petition. The Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter for a new decision. The director again denied the petition and certified the decision to the AAO for review. The AAO will affirm the certified decision.

The petitioner is a Protestant Christian church. It seeks to extend the beneficiary's stay as a nonimmigrant religious worker pursuant to section 101(a)(15)(R)(1) of the Act, to perform services as a pastor. The director determined that the petitioner had not submitted required documentation of the beneficiary's prior compensation; that the petitioner had not adequately shown the nature of the beneficiary's activities at a claimed home office; and that the beneficiary did not belong to the same religious denomination throughout the two years immediately preceding the filing of the petition.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.4(a)(2) indicates that the petitioner may submit a brief within 30 days after the director serves notice of a certified decision. The director issued the certified denial on April 29, 2010, but did not advise the petitioner of its right to submit a brief. Therefore, the AAO notified the petitioner of that right on June 23, 2010. The petitioner has submitted a brief and other documents in response to this notice. The AAO considers the record to be complete as it now stands.

In response to the certified decision, the petitioner submits a brief from counsel and several exhibits, many of them pertaining to removal proceedings underway at the Executive Office for Immigration Review. Those proceedings are separate from the petition under review in this proceeding. Counsel disputes allegations that a third party made against the beneficiary, and contends that these allegations have somehow prejudiced the outcome of the present proceeding. The denial, however, rested not on any such allegations, but on the petitioner's failure to meet specific evidentiary requirements found in USCIS regulations.

Counsel also requests oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, we deny the request for oral argument.

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 USCIS regulation at 8 C.F.R. § 214.2(r)(1) states that, to be approved for temporary admission to the United States, or extension and maintenance of status, for the purpose of conducting the activities of a religious worker for a period not to exceed five years, an alien must:

(i) Be a member of a religious denomination having a bona fide non-profit religious organization in the United States for at least two years immediately preceding the time of application for admission;

(ii) Be coming to the United States to work at least in a part time position (average of at least 20 hours per week);

(iii) Be coming solely as a minister or to perform a religious vocation or occupation as defined in paragraph (r)(3) of this section (in either a professional or nonprofessional capacity);

(iv) Be coming to or remaining in the United States at the request of the petitioner to work for the petitioner; and

(v) Not work in the United States in any other capacity, except as provided in paragraph (r)(2) of this section.

The petitioner filed the Form I-129 petition on August 1, 2008. The first stated ground for denial regards the beneficiary's past compensation. The USCIS regulation at 8 C.F.R. § 214.2(r)(12)(i) requires that any request for an extension of stay as an R-1 nonimmigrant must include initial evidence of the previous R-1 employment. If the beneficiary received salaried compensation, the petitioner must submit Internal Revenue Service (IRS) documentation that the alien received a salary, such as an IRS

Form W-2 or certified copies of filed income tax returns, reflecting such work and compensation for the preceding two years.

In both the initial denial and the certified decision, the director found the evidence of the beneficiary's previous R-1 employment to be insufficient. The AAO's March 24, 2010 remand notice did not explore this issue in depth because, under the regulation at 8 C.F.R. § 214.1(c)(5), there is no appeal from the denial of an application for extension of stay filed on Form I-129. Nevertheless, the regulations at 8 C.F.R. §§ 103.4(a)(4) and (5), taken together, permit the AAO to review, on certification, decisions for which there is no appeal procedure. Therefore, we will now consider the question of whether the petitioner has adequately established the beneficiary's past compensation.

The USCIS regulation at 8 C.F.R. § 214.2(r)(12)(i) requires that any request for an extension of stay as an R-1 must include initial evidence of the previous R-1 employment. If the beneficiary 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 filed income tax returns, reflecting such work and compensation for the preceding two years.

