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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

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 19 2011

IN RE: Petitioner: [redacted]

Beneficiary:

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:

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

The petitioner is [redacted] 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 priest. The director determined that the petitioner had not established its ability to compensate the beneficiary, or that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing date of the petition. In addition, the director found that discrepancies in the petitioner's evidence undermined the credibility of that evidence, and that the petitioner failed to submit a timely response to a request for evidence (RFE).

On appeal, the petitioner submits arguments from counsel and substantial supporting evidence.

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 first issue concerns the issue of whether the petitioner timely responded to an RFE from the director. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.2(b)(8) reads, in part:

> *Request for Evidence; Notice of Intent to Deny*
>
> * * *
>
> (ii) *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.
>
> (iii) *Other evidence.* If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.
>
> (iv) *Process.* . . . The request for evidence or notice of intent to deny will indicate the deadline for response, but in no case shall the maximum response period provided in a request for evidence exceed twelve weeks, nor shall the maximum response time provided in a notice of intent to deny exceed thirty days. Additional time to respond to a request for evidence or notice of intent to deny may not be granted.

The petitioner filed the Form I-360 petition on July 22, 2008. The director determined that the petitioner's initial submission lacked required evidence. On December 29, 2008, the director issued an RFE, instructing the petitioner to respond no later than March 23, 2009. Because the regulation at 8 C.F.R. § 103.5a(b) allows an additional three days when USCIS serves a notice by mail, the petitioner's response was due by March 26, 2009. The director received the petitioner's timely response on March 24, 2009.

On April 10, 2009, the director issued a second RFE, and allowed the petitioner until May 10, 2009 to respond. (May 10, 2009 was, in fact, a Sunday.) California Service Center stamped the petitioner's response as received on May 18, 2009, well outside the additional three-day response window described above.

The director denied the petition on June 23, 2009, in part "due to [the petitioner's] failure to respond to USCIS['s] request for evidence notice within [the] specified time." The director stated that the petitioner did not mail the RFE response until May 11, 2009. On appeal, counsel quotes the RFE cover sheet, which allowed the petitioner "until May 10, 2009 in which to submit the requested information." Counsel states: "USCIS did not request that the evidence be **received** by that date, only that it must be submitted by that date. The response was submitted by the date given" (counsel's emphasis). The petitioner submits a photocopied U.S. Postal Service (USPS) certified mail receipt. A USPS printout matching the number on the certified mail receipt showed delivery on May 15, 2009.

Under the regulation at 8 C.F.R. § 103.2(a)(7)(i), the date of filing is not the date of mailing, but the date of actual receipt. The record does not support counsel's claim to have mailed the RFE response on May 8, 2009. On the certified mail receipt, the handwritten date "5/8/09" appeared in the space marked "Postmark Here." A handwritten date is not a postmark. Furthermore, the record does not reveal the identity of the person who wrote the date.

When discussing the handwritten "5/8/09" on the certified mail receipt, it is very significant that the certified mail receipt number appears in counsel's cover letter (also dated May 8, 2009). This shows that counsel was already in possession of the numbered certified mail receipt before the letter reached the USPS. Therefore, the handwritten date does not prove that the USPS took possession of the letter on May 8, 2009.

The record contains the envelope in which the petitioner mailed its RFE response. The envelope shows no sign of a May 8, 2009 mailing date. A postage meter label affixed to the envelope shows the date "05/11/2009." This is strong evidence that the petitioner mailed the RFE response on Monday, May 11, 2009, not the previous Friday, May 8, 2009. We consider the date on the actual postage – effectively the postmark – to be far more persuasive than the date, written by an unknown hand, on a receipt that is known to have been in counsel's possession while counsel was preparing the cover letter.

If the petitioner or applicant fails to respond to a request for evidence or to a notice of intent to deny by the required date, the application or petition may be summarily denied as abandoned, denied based on the record, or denied for both reasons. 8 C.F.R. § 103.2(b)(13)(i). We agree with the director that the petitioner did not submit a timely response to the RFE, and the cited regulation alone gave the director the authority to cite this failure as the sole ground for denial of the petition.

