

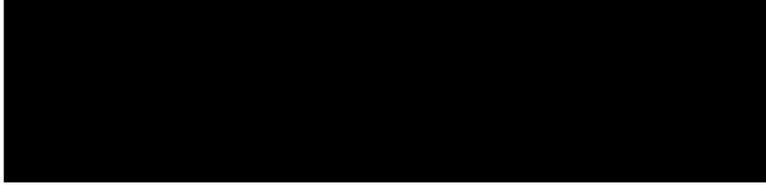
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

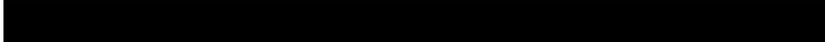


**U.S. Citizenship
and Immigration
Services**



D13

DATE: **APR 09 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE: 


IN RE: Petitioner: 
Beneficiary: 

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:


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.

Thank you,


Perry Rhew
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 AAO will withdraw the director's decision. Because other grounds prevent the approval of the petition, the AAO will remand the petition for further action and consideration.

The petitioner is a church belonging to the Eastern Pennsylvania Conference (EPC) of the United Methodist Church (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 "Chinese Community Liaison – pastor to the Chinese Community" from May 1, 2007 to October 28, 2007. The director determined that the petitioner would rely on an outside entity to pay the beneficiary's intended salary.

On appeal, the petitioner submits materials relating to church finances.

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.

U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 214.2(r)(1) state 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 USCIS regulation at 8 C.F.R. § 214.2(r)(11) states that the petitioner must submit verifiable evidence explaining how the petitioner will compensate the alien. The director, in denying the petition, cited the petitioner's identification of the UMC's General Board of Global Ministries (GBGM) as the source of the beneficiary's compensation. The director asserted that the petitioner, rather than any other body, must be the source of the compensation, because the above-cited regulation requires that "the petitioner will compensate the alien."

In arriving at this conclusion, the director missed a crucial and fatal flaw in the petition. The petitioner did not file the petition in order to employ the beneficiary. Rather, the petitioner seeks to remedy a violation of status that occurred several years in the past.

The AAO discussed the relevant facts in a January 25, 2011 decision regarding an earlier nonimmigrant petition, Form I-129 receipt number [REDACTED]. Briefly, the approval of a 2004 petition permitted the beneficiary to work for the New York Annual Conference (NYAC) of the UMC until November 10, 2007. The regulations in effect at the time included the following provisions at 8 C.F.R. § 214.2(r)(6):

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 beneficiary moved from the NYAC to the Eastern Pennsylvania Annual Conference in May 2007, without first obtaining USCIS authorization to change employers. The director ultimately revoked the beneficiary's R-1 nonimmigrant status based on this failure to maintain status. NYAC then attempted to show, through various financial transactions, that funds had been moved around to mirror the situation that would have existed had NYAC paid the beneficiary's salary throughout the period in question. The AAO held that the petitioner cannot, several years after the fact, retroactively create qualifying circumstances in an attempt to erase a known violation of status. The AAO stated:

[W]e reject the argument on appeal that the beneficiary actually remained an NYAC employee even after she relocated to Philadelphia 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 – Tian Fu UMC, 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.

The petitioner's then attorney of record, [REDACTED] contended that that the petitioner's financial transactions should qualify the beneficiary for "nunc pro tunc relief" by retroactively creating qualifying conditions. The AAO explicitly rejected this assertion, stating:

Generally, *nunc pro tunc* relief is a remedy for administrative or judicial error by the government as a means to prevent inequity or injustice. 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 Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

In the present proceeding, a new attorney continues to pursue the contention that the petitioner can, at this late date, erase the beneficiary's previous violation of status. Counsel, in an introductory brief, referred to the petition as a "request for 'nunc pro tunc' change of employment status." The petitioner filed the Form I-129 petition on February 24, 2011, but on that form, listed "Dates of intended employment" from May 1, 2007 to October 28, 2007.

It is not simply that the dates of intended employment elapsed before the date of adjudication; they elapsed before the date of filing. Counsel did not cite any statute, regulation or case law that would allow a retroactive filing in this manner. Counsel acknowledged that the beneficiary's violation of status disqualified her from various immigration benefits, but declared: "The instant Petition should be treated as having been filed on or about May 1, 2007," because the violation was not willful on the beneficiary's part, and because her congregation has come to depend on her services.

The petitioner has failed to establish that USCIS can properly approve a petition filed under these circumstances. Nevertheless, the director's sole stated ground for denial does not touch on this highly irregular situation. Therefore, the AAO hereby withdraws the director's decision, with instructions to issue a new decision that takes into account the petitioner's attempt to nullify an acknowledged violation of status more than three years after it occurred.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.