The beneficiary previously worked for the [REDACTED]. The [REDACTED] Form I-129 (receipt number [REDACTED]), filed on August 16, 2005, indicated that the [REDACTED] would pay the beneficiary \$40,560 per year. The petitioner's petition and extension request were pending when, on November 26, 2008, USCIS published new regulations, including the requirement at 8 C.F.R. § 214.2(r)(12) that the petitioner provide IRS documentation of past compensation. Supplementary information published with the new rule specified: "All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

On February 6, 2009, the director issued a request for evidence (RFE), instructing the petitioner to submit the newly-required IRS documentation and "an itemized record from the Social Security Administration" (SSA). In response, the petitioner submitted copies of IRS tax return transcripts, showing that the beneficiary reported earnings of \$58,408 in 2006 and \$36,262 in 2007. The petitioner also submitted a copy of IRS Form W-2, Wage and Tax Statements, indicating that the [REDACTED] paid the beneficiary \$57,008.00 in 2006, \$36,262.28 in 2007 and \$21,541.78 in 2008. The record does not identify the source of the extra \$1,400 the beneficiary reported on his 2006 tax return. An [REDACTED] paycheck dated April 4, 2008, is marked "Severance." The record shows that the beneficiary received his last paycheck from the [REDACTED] on June 27, 2008.<sup>1</sup>

In denying the petition on June 8, 2009, the director acknowledged the petitioner's submission of IRS documentation, but found that the petitioner did not submit the requested SSA documentation or "explain why it was not available. Therefore, USCIS is unable to review [the beneficiary's] employment and compensation history." On appeal, counsel made the general argument that the

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<sup>1</sup> Although the issue is outside of our jurisdiction in this proceeding, we note that, because the beneficiary's R-1 status permitted him to work only for the [REDACTED] from August 2005 to August 2008, the beneficiary effectively abandoned his R-1 status when he resigned from the [REDACTED] on March 6, 2008.

director had requested evidence not required by the regulations, but counsel did not specifically address the request for SSA documentation or explain the petitioner's failure to comply with that request.

We note that the regulation at 8 C.F.R. § 214.2(r)(16) permits the director to verify the petitioner's evidence through any means determined appropriate by USCIS. Because the beneficiary's 2006 income tax return shows income that is not reflected on the [REDACTED] IRS Form W-2 for that year, and because outside employment constitutes a failure to maintain status under the regulation at 8 C.F.R. § 214.1(e), the director had a legitimate interest in determining the source of all of the beneficiary's reported income for the year.

The AAO remanded the petition to the director on March 24, 2010, stating that the petitioner had overcome the stated grounds for denial but that the petitioner had not established eligibility. In its March 2010 decision, the AAO did not address the issue of the beneficiary's past compensation. Therefore, the remand order was not a finding that the petitioner had met its burden of proof in that regard.

In a new decision, dated April 29, 2010, the director concluded that "the beneficiary's income tax return information could not be verified for 2008. And the petitioner did not explain why it was not available." The director noted that, according to the record, the [REDACTED] supposedly increased the beneficiary's salary to \$43,084 per year in May 2007. The beneficiary's reported income for 2007, however, was only \$36,262.

The petitioner's lengthy response to the certified decision does not include any attempt to address the issue of the beneficiary's past compensation. Instead, counsel repeats the claim that the director "cannot retro[ac]tively apply the Nov 26, 2008 regulations to an R1 petition filed on June 30, 2008." The AAO discussed, and rejected, this argument in its earlier remand order:

[C]ounsel objected that "[c]hanging the rules in mid stream is arguably a violation of due process." Subsequently, on appeal, counsel again asserted that the director "violated the petitioner's due process rights by applying new R1 regulations issued on November 26, 2008 to an R1 petition filed [before that date]."

The wording of the relevant legislation demonstrates Congress' interest in USCIS regulations. 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))

When USCIS published the new rule in November 2008, it did so in accordance with explicit instructions from Congress. Supplementary information published with the new rule specified:

All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information.

73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). Furthermore, 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 three times.<sup>2</sup> On any of those occasions, Congress could have made substantive changes in response to the regulations they requested, 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). We may therefore presume that Congress has no objection to the new regulations as published, or to USCIS' interpretation and application of those regulations.

The director, therefore, acted in accordance with published USCIS policy by applying the new regulations to the pending petition. USCIS addressed due process concerns by requiring the issuance of an RFE to allow petitioners an opportunity to comply with the new documentary requirements. Neither the director nor the AAO has the authority to exempt the petitioner from the new requirements under the revised regulations.

Counsel offers no rebuttal to the AAO's prior determination, asserting that "[a]s a matter of law, [the director] cannot retroactively apply the new R1 rules to the [previously filed] petition." Counsel cites various U.S. Supreme Court decisions, in support of the principle that "courts should not apply statutes retroactively." This is not an instance of courts applying statutes retroactively. Rather, a federal agency is applying its own regulations retroactively. Counsel claims that we should presume this retroactive application to be contrary to congressional intent, but, as we have previously observed, Congress has never contested this retroactive application, despite three separate opportunities to do so when the statutory provisions required renewal. Therefore, we have no basis to conclude that the retroactive application of the regulations is in any way contrary to congressional intent. *Lorillard* clearly applies here.

