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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 12 2009

SRC 06 174 53287

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

[redacted]

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 employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a "multi-cultural evangelical church ministry." It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a minister. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a minister immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel, witness statements, and copies of previously submitted documents.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

> (i) for at least 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;
>
> (ii) seeks to enter the United States--
>
> > (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,
> >
> > (II) before October 1, 2008, 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) before October 1, 2008, 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; and
>
> (iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation, either abroad or in lawful immigration status in the United States, continuously for at least the two-year period immediately preceding the filing of the petition. The petition was filed on May 12, 2006. Therefore, the

petitioner must establish that the beneficiary was continuously performing qualifying religious work throughout the two years immediately prior to that date.

In an April 20, 2006 letter accompanying the initial filing of the petition, [redacted] of the petitioning entity, stated:

> As an Evangelist and Gospel translator in our denomination [the beneficiary] has worked with us since 1995 in India and continued to work for us on R1 visa here in USA since June 2000. He translates sermons, messages, seminars and appropriate gospel literature, bible study material including hymns. He also translates and interprets all the rituals, sacraments and ordinances with doctrines of the bible from Marathi to English and vice versa.

In a separate letter, dated April 15, 2006, [redacted] stated that the beneficiary "is our Ordained minister." To establish the beneficiary's credentials as a religious worker and an ordained minister, the petitioner submitted copies of various certificates, all of them signed by [redacted], issued to the beneficiary during a previous visit to the United States. Once of these certificates, dated March 31, 1995, states that the beneficiary:

> Has completed all the requirements of ordination as a minister, hence is hereby Commissioned to teach, preach, and proclaim the Gospel of our Lord Jesus Christ under the anointing of the Holy Spirit, to perform dedications, minister baptisms, to celebrate Holy Communion, to conduct Christian marriages, to officiate funerals, to heal the sick, to cast out devils, to exhort, to counsel, to rebuke and edify, to evangelize, to disciple, to equip the saints and to administer all the sacraments, ordinances, rituals and all the function[s] related to the church as authorized by the Bible[.]

A 2006 directory included in the initial submission indicated that the beneficiary served as an evangelist at Broad River International Family Church in Columbia, South Carolina.

The initial submission included a copy of the beneficiary's undated resume, attributed to [redacted]/ Co-ordinator." The "Experience" portion of the resume reads, in full:

> [The beneficiary] has worked as a Gospel Translator with our affiliate in India, since 1995 and continues to work here in USA with [the petitioner] on R1 visa valid until 05/22/2006.
>
> He translates and interprets sacraments, ordinances and rituals as solemnized, performed, administered or celebrated during the liturgy, mass, seminars, crusades or retreats in live sessions or services.
>
> He translates gospel sermons, messages; Sunday Schools & Bible school teaching for printed materials and also for audio productions from English to Marathi and vice versa.

> These printed materials are used in our Bible Academy, seminaries as well as in churches to spiritually and theologically equip the religious workers and laity with diverse cultural backgrounds.
>
> Sacraments, ordinances, and rituals are solemnized, celebrated, performed and translated by licensee only who are authorized and commissioned by Board of Directors of IBA.

On December 11, 2006, the director instructed the petitioner to submit additional evidence in support of the petition. In response, in a letter dated February 28, 2007, [redacted] repeatedly stated that the beneficiary "has not worked with any other organization" since he last entered the United States in 2000.

Copies of Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements indicate that Broad River International Church paid the beneficiary $28,500.00 in 2006. This amount matches the amount reported on the beneficiary's IRS Form 1040 income tax return for 2006. The petitioner did not submit copies of IRS Forms W-2 or other documentary evidence of payment for prior years.

Copies of earlier tax returns indicate that the petitioner reported $13,775.00 in earnings in 2005 and $13,495.60 in 2004, including about $5,000 in "housing or parsonage allowance" per year. The beneficiary did not include the "housing or parsonage allowance" under "wages" on his tax returns. Documents in the record indicate that "Clergy only" may claim a "Parsonage Allowance" that is not taxed as "wages." This indicates that the beneficiary considered himself to be "clergy," or at least represented himself as such on his tax returns.

Tax documents from 2005 and 2006 identify the beneficiary's employer as Broad River International Church; his claimed employer in 2004 was Lexington International Family Church.

