identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

PUBLIC COPY

C1

[redacted]

DATE: JUL 27 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On January 30, 2009, the Director, California Service Center, denied the employment-based immigrant visa petition. The petitioner's March 2, 2009 appeal/motion to reopen was rejected by the director as untimely filed. The director granted the petitioner's motion to reopen its decision and again denied the petition on November 17, 2009. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a church. 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 youth director/missionary. The director determined that the petitioner had not established that it has a need for the beneficiary's service and therefore has not established that it offers the beneficiary full-time employment.

Counsel submits a brief and additional documentation in support of the appeal.

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 issue presented on appeal is whether the petitioner has established that the proffered position will provide the beneficiary with full-time employment.

The regulation at 8 C.F.R. § 204.5(m)(2) provides that to be eligible for classification as a special immigrant religious worker, the alien must be coming to the United States to work in a full time (average of at least 35 hours per week) compensated position in one of the occupations defined in paragraph 8 C.F.R. § 204.5 (m)(5).

The petitioner stated that the beneficiary had been working as its youth director/missionary in an R-1 nonimmigrant religious worker status since February 2006. The petitioner further stated that in the position, the beneficiary "has been assisting [redacted] in planning, coordinating, implementing, and administering the religious education of the children of our church." The petitioner provided a weekly work schedule for the beneficiary and stated that she was expected to work "no less than 40 hours a week."

In a November 19, 2008 request for evidence (RFE), the director instructed the petitioner to "[s]ubmit documentary evidence to show that the beneficiary's services are needed" and to address such as factors the number of volunteers and paid ministers and staff, size of the congregation, the specific duties of the beneficiary as compared with other staff, and the number of students in the youth group worship where the beneficiary would be working.

In its December 8, 2008 response, the petitioner, through its [redacted] stated that it had approximately 200 permanent members with about 110 members in the youth congregation. The petitioner further stated that it employed only two people, the senior pastor and the beneficiary, and that it has thirteen volunteer members, which consisted of nine elementary, three junior high and high school Sunday school teachers and one bible study teacher in the college department. [redacted] stated:

> After Sunday Worship service, these volunteer teachers teach their class according to the bible lessons provided by the [the beneficiary]. The volunteer teachers do not coordinate or create any bible lesson plans. The volunteer teachers aid me and [the beneficiary] in implementing the bible study lessons since two of us cannot teach all 150 youth members of our congregation by ourselves.

[redacted] further stated:

> I started working at [the petitioning organization] in 2003. In 2003, there were only 40 congregation members attending the church. Of the 40 members, only about 10 were children. Therefore, we did not have a Christian Youth Director during this time. However, within the next few years, the number of congregants and consequently, the number of children grew in size approximately double to 70 children. This was when our church hired [the beneficiary] to direct and coordinate the children's education program because the church recognized the need. At approximately the same time, our church also hired [redacted] to assist me in my pastoral duties and to oversee the education of the congregations as a whole (including adults and children). But [redacted] no longer works at our

> church since early 2008. Since hiring [the beneficiary] in 2006, the youth group has again increased in number to approximately 110 students.

The petitioner submitted a list of 213 names that it stated was its membership as of December 7, 2008.

On December 24, 2008, the director notified the petitioner that an immigration officer (IO) conducted an onsite inspection of its premises on July 20, 2007 in connection with a Form I-129, Petition for a Nonimmigrant Worker, filed on behalf of another beneficiary, [redacted] who was to conduct youth group worship and assist [redacted]. The IO reported that [redacted] reported that the petitioner had a membership of 178 and that [redacted] "did youth group workshops on Friday and Sunday as well as administrative duties for [redacted]" The director concluded that the positions of [redacted] and the beneficiary "appears" to be the same and that with a congregation of 178 members, the petitioner had not established a need for the beneficiary's services. The director also concluded that the petitioner's claim of 213 members "contradicts the information attesting that the petitioner has 178 members."

In response, counsel states that the director ignored the petitioner's letter of December 8, 2008 detailing the growth of the congregation and that [redacted] was no longer employed by the petitioner. Counsel also stated that there was no "contradiction" in the petitioner's claim of 178 members in July 2007 to 213 in December 2008 and that this represented a natural growth of the church.