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<sup>2</sup> 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. [Footnote reproduced from earlier AAO decision.]

We note that the previous regulations did not permit appeals to denials of R-1 petitions. It is, therefore, ironic that the petitioner filed an appeal in order to dispute the application of the regulations that made that appeal possible. Having acknowledged and asserted the petitioner's new appeal rights by pursuing the appeal, counsel cannot credibly assert that other new provisions do not apply. Counsel has, in effect, sought a selective application of the new regulations, accepting them when it is to the petitioner's benefit (by permitting an appeal), but not when it is to the petitioner's detriment (by requiring the submission of evidence that the petitioner either cannot or will not provide). The only logically consistent route would have been to file no appeal at all, on the grounds that the former regulations did not permit appeals.

Because the petitioner, in its latest submission, has made no attempt to contest the director's findings regarding the beneficiary's past compensation, those findings stand undisturbed.

The next issue concerns the physical location of the petitioning church and the question of where the beneficiary is to perform his duties. The USCIS regulation at 8 C.F.R. § 214.2(r)(8)(x) requires the petitioner to list the specific location(s) of the proposed employment. We will not repeat the discussion of this issue that appeared in the AAO's remand order, but we will summarize by noting that the petitioner has identified several different work sites, including the beneficiary's residence in [REDACTED]. In the remand order, the AAO described various schedules and documents, and stated:

If the beneficiary's other duties primarily take place at his own home, as the petitioner indicated on the aforementioned attestation, we would not necessarily expect a rigidly regimented hourly work schedule as might be the case when work takes place at a facility that is only available at certain hours of the day. The petitioner's failure to correlate specific functions with certain times of day is not, itself, reason to doubt the authenticity of the petitioner's claims. Each petition must be considered on its own merits, but in this particular proceeding we see nothing to undermine the petitioner's credibility.

In its finding, quoted above, the AAO indicated that there was nothing inherently disqualifying about the beneficiary performing some duties at home. This was not to say, however, that there could be no further inquiry about such duties.

In the new denial decision, the director found that the petitioner had failed to "describe and provide evidence of activity at the home office location," and that "USCIS cannot approve [a petition based on] unknown activity."

Once again, the petitioner's response to the certified denial contains nothing to dispute the director's findings, relying instead on the argument that the new regulations should not apply to this petition (except, obviously, the new provision granting appeal rights). Because the petitioner has made no further attempt to clarify the issue of the nature of the beneficiary's activities at home, we will not disturb the director's decision.

The third and final issue before the AAO concerns the beneficiary's denominational membership. The USCIS regulation at 8 C.F.R. § 214.2(r)(8)(ii) requires the petitioner to attest that the beneficiary has been a member of the prospective employer's religious denomination for at least two years. This mirrors the statutory requirement at section 101(a)(15)(R)(i) of the Act, quoted earlier in this decision. The denominational membership issue is the only ground for denial that the petitioner has chosen to contest on certification.

The USCIS regulation at 8 C.F.R. § 214.2(r)(3) defines a "religious denomination" as a religious group or community of believers that is governed or administered under a common type of ecclesiastical government and includes one or more of the following:

- (A) A recognized common creed or statement of faith shared among the denomination's members;
- (B) A common form of worship;
- (C) A common formal code of doctrine and discipline;
- (D) Common religious services and ceremonies;
- (E) Common established places of religious worship or religious congregations; or
- (F) Comparable indicia of a bona fide religious denomination.

In its prior decision, the AAO quoted [REDACTED], chairman of the petitioner's board of trustees, who stated:

[The petitioner's] origin is truly remarkable. In March of 2008, a core group belonging to the [REDACTED] formed a separate congregation based in Adelphi, Maryland. [The petitioner] is therefore an exponent of the Wesleyan movement within Christianity. . . . Although [the petitioner] recognizes [the Wesleyan Church's] basic principles, [the petitioner] does not ascribe to the corporate hierarchy of the Wesleyan church. . . . Other than this administrative difference, there is nexus between the principles of Wesleyan movement and [the petitioner].