On each of the tax returns, the beneficiary identified his occupation as "Gospel Translator." Only the 2005 return is signed and dated; that return bears the date March 16, 2006, consistent with timely filing of the return. The beneficiary reported "Self-employment tax" on his 2006 return, although the Form W-2 identified him as a church employee that year.

The record reflects that agents of Immigration and Customs Enforcement (ICE) arrested the beneficiary at a jewelry store on October 16, 2007. On October 24, 2008, the director issued a notice of intent to deny the petition. In that notice, the director stated:

> The petitioner claims that the beneficiary has worked for them since June 3, 2000 and he has not worked for any other organization. The beneficiary was found working at Gold Rush Jewelry Store. He was interviewed and stated that in 2003 he began working for different gasoline stations part time approximately 20-25 hours per week. In June or July of 2005 he began working at the Gold Rush Jewelry Store in Dutch Square Mall. As such the beneficiary does not have the required two years of experience in the position.

In response to the notice of intent to deny, counsel contended that the ICE agents did not possess the proper warrant to allow them to arrest the beneficiary at his place of work, or to subsequently interview the beneficiary regarding his employment. It is not disputed that the arrest and interview took place. Any procedural issues arising from the circumstances of ICE's actions lie outside the scope of the present proceeding. This proceeding concerns the beneficiary's eligibility for employment-related immigration benefits; it is not a hearing on the beneficiary's apprehension or detention. Because ICE is not a part of USCIS, USCIS has no jurisdiction over ICE, and alleged procedural deficiencies committed by ICE agents do not alter the facts under consideration by USCIS.

The petitioner submitted copies of extensive documents relating to the theological training that the beneficiary had undertaken in the 1990s. The director had not disputed the beneficiary's training, and this evidence does not address the beneficiary's apprehension at a secular place of business.

The petitioner also submitted copies of "Attendance Records" from the petitioning church, dated between October 2006 and July 2008, intended to show that the petitioner had regularly attended Sunday services at the petitioning church. Like his training more than a decade ago, the beneficiary's attendance at weekly church services is irrelevant to the allegation that he worked at a jewelry store. The petitioner did not explain why the beneficiary attended the petitioning church instead of Broad River International Church, where he was supposedly employed.

We note that the Employer Identification Number (EIN) listed by the petitioner on Form I-360, and shown on the petitioner's IRS non-profit determination letter, does not match the EIN shown on the IRS Forms W-2 from Broad River International Church. This indicates that the petitioner and Broad River International Church are not one and the same; they are separately incorporated entities with separate EINs.

Most of the documents relating to Broad River International Church show no physical address, only a post office box. Pay stubs, however, show the beneficiary's apartment address as the church's street address. Considering that even the beneficiary himself apparently does not attend services at the "church" in his own apartment, instead attending the petitioning church regularly enough to have his name pre-printed on the attendance forms, it is not at all clear what kind of "church" operates at the beneficiary's apartment. The petitioner has submitted photographs of the beneficiary holding a microphone inside a building that appears to be a church, rather than a residential apartment.

The pay stubs in the record include nine weekly stubs dated 2004, from Lexington International Family Church; five weekly stubs dated 2005 from "Board River Intn'l Family Church" (*sic*); and photocopies of six monthly stubs dated 2006 from Broad River International Church. We will discuss these materials further in the context of the appeal.

The petitioner submitted a November 21, 2008 affidavit from the beneficiary, which reads, in part (grammar and capitalization reproduced from original):

> On October 16, 2007 I was arrested as being "out of status" and with allegation that I was working at a jewelry store in a mall, both allegations are not true.
>
> The officer specifically inquired if I was working there which I clearly denied.
>
> I was informed that there was a complaint received from somebody in our church that I was working there at the mall but I have not seen that complaint to date. I have heard that [the petitioner's] personnel have filed complaints against that person who was excommunicated from the church for adultery and she has been making such complaints out of personal grudge. . . .
>
> The owner of the jewelry store is a muslim from India (an Ismaili) who seeks out religious and faith based discussions with me often. . . .
>
> I never worked for any gas station neither did I make any such statement to any officer.
>
> I am still with [the petitioning church] since my entry in June 2005.

The reference to the beneficiary's "entry in June 2005" is of concern because the record shows that the beneficiary entered the United States to work for the petitioner in 2000, not 2005.