The remaining three grounds for denial all concern various aspects of the beneficiary's compensation. With respect to his future compensation, the USCIS regulation at 8 C.F.R. § 204.5(m)(10) states:

> Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. If IRS [Internal Revenue Service] documentation, such as IRS Form W-2 or

> certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

The petitioner's initial submission included a July 9, 2008 letter from [redacted], president of the petitioner's administrative board, who stated that the beneficiary "will be receiving a monthly salary of $990, in addition to that the church provides him housing, food, and transportation. . . . In addition to this salary, it is a tradition in our church and community that the congregation routinely bestows gifts in the nature of food, services, and money to our priests."

The petitioner's initial submission contained no financial documentation to show the petitioner's ability or intent to compensate the beneficiary in the manner claimed. In the first RFE in December 2008, the director instructed the petitioner to "[s]ubmit bank letters, recent audits, church membership figures, and/or the number of individuals currently receiving compensation."

In response, [redacted] indicated that the beneficiary "will be paid a salary of $1,190 per month. Furthermore, his food and lodging will be provided by the Church as part of his remuneration. . . . The Priest is paid by the church's official by check every month." The petitioner submitted copies of IRS Form 1099-MISC Miscellaneous Income statements, showing that the petitioner paid the beneficiary $7,200 in 2007 and $12,680 in 2008. Photocopied pay stubs indicate monthly $990 payments for the first eight months of 2008, and monthly $1,190 payments from September 2008 through February 2009.

In the second RFE in April 2009, the director stated:

> Records indicate that the beneficiary will receive $1,190 a month plus food, lodging, and medical care from the petitioning organization. However, no evidence of provided non-salaried compensation was submitted.
>
> Provide complete and verifiable evidence showing how the petitioning organization will provide compensation for the beneficiary.

Counsel, in the cover letter for the petitioner's response, stated: "Please find enclosed evidence of the Petitioner providing food and lodging." Counsel did not describe this evidence. The petitioner submitted a new letter from [redacted], stating "[t]he church provides food and lodging," but this is not evidence that the petitioner provides food and lodging. It is, rather, a repetition of the petitioner's already-stated claim to do so. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

In denying the petition, the director stated: "The petitioner indicated that the beneficiary received food, clothing, and shelter free from the church. However, no evidence was submitted to confirm such

claim." On appeal, counsel observes: "At no time did Petitioner indicate it would be providing clothing." The director's earlier reference to "medical care" appears to be mistaken as well.

The petitioner submits, as counsel describes, "photographs of Beneficiary in his living quarters," "photographs of Beneficiary in the church kitchen preparing his meals" and "recent grocery receipts" (all dated June 2009). Leaving aside the petitioner's failure to specify the location shown in the photographs or to establish its ownership or control of the property depicted, the petitioner has not explained its earlier failure to submit "complete and verifiable evidence," as requested in the RFE, to document that it feeds and houses the beneficiary.

The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The director, in the denial notice, made no definitive finding that the petitioner does not feed or house the beneficiary. Rather, the director found that the petitioner had not submitted evidence of that support. The petitioner's submission of photographs and receipts on appeal does not and cannot show that the director's decision was incorrect at the time the director made that decision. The director can base the decision only on the evidence provided by the petitioner. We cannot fault the director for failing to anticipate the petitioner's future submission of new evidence that, for whatever reason, the petitioner withheld at the time of the RFE.

For the above reasons, we agree with the director's finding that the petitioner failed to submit sufficient evidence to show its material support of the beneficiary. Even if the petitioner had submitted the required evidence earlier in the proceeding, the director could not properly have approved the petition because of a facially disqualifying circumstance which we will explain below.

We turn now to the issue of the beneficiary's past compensation. The 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 USCIS regulation at 8 C.F.R. § 204.5(m)(11) reads, in part:

> *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.

In a letter dated June 27, 2000 (the year appears to be a typographical error), [redacted] stated that the beneficiary "resides at the Church Pastor quarters and he gets full accommodation from the Church. . . . Please find two returned checks that reflect his monthly salary." Attached to the letter are photocopied pay receipts (not "returned checks") indicating that the petitioner paid the beneficiary $990 per month in May and June 2008.

