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



U.S. Citizenship and Immigration Services

PUBLIC COPY

[Redacted]

D13

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 25 2011

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

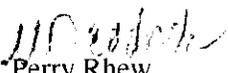
[Redacted]

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 \$630. 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, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a church belonging to the [REDACTED] (EPC) of the [REDACTED] (UMC). It seeks to classify the beneficiary as a nonimmigrant religious worker under 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 [REDACTED] Community Liaison – pastor to the [REDACTED] Community.” The director determined that the beneficiary had violated her nonimmigrant status.

On appeal, the petitioner submits a brief from counsel and exhibits in support of the argument that an “internal administrative error” by the UMC led to the revocation; that the UMC had remedied the error; and that, therefore, the petitioner had eliminated the grounds for revocation.

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)(I) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii)(I), pertains to a nonimmigrant who seeks to enter the United States solely for the purpose of carrying on the vocation of a minister of that religious denomination.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 214.2(r)(1), as in effect at the time the petitioner filed the petition, reads:

General. Under section 101(a)(15)(R) of the Act, an alien who, for at least the two (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, may be admitted temporarily to the United States to carry on the activities of a religious worker for a period not to exceed five (5) years. The alien must be coming to the United States for one of the following purposes: solely to carry on the vocation of a minister of the religious denomination; to work for the religious organization at the request of the organization in a professional capacity; or to work for the organization, or a bona fide organization which is affiliated with the religious denomination, at the request of the organization in a religious vocation or occupation.

The USCIS regulation at 8 C.F.R. § 214.2(r)(18) reads, in pertinent part:

(18) *Revocation of approved petitions.* (i) *Director discretion.* The director may revoke a petition at any time, even after the expiration of the petition.

* * *

(iii) *Revocation on notice.* (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

* * *

(4) The petitioner violated requirements of section 101(a)(15)(R) of the Act or paragraph (r) of this section; or

(5) The approval of the petition violated paragraph (r) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition.

The regulation at 8 C.F.R. § 214.2(r)(19) provides appeal rights in the event of revocation on notice.

The petitioner filed the Form I-129 petition on October 29, 2007. On that form, the petitioner indicated that the beneficiary was already an R-1 nonimmigrant religious worker, as a result of a prior petition. Part 2, line 2 of the Form I-129 offered the following choices:

- a. New employment (including new employer filing H-1B extension).
- b. Continuation of previously approved employment without change with the same employer.
- c. Change in previously approved employment.
- d. New concurrent employment.
- e. Change of employer.
- f. Amended petition.

The petitioner checked "e," "Change of employer."

The [REDACTED] Conference ([REDACTED]) of the UMC filed the earlier petition on or about November 8, 2004. The beneficiary's R-1 status under the 2004 petition authorized her to work for the [REDACTED] until November 10, 2007. She was not permitted to work for any other organizational unit of the UMC. Under the USCIS regulation at 8 C.F.R. § 214.2(r)(13), an R-1 nonimmigrant may not receive compensation for work for any religious organization other than the R-1 petitioner or the alien will be out of status. More generally, under 8 C.F.R. § 214.1(e) a nonimmigrant may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status.

Prior to November 26, 2008, the USCIS regulation at 8 C.F.R. § 214.2(r)(6) read:

Change of employers. A different or additional organizational unit of the religious denomination seeking to employ or engage the services of a religious worker admitted under this section shall file Form I-129 with the appropriate fee. The petition shall be filed with the Service Center having jurisdiction over the place of employment. The petition must be accompanied by evidence establishing that the alien will continue to qualify as a religious worker under this section. Any unauthorized change to a new religious organizational unit will constitute a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

The above regulation was in effect when the [REDACTED] filed its petition in 2004, and when the present petitioner filed its petition in 2007.¹

In a letter dated October 20, 2007, [REDACTED] of the petitioning church stated that the beneficiary "comes to us well suited for the job from the [REDACTED] (Brooklyn, NY) where she was the pastor from September 1, 2004 to April 30, 2007." [REDACTED] added that the beneficiary "is an integral part of our ministry at [the petitioning church]." These statements indicate that the beneficiary moved from the [REDACTED] to the petitioning church six months before the 2007 filing of the petition.

We note that, on July 20, 2007, the petitioner filed a Form I-360 special immigrant petition (with receipt number [REDACTED]) on the beneficiary's behalf. In that petition, like the nonimmigrant petition now under discussion, the petitioner indicated that the beneficiary had left the [REDACTED] in the spring of 2007 to work for the petitioner in Philadelphia.