The beneficiary's affidavit, unsupported by documentary evidence, does not persuasively overcome the allegations in the notice of intent to deny. Earlier descriptions of the beneficiary's duties did not indicate that his duties involved discussing religion at places of secular business. Furthermore, while the beneficiary impugns the alleged motivations of the unidentified person who is said to have alerted ICE to the beneficiary's activities, it remains that ICE was readily able to find the beneficiary at the jewelry store, not at a church, during regular business hours.

Counsel quotes the preamble of the petitioner's constitution, with its injunction to "[p]ropagate the Gospel . . . by all available means." Counsel contends that USCIS and ICE have violated the beneficiary's constitutionally guaranteed freedom of religion by prohibiting him from discussing religious matters at a jewelry store. This allegation misrepresents the circumstances of the beneficiary's arrest. ICE did not apprehend the beneficiary on suspicion of discussing religion in a secular setting. Rather, as shown on Form I-831, Continuation Page, appended to Form I-862, Notice to Appear, ICE apprehended the beneficiary because he was "observed . . . while working at The Gold Rush," and because the beneficiary had no lawful status in the United States, his R-1 nonimmigrant status having expired on May 22, 2006, well over a year before the October 2007 arrest.

The director denied the petition on December 19, 2008, based on the information that the beneficiary had worked at gas stations and a jewelry store during the two-year qualifying period. The director noted that the beneficiary's subsequent denial of such employment "is in direct conflict to the information he gave to the officers after his arrest." With respect to the credibility of the petitioner and the beneficiary, the director cited case law. It is incumbent upon the petitioner to resolve any

inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, counsel claims that the beneficiary's 2004-2006 tax returns are evidence of "continuous employment." The 2004-05 pay stubs submitted earlier indicate gross pay of $581.00 per week, which is equivalent to about $30,212.00 per year. The beneficiary's 2004 and 2005 tax returns, however, indicate that the beneficiary earned less than half that amount, reporting less than $14,000 per year in each of those two years. Only in 2006 does the annual figure shown on the tax documents, $28,500.00, match the pay stubs (which show $2,375.00 per month). The tax and payroll documents, therefore, are not consistent with continuous employment throughout the 2004-2006 qualifying period. Rather, the documents are consistent with lengthy interruptions in the beneficiary's compensation and, by inference, his employment. Furthermore, 8 C.F.R. § 204.5(m)(11)(i) states the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns. The petitioner submitted IRS documentation only for 2006. The documentation from earlier years does not conform to this regulatory requirement; the photocopied tax returns are not IRS-certified copies.

The petitioner submits a January 15, 2009 signed statement attributed to which reads, in part:

> I am the owner of the Gold Rush Jewelry store in Columbia, SC. . . .
>
> [The beneficiary] came to my store a number of times and spent time with me counseling me from the Bible. We have developed a very close and personal relationship over the years and he is now like a family member. He has also occasionally helped me in my daily affairs in my business and at home. I have never paid him money for his services in any form nor was he on my payroll as an employee.

An immigrant petition may be approved only upon a determination that "the facts stated in the petition are true." The petitioner must establish that the claims set forth in the petition are true; USCIS is not obliged to accept unproven claims. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988).

The assertion that the beneficiary "occasionally" volunteered at the jewelry store, and had the bad luck to be there when the ICE agents appeared, lacks credibility. Instead, the new claim on appeal has the hallmarks of an *ad hoc* explanation, intended to account for the beneficiary's presence at the Gold Rush store rather than at the church where he was supposedly employed at the time. Repeated prior descriptions of the beneficiary's alleged duties did not include spending time at retail stores, and if the beneficiary was in fact at such establishments, then he was not performing the duties that the petitioner had described earlier.

The petitioner submits a new statement from [redacted]. The new statement is structured like an affidavit, but the spaces for the date, notary's signature, and other information remain blank on the document in the record. Without at least the date, this document cannot be considered the legal equivalent of an affidavit under 28 U.S.C. § 1746.