The AAO also noted that the petitioner had acknowledged a "schism" between itself and the Wesleyan Church. The AAO stated:

In this proceeding, the petitioner has attempted to minimize the distinction between itself and the Wesleyan Church, stating that there is only an "administrative difference" in that the petitioner "does not ascribe to the corporate hierarchy of the Wesleyan church."

This distinction, however, is central to the discussion. . . . [T]he beneficiary's entire training, background and experience is within an established religious denomination whose "internal organization" includes a "corporate hierarchy" that the petitioner explicitly rejects. Given this significant difference, we cannot find that the petitioner and the Wesleyan Church are both "governed or administered under a common type of ecclesiastical government" as the plain wording of 8 C.F.R. § 214.2(r)(3) requires.

We note that article 6, section 305 of the Wesleyan Church's Constitution (found on page 30 of the *Discipline*) states that membership in the Wesleyan Church is "terminated" upon "[j]oining another religious body." The petitioner's acknowledged "schism" and open disavowal of the Wesleyan Church's organizational structure appear to be sufficient to infer termination of the petitioner's (and beneficiary's) membership in the Wesleyan denomination.

Having removed itself from the denomination's authority, the petitioner cannot claim that it shares a common ecclesiastical government with the Wesleyan Church. More broadly, we find that the petitioner has taken deliberate steps to remove and dissociate itself from the Wesleyan Church, and therefore we cannot find that the petitioner and the Wesleyan Church are the same denomination for the purposes of this petition. This is a disqualifying finding that prevents approval of the petition.

In the subsequent denial notice, the director noted some apparent doctrinal distinctions between the Wesleyan denomination and the petitioner, regarding such issues as baptism and grounds for obtaining or losing membership. The director found that "the petitioner has not established that the beneficiary's [former] church shares [a] common creed and practice with the petitioner or that the beneficiary has met [the] two year membership requirement."

In response, counsel argues that the director "focused solely on the common government, common administration [provisions of the regulations] – clearly in contradiction to USCIS's interpretation . . . that 'the definition is premised on the shared faith and worship practices of the institution, rather than on their formal affiliation.'"

While the regulatory definition of "religious denomination" is flexible in order to accommodate churches that exist outside of a formalized denominational framework, that flexibility does not require us to ignore such frameworks where they already exist. As it stands, there is an established, recognized Wesleyan Church denomination, with its own formalized internal structure and its own guidelines as to who belongs to the denomination and who does not. We cannot usurp the denomination's authority and declare that the beneficiary remains a member of the Wesleyan Church in spite of that church's doctrine and practice, any more than we could, for example, reverse an alien's excommunication from the Roman Catholic Church.

The beneficiary was trained and ordained within the Wesleyan Church denomination, and worked within that denomination until he resigned from the [REDACTED] in March 2008. He then left that

denomination by starting a new congregation outside of the authority of the existing Wesleyan Church hierarchy. The petitioner has submitted no evidence that the Wesleyan Church denomination still recognizes the beneficiary or the petitioner as part of that denomination. We will not accept a self-serving definition of "denomination" that forces us to ignore an admitted "schism" and the beneficiary's deliberate self-removal from denominational authority. The petitioner submitted a denomination certification, but it was signed by a local pastor rather than by an official with authority to speak on behalf of the Wesleyan Church.

We note that, even while counsel attempts to classify all sects influenced by John Wesley as a single, all-encompassing denomination, the petitioner submits copies encyclopedia entries concerning John Wesley and Methodism. One entry refers to Methodism as "a group of denominations within Protestant Christianity," specifically mentions "the Wesleyan Church" and states "[t]here are other denominations with similar titles." Another entry states: "The Methodist movement is a group of historically related denominations of Protestant Christianity." We do not consider these encyclopedia entries, by themselves, to be authoritative on the question at hand. Nevertheless, it is instructive that this material, which the petitioner has introduced into the record to support its argument, is in fact fully consistent with the AAO's position that the term "Wesleyan" refers to a family of denominations rather than a single religious denomination.

The record unequivocally shows that the beneficiary and the petitioner have severed their ties with the Wesleyan Church and established their own congregation which, while doctrinally similar, is denominationally distinct from the Wesleyan Church. We will affirm the director's finding in this regard.

The AAO will affirm the denial of the petition for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

**ORDER:** The director's decision of April 29, 2010 is affirmed. The petition is denied.