On October 7, 2008, the director instructed the petitioner to submit additional information and evidence regarding the beneficiary's employment. In response, the petitioner submitted an October 24, 2008 letter from [REDACTED] superintendent of the [REDACTED] West District, who stated that the beneficiary "has worked as a full-time pastor at [REDACTED] in Brooklyn, NY from November 2004 to April 2007. Her salary was paid by the [REDACTED] of

¹ USCIS published revised regulations on November 26, 2008, which applied to all petitions pending on that date. See 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). Because the present petition was not pending on November 26, 2008 (having been approved nine days earlier), the AAO will not apply the revised evidentiary standards in the present proceeding.

the [redacted] [The beneficiary] was a member of [redacted] from November 2004 to April 2007.”

In a January 10, 2008 letter, [redacted] of the [redacted] General Board of [redacted] Ministries [redacted] stated:

[The beneficiary] is appointed as a full-time pastor in the [redacted] Conference of the [redacted]

The General Board of [redacted] Ministries, a mission agency of the [redacted] Church has been providing a salary supplement grant for [the beneficiary and her spouse] since 2005. In 2005 and 2006, both [the beneficiary and her spouse] were employed as full-time pastors in the New York area. In May 2007, [the beneficiary] changed her appointment to [redacted] at the [petitioning church].

The petitioner submitted copies of Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, showing that the petitioner paid the beneficiary \$33,341.56 in 2007. [redacted] [redacted] dated September and October 2008 show monthly payments to the petitioner from the EPC, marked “[redacted]”

In a letter dated November 2, 2008, [redacted] stated:

From November 2004 to April 2007, [the beneficiary] worked as a full-time pastor in the [redacted] of the [redacted]. In May 2007, [the beneficiary] was appointed at [the petitioning church] in [redacted] and her salary was paid through [the petitioning church] since then.

We . . . did not file a new R-1 petition for [the beneficiary] in May 2007 when we started to employ her because we did not consider [her] appointment as a change of employer. [The beneficiary] simply works for a different branch of the same employer, the [redacted] [redacted]. All her salary is paid by the same employer, the General Board of [redacted] Ministries of the [redacted], just through a different branch.

[redacted] did not discuss the regulation at 8 C.F.R. § 214.2(r)(6), which prohibits “[a]ny unauthorized change to a new religious organizational unit.”

The director approved the petition on November 17, 2008. Subsequently, on January 5, 2010, the director issued a notice of intent to revoke the approval of the petition. In that notice, the director found that the beneficiary was authorized to work only for the NYAC, not the petitioner, during mid-2007. The director determined, therefore, that the beneficiary violated her status by working for the petitioner before she received authorization to do so.

The record contains no response to the director's notice. Accordingly, the director revoked the approval of the petition on March 29, 2010, noting the absence of any response from the petitioner.

On appeal, counsel argues that the beneficiary "was in the employ of the [redacted] her authorized employer, for the period of time running from May 2007 until November 2007." [redacted] successor as superintendent of the [redacted] West District, claims that the beneficiary worked for the NYAC until November 2007, but "[d]ue to an administrative error, we have only recently compensated her for her employment for the period of time running from May 2007 through November 10, 2007."

[redacted] general treasurer of the [redacted] of the UMC, states that the [redacted] "provided a grant to the [redacted] to pay [the beneficiary's] salary." He states:

Unfortunately, probably because it was administratively easier and more direct to pay [the beneficiary's] salary to [the petitioner] while [the beneficiary] was in [redacted] [redacted] Ministries did not pay her salary to the [redacted] during that time. Instead, it paid her salary to [the petitioner]. . . .

In order to reverse these errors . . . [redacted] Ministries requested that [the petitioner] return to [redacted] Ministries . . . the total sum of the grant funds that [redacted] Ministries paid to [the petitioner] rather than to the [redacted] [The petitioner] has returned the full amount of the grant funds to [redacted] Ministries and [redacted] Ministries has paid that same amount to the [redacted]. The [redacted] has now repaid [the beneficiary] for the period running from May 1, 2007 through November 5, 2007.

The petitioner submitted documentation showing the transfer of funds as described above.

Counsel argues that we should accept this attempt to retroactively engineer a qualifying employment situation:

[redacted] relief should be recognized in this matter. Such equitable relief has a long and distinguished history in the field of immigration law, since 1940 (see matter of L-, 1 I. & N. Dec. 1 (A.G. 1940)). The use of the nunc pro tunc doctrine is used to return aliens to the position in which they would have been but for a significant error in their immigration proceedings. Please see Edward[s] v. Immigration and Naturalization Service 393 F.3d 299 (2nd Circuit, 2004), which recognized that nunc pro tunc relief should be made available in immigration cases.