In his new statement, [redacted] states: "Generally, I am traveling all over the world for ministry and with the busy schedule sometimes I do not read the whole file and sign papers in a rush but without an intent to deceive, mislead or evade the requirements of law." By signing the Form I-360 petition, [redacted] attested under penalty of perjury that "this petition and the evidence submitted with it is true and correct." The record contains numerous documents bearing his signature. He cannot evade responsibility for the content of those documents by claiming, now, that he signed them "in a rush."

[redacted] echoes the beneficiary's claim that an excommunicated former church member "spitefully complained to USCIS/DHS with false allegations." [redacted] claims "we have recently filed criminal complaints against her." Even if the record contained documentation that such complaints had indeed been filed, which it does not, that would not serve as proof that ICE acted on false information when its agents arrested an out-of-status alien at a retail store. Regarding the beneficiary's presence at that store, [redacted] claims that, once the beneficiary's R-1 status expired, "he wanted to do some 'field work.'" As with the statement attributed to [redacted]'s statement is tenuous and uncorroborated and appears to have been crafted to account for the known facts of the case, rather than as a factual historical narrative.

Counsel asserts: "only one question here is presented by the examiner, whether [the beneficiary] worked in the gas station or not." Counsel contends that, because the jewelry store owner has rebutted the assertion that the beneficiary worked at the store, the claim that the beneficiary "also worked at a gas station . . . is negated." The allegation regarding the gas stations is not the "only . . . question . . . presented by the examiner." The denial notice also commented on the beneficiary's undisputed presence at a jewelry store, apparently as an employee. The petitioner has not submitted competent objective evidence to overcome the concerns raised by the director. Counsel cites church attendance records and tithing records. Attendance at a church is not, by any stretch of the imagination, evidence of employment at that church. Counsel does not suggest that everyone named on the attendance records is or was an employee of the petitioning church. At best, the church attendance records demonstrate the petitioner's continuous presence in the Columbia area, in the vicinity of the shopping mall where he is alleged to have worked.

Notwithstanding counsel's assertions to the contrary, the petitioner has not overcome the evidence of secular employment during the qualifying period. Also, as we have already explained, the fragmentary payroll documentation fails to meet the regulatory requirements at 8 C.F.R. § 204.5(m)(11)(i), and the evidence the petitioner has submitted indicates, on its face, that the beneficiary did not work without interruption in 2004 or 2005. The beneficiary's tax returns for those years reflect less than half the amount that would be expected based on his claimed weekly pay. Therefore, there is no evidence that the petitioner consistently received paychecks throughout either of those years.

Based on the above discussion, the AAO affirms the director's finding that the petitioner has not established that the beneficiary performed qualifying religious work continuously throughout the two-year period preceding the petition's May 12, 2006 filing date. This finding is, by itself, sufficient to warrant denial of the petition and, by extension, dismissal of the appeal.

Beyond the decision of the director, review of the record reveals an additional evidentiary deficiency that prevents approval of the petition. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Pursuant to 8 C.F.R. § 204.5(m)(7), an authorized official of the beneficiary's prospective employer of an alien seeking religious worker status must complete, sign and date an attestation in which the prospective employer must specifically attest to all of the following:

> (i) That the prospective employer is a bona fide non-profit religious organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation;
>
> (ii) The number of members of the prospective employer's organization;
>
> (iii) The number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion;
>
> (iv) The number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years by the prospective employer's organization;
>
> (v) The number of special immigrant religious worker and nonimmigrant religious worker petitions and applications filed by or on behalf of any aliens for employment by the prospective employer in the past five years;
>
> (vi) The title of the position offered to the alien, the complete package of salaried or non-salaried compensation being offered, and a detailed description of the alien's proposed daily duties;
>
> (vii) That the alien will be employed at least 35 hours per week;

(viii) The specific location(s) of the proposed employment;

(ix) That the alien has worked as a religious worker for the two years immediately preceding the filing of the application and is otherwise qualified for the position offered;

(x) That the alien has been a member of the denomination for at least two years immediately preceding the filing of the application;

(xi) That the alien will not be engaged in secular employment, and any salaried or non-salaried compensation for the work will be paid to the alien by the attesting employer; and

(xii) That the prospective employer has the ability and intention to compensate the alien at a level at which the alien and accompanying family members will not become public charges, and that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization.

The record, as it now stands, contains some but not all of the information required above. Absent the required attestation, the petition cannot be approved under the regulations now in effect.

The appeal will be dismissed 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.