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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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 12 2010

WAC 06 184 51860

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO subsequently remanded the petition to the director for a new decision based on revised regulations. The director determined that the petitioner had failed to submit required evidence, and therefore the director again denied the petition and certified the decision to the AAO. The AAO will affirm the director's decision.

The petitioner is a church of the United Methodist denomination. 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 director of Christian education and deaconess. The director determined that the petitioner had not established that had the requisite two years of continuous qualifying work experience immediately preceding the filing date of the petition.

In response to the certified denial, the petitioner submits a brief from counsel and copies of various documents, many of them previously submitted.

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 September 30, 2012, 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 September 30, 2012, 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 U.S. Citizenship and Immigration Services (USCIS) 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 26, 2006. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work throughout the two years immediately prior to that date.

The USCIS regulation at 8 C.F.R. § 204.5(m)(11) reads:

> (11) *Evidence relating to the alien's prior employment.* Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:
>
> (i) 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 income tax returns.
>
> (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.
>
> (iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.
>
> If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

In a letter accompanying the initial filing, [redacted] of the petitioning church, stated:

> [The beneficiary's] theological training and studies include graduating in March 1991 from the Deaconess program with a Bachelor's degree in Kindergarten Education from Harris Memorial College, a United Methodist Christian college, in Taytay, Rizal, Philippines. Following her graduation, [the beneficiary] was commissioned as a Deaconess at Blas United Methodist Church from 1991 to 1993. From 1993 to 1995, [the beneficiary] was employed at Harris Memorial College on a special appointment by

> the Bishop of the United Methodist Church as a Deaconess Kindergarten Teacher. She was later appointed as a Deaconess/Christian Education Teacher at Tortugas United Methodist Church in the Philippines from 1995 to 2001. Since her arrival to the U.S. in August 2001, [the beneficiary] has been employed by [the petitioning church] as our Director of Christian Education/Deaconess.
>
> . . . [The petitioner] will pay [the beneficiary] a monthly salary of $1,855.83. Moreover, we will pay her an additional $200 per month for health insurance costs, as well as provide remuneration in the form of free room and board valued at approximately $1200 per month.

[redacted], in a December 8, 2005 letter, certified that the beneficiary "was ***commissioned*** as **Deaconess** of **The United Methodist Church**" in 1992, and "was for sometime [sic] appointed as *Full-time* ***deaconess*** and ***teacher*** of local churches and church institution respectively, of The United Methodist Church of the Philippines" (emphasis in original). Officials of Tortugas United Methodist Church and Harris Memorial College attested to the beneficiary's employment at those institutions from 1993 to 2001.

A copy of Internal Revenue Service (IRS) Form 1099-MISC indicates that the petitioner paid the beneficiary $18,066.72 in "Other Income" in 2004. A copy of an IRS Form W-2 Wage and Tax Statement shows that the petitioner paid the beneficiary $20,194.24 in 2005. Copies of pay receipts indicate that the petitioner paid the beneficiary $1,855.84 per month in the first five months of 2006. California Form DE 6 Quarterly Wage and Withholding Reports reflect the beneficiary's compensation from the second quarter of 2005 through the first quarter of 2006. Photocopies of processed checks between March 2005 and February 2006 show monthly $200 payments earmarked for "Health Insurance."

attested that the beneficiary and her family "reside in our home . . . as part of the remuneration [the beneficiary] will receive from the church."

On the Form I-360 petition, the petitioner responded "yes" to the question: "Has the [beneficiary] ever worked in the U.S. without permission?" The petitioner indicated that the beneficiary worked "[p]art-time at [a] Christian day-care center until she received legal advice informing her that it was unauthorized under her R-1 status at which point she ceased employment."

On June 12, 2007, the director instructed the petitioner to submit further evidence of the beneficiary's work history, including "certified Computer generated copies of the beneficiary's Federal Tax Returns and W-2's for the years 2005 and 2006." The director specified that the copies "must be stamped certified by the IRS. Failure to provide certified tax returns may result in denial of the petition." The director also requested copies of the petitioner's quarterly wage reports for 2004, as well as further information about the beneficiary's unauthorized employment.

In response, [redacted] of the petitioning church, stated: "we are not submitting a Payroll Summary for 2004 because, prior to 2006, no employee of the Church was on payroll. . . . In addition, the Church did not submit any Quarterly Wage Reports for the year 2004, so we have no 2004 Quarterly Wage Report to attach." The petitioner submitted new copies of quarterly wage reports from the second quarter of 2005 through the first quarter of 2007. The beneficiary left the United States in May 2006 when her R-1 nonimmigrant status expired, and therefore she does not appear on payroll documents after that date.

The petitioner submitted copies of processed checks, showing semimonthly salary payments from January 2004 to January 2005. The petitioner did not submit IRS-certified copies of the beneficiary's income tax returns, but the petitioner did show that it requested such copies on August 22, 2007, about a week before the petitioner responded to the director's notice. This timing explains why certified copies did not accompany the petitioner's response to the notice, but it is not clear why the petitioner waited more than two months before requesting the materials from the IRS.

The petitioner submitted uncertified copies of the beneficiary's 2004-2006 income tax returns. All of the beneficiary's tax returns indicate that her spouse was unemployed. Therefore, all reported earnings and business income would be from the beneficiary alone. In 2004, the beneficiary reported $8,434 in wages and $18,087 in gross business income as a "consultant." According to the IRS Form 1099-MISC discussed previously, only $8,086 of the beneficiary's 2004 income was from the petitioner. A Form W-2 shows that Ark Christian Preschool paid the beneficiary $8,434.15 that year, matching the (rounded) wages reported on the tax return.

On her 2005 income tax return, the beneficiary listed her occupation as "director," which is part of her title at the petitioning church. She reported $1,835 in gross receipts from her work for the petitioner, as well as $28,755 in total wages. Forms W-2 indicated that $8,561.09 of the reported wages were from Ark Christian Preschool, with the petitioner paying the balance.

Regarding the beneficiary's unauthorized employment, stated that the beneficiary had worked at Ark Christian Preschool from September 2002 to April 2006, meaning that she held that employment for nearly all of the two-year qualifying period.

The director denied the petition on April 24, 2008, based on the beneficiary's self-identification as a "consultant" on her 2004 income tax return. The petitioner appealed the decision on May 23, 2008, arguing that, in 2004, the church considered the beneficiary to be an independent consultant rather than an employee, hence the petitioner's issuance of IRS Form 1099-MISC rather than Form W-2 that year. The petitioner resubmitted evidence of the beneficiary's compensation, and submitted additional documentation showing that she worked at the church.

While the appeal was pending, USCIS published new regulations on November 26, 2008 to revise and replace the prior regulations at 8 C.F.R. § 204.5(m). The AAO remanded the petition to the director on December 5, 2008, to allow the petitioner an opportunity to comply with new evidentiary requirements.

On February 4, 2009, the director advised the petitioner of the new regulations and instructed the petitioner to submit evidence required by those regulations. In response, the petitioner submitted copies of financial and tax documents (some previously submitted), as well as other evidence of the beneficiary's involvement with the church.

The director denied the petition on June 19, 2009, stating that the petitioner had failed to establish that the beneficiary met the requirement of two years of continuous, lawfully authorized experience immediately prior to the petition's filing date.

In response to the certified denial notice, counsel argues that the petitioner has submitted all the required evidence to establish that USCIS should approve the petition. The petitioner submits IRS-certified copies of the beneficiary's income tax returns for 2004-2006. The 2004 and 2005 documents agree with the uncertified copies submitted previously. On the 2006 return, the beneficiary reported $9,279.20 in income, all reflected on a Form W-2 from the petitioner.

In the certified decision, the director stated that the petitioner seeks to employ the beneficiary as "Director of Media/African-National Outreach Coordinator." Noting this error, counsel stated: "Petitioner is sympathetic to the large caseload of the Service, but it is an egregious violation of procedural due process to deny the church's case on the grounds that it failed to meet the burden of proof for another organization's petition."

The reference quoted above is clearly incorrect, but we do not agree with counsel's suggestion that the director essentially adjudicated the wrong petition. Rather, the language appears to have been mistakenly copied from another decision. Elsewhere in the same decision, the director correctly referred to the beneficiary as the "Director of Christian Education/Deaconess," and mentioned [redacted] and several specific pieces of evidence in the record. It is clear, on balance, that the director reviewed the correct record of proceeding in rendering this decision. The one erroneous reference to a different job title appears to be an isolated error, rather than a systematic or substantive error that would invalidate the entire decision.

Counsel's brief, like the certified decision, is not free from error. Counsel claims to cite "AAO case law," but instead cites a partially redacted, unpublished appellate decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, the cited decision is from 2007, and therefore it has been substantially superseded by new regulations that went into effect in late 2008.

Another error appeared in the director's decision, when the director claimed: "On schedule C of Form 1040 for the year 2004, the beneficiary's occupation indicated 'None.'" As explained above, it was the beneficiary's spouse, not the beneficiary, who the 2004 tax return showed as having no occupation. Indeed, the director had previously denied the petition because that same 2004 tax return identified the petitioner as a "consultant." As with the error regarding the beneficiary's job title, however, this appears to be isolated.

More substantive is the director's finding that:

> The petitioner has failed to submit the requirements for the position, evidence of how the beneficiary is qualified, training received, and the requirements of the organization for becoming a member of the clergy. Additionally, the Bachelor's Degree in Kindergarten Education attained by the beneficiary is issued by a non affiliated entity which requires no proof of religious training.

The record does not support the above findings. The petitioner's original submission included copies of the beneficiary's Bachelor of Kindergarten Education diploma and transcript from Harris Memorial College. The transcript listed several clearly religious courses, including "Faith and Modern Man," "The Christian and His Faith," "Introduction to the Bible" and "History of Israel & Prophets." Printouts from http://www.harrismemorialcollege.com leave no doubt as to the religious nature of the institution.[1] The college's vision statement reads:

> Harris Memorial College, Inc. shall continue to be a United Methodist institution of higher learning, offering education that is Christian in character and holistic in approach. It shall promote academic excellence, servant leadership, and responsible citizenship. Harris shall continue as a Center for Deaconess Training and Women Development not only in the Philippines, but also in Asia and in the world. Harris shall provide equal access to quality education for both women and men.

Another printout from the web site stated that the Bachelor of Kindergarten Education "program prepares students to become competent Early Childhood Educators with a Christian perspective." The record, therefore, establishes that the beneficiary's degree is from a United Methodist Church-affiliated institution that operates a program specifically for "Deaconess Training." The sufficiency of this training is evident from the previously-quoted letter from [redacted] who confirmed that the beneficiary "was ***commissioned*** as **Deaconess** of **The United Methodist Church**" in 1992, shortly after her 1991 graduation.

There remains the director's core finding that the petitioner had not established that the beneficiary meets the requirement of two years of continuous, qualifying employment. The USCIS regulations at 8 C.F.R. §§ 204.5(m)(4) and (11) require that all qualifying experience that occurred in the United States must have been authorized under United States immigration law.

Here, the record shows that the beneficiary engaged in unauthorized employment at Ark Christian Preschool for nearly all of the two-year qualifying period. The USCIS regulation at 8 C.F.R. § 214.1(e) reads, in part:

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[1] The vision statement shows a 2004 copyright date, and the printout is dated May 11, 2006. As of December 7, 2009, the site is no longer active.

> A nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

The former section 241(a)(1)(C)(i), now reclassified as section 237(a)(1)(C)(i) of the Act, reads:

> *Nonimmigrant status violators.* – Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 248, or to comply with the conditions of any such status, is deportable.

By engaging in unauthorized employment, the beneficiary failed to maintain status during the two-year qualifying period. We must conclude, from the evidence provided, that the beneficiary was out of status and that, therefore, her employment experience was non-qualifying.

While we do not agree with every element of the director's decision, the materials in the record support the director's primary finding that the petitioner has not shown that the beneficiary meets the two-year experience requirement. Once the beneficiary violated her status by accepting additional employment, she was out of status, even while performing the work covered by her R-1 nonimmigrant status.

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 affirm the director's denial of the petition.

ORDER: The director's decision of June 19, 2009 is affirmed. The petition is denied.