In a July 6, 2006 job offer letter to the beneficiary, [redacted], the petitioner's parish president, stated: "The church will pay you a Stipend in the amount of $600.00 (six hundred) dollars Per month. The church will also provide you with housing, food and comprehensive Medical coverage."

In the December 2008 RFE, the director stated: "The two submitted pay stubs are not sufficient supporting evidence. Provide evidence of the beneficiary's work history beginning July 21 [*sic*], 2006 and ending July 22, 2008. . . . Ideally, this evidence should come in a way that shows monetary payment."

In response, [redacted] stated: "The Priest is paid . . . by check every month. The church also provides all his lodging and food necessities as part of compensation for his work." As previously noted, the petitioner submitted copies of pay stubs and IRS Forms 1099-MISC. The amounts on the twelve 2008 pay stubs add up to $12,680.

The petitioner also submitted copies of the beneficiary's IRS Form 1040 income tax returns for 2007 and 2008. On those returns, the beneficiary claimed business income of $5,640 for 2007 and $7,175 for 2008. The petitioner did not submit copies of Schedule C, which would have itemized the beneficiary's business income and expenses, for either year.

In the second RFE, issued April 2009, the director acknowledged the petitioner's submission of the above evidence, but stated: "the submitted tax documentation was incomplete because no tax schedules were provided with the returns." The director requested more complete tax documentation, as well as

"an itemized record, for years 2006 to 2008, from the Social Security Administration (SSA) on form SSA-7050-F4."

As we have already noted, the petitioner submitted no timely response to the second RFE. Nevertheless, because the director considered and discussed the petitioner's untimely response, we will take the submitted materials into consideration here.

The petitioner's response included IRS-printed tax return transcripts, showing that the beneficiary's gross income was $7,200 in 2007 and $12,600 in 2008. The petitioner submitted no transcript for 2006. The 2007 amount matches the beneficiary's IRS Form 1099-MISC for that year. The 2008 amount is $80 less than the amount shown on that year's Form 1099-MISC. The discrepancy, while small, is real and unexplained. The transcripts calculated the beneficiary's net income as $5,208 in 2007 and $6,626 in 2008.

The petitioner also submitted a photocopy of Form SSA-7050-F4, showing that the beneficiary had requested "Detailed Earnings Information" from the SSA. The beneficiary requested records for 2007 and 2008, even though the director had also requested records from 2006. Counsel stated that the beneficiary "went to the local Social Security Office ("SSO") to request an itemized record. . . . He was told by SSO that the request would be completed in two months. . . . [The beneficiary] attempted to comply with the RFE and now must wait for the SSO to complete the request." We note that the beneficiary signed Form SSA-7050-F4 on May 5, 2009, several weeks after the director issued the RFE, and less than a week before the response was due.

In denying the petition, the director stated that the petitioner had submitted "no official statement or record from the Social Security Administration explaining and confirming" that the earnings report would take two months to generate. The director concluded that "USCIS is unable to review [the] employment history of the beneficiary and the petition cannot be approved."

On appeal, the petitioner submits a statement of earnings from the SSA. The date on the SSA's cover letter, May 21, 2009, fell 16 days after the beneficiary executed the request form. This indicates that, if the beneficiary had submitted the request upon receipt of the RFE instead of days before the end of the response period, the petitioner may have been able to include the statement with a timely RFE response.

The SSA statement indicates that the beneficiary reported self-employment earnings of $5,209 in 2007 and $6,627 in 2008. These figures are close to the $5,208 and $6,626 figures shown on the IRS transcripts; the $1 differences may result from rounding. The statement does not show any other employment by the beneficiary in 2007 or 2008. The statement, therefore, is essentially consistent with the previously submitted IRS transcripts.

The petitioner submits a copy of the beneficiary's summary payroll records. One document shows the heading "January through December 2007," but the earliest date shown is June 11, 2007. The document shows eight payments of $900 each between June and December 2007, consistent with earlier documents showing that the petitioner paid the beneficiary $7,200 in 2007.

Counsel states that IRS and SSA documentation from 2007 and 2008 "confirms Beneficiary's employment history." The required employment history, however, is not limited to 2007 and 2008. The statutory qualifying period began two years before the petition's filing date. In this instance, the petitioner filed the petition on July 22, 2008, and therefore the petitioner must document the beneficiary's continuous employment back to July 2006. The petitioner, however, has documented nothing before June 2007, covering barely half the two-year qualifying period.

The director repeatedly instructed the petitioner to submit employment evidence dating back to 2006, and the petitioner has repeatedly responded with evidence from only 2008 and the latter half of 2007. Even if the petitioner's evidence from mid-2007 onward were faultless, this evidence cannot show two years of continuous employment immediately before the July 2008 filing date. Counsel acknowledges that the payroll evidence goes back no further than June 2007, but makes no attempt to explain this very significant lapse in the beneficiary's employment documentation.

Further review of the record implies an explanation for the lapse. The record shows that the beneficiary entered the United States on December 26, 2005 as a B-2 nonimmigrant visitor for pleasure. On or about September 26, 2006, the petitioner filed a Form I-129 nonimmigrant petition, receipt number [redacted] to classify the beneficiary as an R-1 nonimmigrant religious worker. The director approved that petition, and notified the petitioner that the beneficiary's R-1 status would be valid from May 22, 2007 to September 20, 2008. [redacted] July 9, 2008 letter acknowledged the validity dates of the beneficiary's R-1 nonimmigrant status.

The record indicates that the beneficiary was a B-2 nonimmigrant visitor between December 26, 2005 and May 22, 2007. Under the regulation at 8 C.F.R. § 214.1(e), a B-2 nonimmigrant may not engage in any employment. Therefore, the beneficiary had no authorization to work in the United States before May 22, 2007, when he changed from B-2 to R-1 nonimmigrant status. That date roughly coincides with the date of the beneficiary's first documented paycheck on June 11, 2007.

On the Form I-360 petition, asked whether the beneficiary had ever worked in the United States without authorization, the petitioner answered "no." If true, this means that the beneficiary did not work in the United States before May 22, 2007. This is entirely consistent with the evidence of record.

The petitioner has not shown, or even directly claimed, that the beneficiary worked continuously throughout the two-year period immediately before the filing of the petition. As a B-2 nonimmigrant, the beneficiary could not lawfully have worked for the petitioner in 2006 or early 2007, as required under the regulations at 8 C.F.R. §§ 204.5(m)(4) and (11). We therefore agree with the director's finding that the petitioner has failed to establish the beneficiary's required continuous experience during the two-year qualifying period.

The fourth and final stated ground for denial concerned "inconsistencies among reported earnings." The director cited case law tying such discrepancies to the petitioner's overall credibility. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and

sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Id.* at 582, 591-92.

On closer examination, the record refutes the director's example of a discrepancy. The director stated: "the petition indicated that the beneficiary would receive $1,190 a month or about $14,280 annually from the petitioner," but the beneficiary's IRS Form 1099-MISC for 2008 showed only $12,680. This would be a discrepancy only if the petitioner had claimed to have paid the beneficiary $1,190 per month for all of 2008. In fact, when the petitioner filed the petition in July 2008, the petitioner stated the beneficiary's salary as $990 per month. The higher $1,190 rate first appeared on the beneficiary's September 2008 pay statement. Eight months at $990 per month plus four months at $1,190 per month adds up to $12,680, entirely consistent with the Form 1099-MISC.

Similarly, the director expressed concern that the beneficiary earned only $7,200 in 2007. As we have already noted, the petitioner's payroll documentation (submitted on appeal) shows eight payments of $900 each, beginning in June 2007. This is consistent with the Form 1099-MISC. It is not consistent with continuous employment throughout all of 2007, but that is a separate issue that we have already addressed.

Therefore, we do not share the director's conclusion that the IRS documentation is inconsistent with the petitioner's overall claims. We will withdraw this particular finding. Because the director's other findings stand undisturbed, however, the withdrawal of this one finding will not change the outcome of our appellate decision.

Review of the record reveals another deficiency. The AAO may identify additional grounds for denial beyond what the Service Center identified 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).

The regulation at 8 C.F.R. § 204.5(m)(7) requires the intending employer to execute a detailed employer attestation concerning the employer, the beneficiary, and the job offer. The record does not contain this required document, and its omission is yet another basis for denial.

The AAO will dismiss the appeal 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 met that burden.

ORDER: The appeal is dismissed.