On January 30, 2009, the director denied the petition, stating:

> The petitioner has not submitted any evidence showing a congregation growth or information showing that there are over 200 youths which make up the youth group of the church. The petitioner has not submitted supporting documentation showing the names of the students or curriculums of classes showing the existence of the youth group. The record does not contain the petitioner's training program. Absent a training program which includes a detailed description of the coursework, the number of hours that will be spent, respectively, in classroom instruction, a listing of the textbook(s), a description of the method of instruction, and the grading criteria, the petition has not shown that it has a structured program.

The director determined that the petitioner had failed to demonstrate that the duties of the proffered position primarily relate to, and clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination. The director also determined that the petitioner had failed to establish that the beneficiary had been appointed to her position according to its bylaws and therefore failed to establish that the position qualifies as that of a religious occupation.

On March 2, 2009, the petitioner filed a Form I-290B, Notice of Appeal or Motion. Although counsel indicated in Part 2 of the Form I-290B that she was filing an appeal, her brief indicated that she was filing a motion to reopen and reconsider the decision. Counsel argued that the director had overlooked the evidence of record that indicated [redacted] was no longer employed by the petitioner and that the membership of the youth congregation was stated as being 110 and not 200 as alleged in the denial. The petitioner submitted lists of its youth membership as of February 22, 2009 that included 21 members in its elementary department, 12 in its junior and senior high department, and 65 in its youth and college department. The petitioner also submitted a February 26, 2009 letter signed by [redacted] its council president, in which he stated that its bylaws allow for ministerial workers to be appointed through either a recommendation of the chairman of the church session or through graduation from a seminary. The petitioner submitted documentation of the beneficiary's qualifications and submitted documentation of booklets that it uses in its youth education programs.

The director rejected the petitioner's appeal/motion as untimely on August 12, 2009. The director treated the petitioner's September 3, 2009 appeal of the rejected Form I-290B as a motion to reopen and issued the petitioner a NOID in which she cited to the religious worker regulation that was superseded by new regulations on November 26, 2008. The director again stated that the beneficiary had provided contradictory information regarding the size of its congregation.

In response, counsel stated that the petitioner had previously addressed the issues raised by the NOID in its previous submissions. The director again denied the petition, determining that the petitioner had not established a need for the beneficiary's services, and stating:

> The petitioner indicates that as of February 22, 2009, the number of regularly attending youth group members totaled 98. The petitioner indicates that approximately 5 to 10 non-regular students will join in Sunday Worship Service and Sunday school on any given Sunday increasing the total to 110 children. The petitioner submitted a membership list as of February 22, 2009 indicating the names of the children belonging to the religious entity. The list is not persuasive in demonstrating the increase of children enrolled in the religious organization since 2003.

On appeal, counsel states that:

> [T]he list of children was submitted in response to the Service questioning the sheer existence of the Youth Group. The Service decision reflects its apparent acknowledgement of the existence of the group, yet now purports without any evidence to the contrary that the group has [not] grown in number since 2003.

The director does not explain why the petitioner's list of youth group members indicates that the petitioner does not need the beneficiary's services. The decision purports to compare the petitioner's 2003 youth membership level to that claimed in 2009. The record does not contain a

list of the petitioner's 2003 youth membership but does contain a membership list for 2009. It is illogical for the director to question the undocumented number of children in the petitioning organization in 2003 yet fail to accept a documented list of members in 2009. The director does not question the legitimacy of the list or the number of youth congregants. The petitioner has explained that its membership has grown throughout the years and, in 2008, the year the petition was filed, stood in excess of 100 youth members. The record does not indicate any inconsistency in the record to establish that the duties of the position would provide the beneficiary with less than full time employment and we withdraw the director's decision to the contrary.

However, the petition cannot be approved as the record now stands. The regulation at 8 C.F.R. § 204.5(m)(7) requires the petitioner to submit a detailed attestation with details regarding the petitioner, the beneficiary, the job offer, and other aspects of the petition. The record contains no such attestation.

Further, the regulation at 8 C.F.R. § 204.5(m)(12) provides:

> *Inspections, evaluations, verifications, and compliance reviews.* 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 does not reflect that the petitioner has successfully completed a compliance review or other inspection. On remand, the director shall determine whether additional verification of the petitioner's claims is warranted pursuant to the above-cited regulation.

This matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. 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 AAO for review.