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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

C1

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER DATE: OCT 25 2010

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:

SELF-REPRESENTED

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 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 withdraw the director's decision. Because the record, as it now stands, does not support approval of the petition, the AAO will again remand the petition for further action and consideration.

The petitioner seeks classification 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 the pastor of youth and [redacted] The director determined that the petitioner had not established that he had the requisite two years of continuous, qualifying work experience immediately preceding the filing date of the petition.

As required by 8 C.F.R. § 103.4(b)(2), the director allowed the petitioner 30 days in which to submit a brief in response to the certified decision. To date, the record contains no further correspondence from the petitioner. We will therefore base our decision on the record as it now stands.

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 [redacted] 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 August 20, 2007. Therefore, the petitioner must establish that he was continuously performing qualifying religious work throughout the two years immediately prior to that date.

In a letter accompanying the initial filing, [redacted] stated: "Our congregation licensed [the petitioner] on January 26, 2003." A copy of [redacted] job offer letter to the petitioner, dated August 14, 2002, indicated that the church would compensate the petitioner with an annual salary of [redacted] housing allowance, and [redacted] in pension and insurance benefits.

On September 10, 2007, the director instructed the petitioner to submit, among other things, evidence of the petitioner's work history during the August 2005-August 2007 qualifying period, including IRS Form W-2 Wage and Tax Statements and certified copies of the petitioner's income tax returns from those years.

In response, the petitioner submitted copies of IRS Forms W-2 showing that the church paid the petitioner [redacted] in 2005 and [redacted] in 2006. The Forms W-2 do not show withholding of any taxes. The church's IRS Form W-3 Transmittal of Wage and Tax Statements indicates that three employees received a total of [redacted] in wages, but only [redacted] of that amount was counted toward Social Security and Medicare taxes. On its Form 941 quarterly income tax returns, the church reported paying two employees between [redacted] and [redacted] per quarter, or [redacted] per month, in 2005 and 2006. This indicates that the church did not include the petitioner in its quarterly tax returns.

The petitioner also submitted copies of [redacted] income tax returns for 2005 and 2006. On these returns, the petitioner reported his [redacted] as "Foreign employment income."

The director denied the petition on January 23, 2008, stating: "It is unclear how the beneficiary was employed in the United States as claimed by the petitioner but paid [redacted] income tax on the income while at the same time not providing evidence of payment of U.S. income tax."

On appeal, the petitioner submitted copies of four pay stubs, showing that the church paid him [redacted] per month in 2007. The pay receipts, like the earlier IRS Forms W-2, show no withholding of taxes. The petitioner (referring to himself in the third person as "the beneficiary") stated:

> The beneficiary pays income tax in [redacted] because he has been deemed a factual resident of [redacted] for tax purposes by the [redacted] government, even though he works

> and lives in the United States. Under the [redacted]ncome Tax Treaty the individual pays the tax in only one country to avoid und[ue] hardships.

On November 26, 2008, while the appeal was pending, USCIS published substantially revised regulations at 8 C.F.R. § 204.5(m). The AAO remanded the petition to the director on December 16, 2008, to give the petitioner the opportunity to submit evidence newly required under the revised regulations.

The director advised the petitioner of the new regulatory requirements on May 6, 2009. The petitioner's response included additional copies of IRS Forms W-2 showing that the church paid the petitioner [redacted]

The director denied the petition on July 16, 2009, based solely on the finding that "the petitioner failed to submit evidence of payment of U.S. income taxes for 2005 and 2006." As noted previously, the record contains no further response from the petitioner. We must, therefore, consider the petitioner's prior statements regarding the matter.

The record indicates that the petitioner reported his income to [redacted] tax authorities, under the impression that he did not have to file a United States income tax return. The petitioner did not submit a copy of the relevant section of "the [redacted] Income Tax Treaty" to support his explanation. Still, whether the petitioner's impression was correct or not is beside the point for our purposes. More significantly, it explains why the petitioner did not file United States income tax returns. Whether or not he should have filed those returns is a matter for the IRS, not USCIS, to decide.

We must look at the context of the regulations. 8 C.F.R. § 204.5(m)(11)(i) requires the petitioner to submit evidence "that the alien received a salary." How the alien handled the taxation of that salary is a separate issue. The same regulation further states that this evidence must come in the form of "IRS documentation . . . such as an IRS Form W-2 or certified copies of income tax returns." The conjunction "or" is crucial here. Some alien religious workers, ministers in particular, are paid as contractors rather than employees for tax purposes. In such instances, those workers would not receive any IRS Form W-2, in which case other IRS documentation would be necessary instead.

Here, the petitioner has repeatedly submitted copies of IRS Forms W-2 showing that the church paid him a salary in 2005, 2006 and 2007, in amounts close to the proffered annual salary of [redacted] The director has not questioned the authenticity or credibility of those documents. Therefore, it is not in dispute that the petitioner has submitted IRS documentation showing that he received a salary throughout the two-year qualifying period. The petitioner's Canadian tax returns do not reflect outside employment. Rather, they show "[f]oreign employment income" in amounts consistent with the church's salary payments.

The regulation does not justify the director's position that the petitioner must submit IRS Forms W-2 and certified tax returns. The regulation's use of examples, rather than specific mandatory documents, allows for some flexibility. The key consideration is that the documentation must establish the amount

paid to the alien, and the source(s) of those payments. The reference to "IRS documentation" is intended not to ensure that the alien has paid United States income tax, but rather to provide an avenue for independent verification of the petitioner's claims.

If the petitioner should have paid United States income tax, but did not, during the qualifying period, then admissibility issues may arise if the petitioner files an adjustment application or applies for an immigrant visa. The purpose of this proceeding, however, is not to determine whether the petitioner is admissible to the United States, but whether he meets the requirements for a particular immigrant classification. The visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws. When eligibility for the claimed status is established, the petition should be granted. *Matter of O*, 8 I&N Dec. 295 (BIA 1959).

We will not attempt to establish, here, whether the petitioner is correct in his understanding of tax treaty law between the United States and Canada. We do, however, find that the petitioner has satisfied the USCIS regulation at 8 C.F.R. § 204.5(m)(11)(i) by submitting, as required, "IRS documentation that the alien received a salary." We will therefore withdraw the director's finding in this regard.

Other issues remain before the petition can be approved. The AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

[redacted] in his initial letter on the petitioner's behalf, described the petitioner's "remuneration package for 2007":

[redacted]

While the IRS Forms W-2 document the petitioner's receipt of his base salary, the record contains no documentation that the church has paid, or is able to pay, the other benefits listed above. Because these non-salary benefits amount to nearly half of the petitioner's total compensation package, this is a significant omission. The regulation at 8 C.F.R. § 204.5(m)(10) requires the petitioner to submit verifiable evidence (including IRS documentation, if available) to show how the employer will compensate the alien. The petitioner must therefore document his receipt of a housing allowance, pension and health insurance. Further, the petitioner's employer must explain the petitioner's apparent omission from the church's quarterly tax returns, discussed above.

Finally, the regulation at 8 C.F.R. § 204.5(m)(12) states that the supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an

on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition. The record, as it now stands, does not reflect any attempt to verify the claims contained in the petition.

Therefore, the AAO will withdraw the director's certified denial decision and remand the matter for further consideration in keeping with the above discussion. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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.