Since that denial was the result of an internal administrative error within the [redacted] [redacted] which has now been corrected, we request that you consider [the beneficiary] to have been correctly employed by her authorized petitioner, the [redacted] [redacted], at all applicable times, [redacted]

The case law cited above, however, does not support counsel's argument. We quote, here, from the cited *Edwards* decision:

The equitable remedy of nunc pro tunc (literally "now for then") relief has a long and distinguished history in the field of immigration law. . . . When a matter is adjudicated nunc pro tunc, it is as if it were done as of the time that it should have been done. See *Matter of A-*, 3 I. & N. Dec. 168, 172-73 (BIA 1948) (remedying a prior failure to waive grounds of exclusion by entering an order nunc pro tunc).

. . . While our circuit has not previously explicitly invoked the nunc pro tunc doctrine in ordering relief for BIA error, we have, in substance, awarded just such relief where equity required. See *Drax v. Reno*, 338 F.3d 98, 118-19 (2d Cir.2003); see also *Iavorski v. INS*, 232 F.3d 124, 130 n. 4 (2d Cir.2000) (noting that nunc pro tunc relief has long been available to remedy error in immigration cases).

It is thus beyond question that an award of nunc pro tunc may, in an appropriate circumstance, be granted as a means of rectifying error in immigration proceedings.

Id. at 308-09 (endnote omitted). *Nunc pro tunc* relief is a remedy for administrative or judicial error *by the government*. It is not a means for a petitioner, or any related private entity, to correct its own errors or retroactively change disqualifying circumstances of its own making.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). This provision would, in many contexts, be meaningless if an applicant or petitioner could erase disqualifying circumstances simply by making changes after the fact, and then demanding that USCIS consider those changes to have already been in effect as of the filing date. USCIS and its predecessor, the Immigration and Naturalization Service, have consistently held that the applicant or petitioner must establish eligibility at the time of filing. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Regl. Commr. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

Similarly, the Board of Immigration Appeals has found that creating new documentation after the fact, to create circumstances more favorable to the petitioner or the beneficiary, calls into question the credibility and evidentiary weight of the new documentation. See *Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991); *Matter of Serna*, 16 I&N Dec. 643, 645 (BIA 1978) (discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). Counsel cites no case law to show that any court has discarded these regulations or binding precedent decisions on the grounds that they are inconsistent with *nunc pro tunc* relief.

We recall [REDACTED] claim that the [REDACTED] began paying the beneficiary through the petitioner rather than through the NYAC "probably because it was administratively easier and more direct." The petitioner itself, however, has submitted material that appears to contradict that claim. As

we have noted above, the petitioner filed a special immigrant petition on the beneficiary's behalf in 2007. The record of proceeding for that petition contains a three-page "Summary" of the "[redacted] Initiative / May 1 – September 30, 2007," dated October 2, 2007 and signed by [redacted]. In that document, [redacted] reported "some initial difficulty in getting the cash flow [sic] straightened out," during which time the petitioner paid the beneficiary "from our escrow account" until payments from the [redacted] could begin. This "difficulty" is not consistent with the 2010 claim that the new payment route was "administratively easier." We note that at no time does the 2007 "Summary" refer to the beneficiary as an NYAC employee who is somehow on loan to the petitioning church in [redacted]. The 2007 "Summary" is wholly consistent with the petitioner's reference to a "[c]hange of employer" on Form I-129.

For the reasons described above, we reject the argument on appeal that the beneficiary actually remained an NYAC employee even after she relocated to [redacted] and the petitioner began consistently referring to her as the petitioner's own employee. However the petitioner now chooses to portray the situation, in April/May 2010 the beneficiary left one "organizational unit" of the UMC – [redacted] under the NYAC's jurisdiction – and began working for a different "organizational unit – the petitioning church, under the EPC's jurisdiction. This is precisely the situation described in the USCIS regulation at 8 C.F.R. § 214.2(r)(6) (2007). However one may wish to contort the definition of "employ" (for instance, by arguing that the ultimate source of the beneficiary's salary remained the GBGM), the plain wording of the regulation requires the filing and approval of a new Form I-129 petition whenever "[a] different or additional organizational unit of the religious denomination seek[s] to employ *or engage the services* of a religious worker." It is indisputable that two different organizational units of the UMC, with non-overlapping geographic jurisdictions, engaged the beneficiary's services at a time when only the NYAC had authorization to do so.

We therefore agree with the director that the beneficiary violated her R-1 nonimmigrant status, which is grounds for revocation under 8 C.F.R. § 214.2(r)(18)(iii)(4). We also agree that, because the beneficiary was already in violation of that status at the time the petitioner filed the petition, the director should not have approved the petition. Therefore, the approval of the petition involved gross error, which is grounds for revocation under 8 C.F.R. § 214.2(r)(18)(iii)(5).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed.