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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

U.S. Citizenship and Immigration Services

C1

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 0 1 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 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 again denied the petition and certified the decision to the AAO. The AAO will affirm the director's decision.

The petitioner is a Romanian Pentecostal 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 music director. The director determined that the petitioner had not established that the beneficiary had the required two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition, or that the beneficiary's intended position qualifies as a religious occupation.

In response to the certified decision, the petitioner submits arguments from counsel.

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 petitioner filed the Form I-360 petition on November 9, 2007. At the time of filing, the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(2) defined a

"religious occupation" as "an activity which relates to a traditional religious function." The regulation did not elaborate, except to list examples of qualifying and non-qualifying occupations.

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

> Our *form of worship*, which is practiced at our church services, is prayer with mostly religious songs, sung by our worship team, youth group, children choral group, combined with choral songs and orchestra, and by our church congregation to the accompaniment of piano and organ music. . . . The songs are composed and sung to deliver a religious message, as music is used as a medium and is an integral part of the Pentecostal prayer and church service, since it promotes spiritual inspiration to uplift and prepare the souls to serve God, as they are touched by the Holy Spirit while they are singing.
>
> . . . As Religious Music Director for our church's youth groups, the beneficiary . . . will be engaged in a traditional religious occupation. His employment with our church is directly and habitually involved with our weekly church services and church liturgy. . . . [T]he Religious Music Director plans, directs, and executes the performance of the musical liturgy.
>
> . . . Furthermore, the proffered position is recognized by churches within the Romanian Pentecostal denomination as a traditionally full-time and salaried occupation. . . .
>
> [The beneficiary] obtained his professional education from the [redacted] in [redacted] where he completed a three-year program in Music (Piano) in 1984. . . . Based on his formal musical education and experience, he can read and write religious music to convey the Christian message and teach . . . our singing groups and can personally play the piano and organ professionally.

[redacted] stated that the beneficiary's 35-hour work week would include selecting and preparing music, planning and teaching lessons, playing the organ, and related functions.

[redacted] of [redacted] stated: "for our [redacted] we require a music director, who leads worship in the Romanian language and is knowledgeable of the [redacted]. The music director is considered a minister in the church body." [redacted] added: "The music director function is traditionally a full time position in the church." The letterhead on this letter ties [redacted] The petitioner has not

A translated letter from [redacted] indicated that the church employed the beneficiary as a musical director from 1993 to 1996. An accompanying list of duties broadly resembles the beneficiary's duties for the petitioner.

The director denied the petition on January 24, 2008, stating that the petitioner had not shown that the beneficiary's intended job qualifies as a religious occupation. The petitioner appealed that decision.

While the appeal was pending, USCIS published new regulations for special immigrant religious worker petitions. Supplementary information published with the new rule specified: "All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). The AAO remanded the petition to the director for a new decision under the revised regulations.

The new regulation at 8 C.F.R. § 204.5(m)(5) defines a *religious occupation* as an occupation that meets all of the following requirements:

> (A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination.
>
> (B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.
>
> (C) The duties do not include positions that are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible.
>
> (D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

The director again denied the petition on May 6, 2009, repeating the finding from the previous decision. In response to the director's certified decision, counsel argues that the petitioner has already explained how the beneficiary's duties relate to a traditional religious function.

The regulation at 8 C.F.R. § 204.5(m)(5) requires that, to qualify as a religious occupation, the duties of that occupation must be recognized as a religious occupation within the denomination. That same regulation defines a "religious denomination" as a religious group or community of believers that is governed or administered under a common type of ecclesiastical government and includes one or more of the following:

> (A) A recognized common creed or statement of faith shared among the denomination's members;
>
> (B) A common form of worship;
>
> (C) A common formal code of doctrine and discipline;
>
> (D) Common religious services and ceremonies;

(E) Common established places of religious worship or religious congregations; or

(F) Comparable indicia of a bona fide religious denomination.

The definition does not allow USCIS to treat distinct and unaffiliated denominations as though they were the same denomination.

The petitioner, however, has relied on letters from churches self-identified, respectively, as [redacted] a denomination) and "Baptist" (a class of denominations). The petitioner has not claimed to belong to any Baptist denomination, and [redacted] previously stated: "Our [redacted] which is a form of [redacted] similar to [redacted]." Claimed similarity between denominations is not membership in each of those denominations. The petitioner has, therefore, submitted letters from churches of self-evidently different denominations, supposedly as evidence regarding practices in the petitioner's own denomination.

Elsewhere in this decision, we will have more to say about the petitioner's submission of misleading evidence. For the moment, it will suffice to state that the AAO agrees with the director's finding that the petitioner has not met the regulatory requirements to show that the beneficiary's intended position qualifies as a religious occupation. (This is not a definitive finding that the position is not a religious occupation. It may well be one, but the petitioner has not submitted sufficient evidence in that regard.)

The next issue concerns the beneficiary's prior experience. At the time of filing, the USCIS regulation at 8 C.F.R. § 204.5(m)(1) required that an alien seeking classification as a special immigrant religious worker must have been performing qualifying religious work continuously for at least the two-year period immediately preceding the filing of the petition. The regulation at 8 C.F.R. § 204.5(m)(3)(ii)(A) required the petitioner to submit a letter from an authorized official of the religious organization to establish that the beneficiary had the required two years of experience.

On Form I-360, the petitioner indicated that the beneficiary entered the United States on December 6, 1999 as a B-2 nonimmigrant visitor. The petitioner stated that the beneficiary had worked in the United States without authorization, and did not claim that the beneficiary had held any lawful status in the United States after his B-2 nonimmigrant status expired on May 5, 2000.

[redacted] stated that the beneficiary "has been continuously employed by the [petitioner] on a full-time, paid basis since May 2000 to the present time, in the position [redacted]." The petitioner submitted photocopies of processed checks, showing payments to the beneficiary in various amounts from January 2005 onward. IRS Form 1099-MISC Miscellaneous Income statements show that the petitioner paid the beneficiary $18,000 in 2004, $18,000 in 2005 and $24,164 in 2006.

The revised 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:

> *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 [Internal Revenue Service] 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 the certified denial notice of May 6, 2009, the director found that the beneficiary had worked without authorization during the two-year qualifying period, and therefore did not qualify for classification as a special immigrant religious worker.

In response to the denial, counsel does not dispute the beneficiary's lack of employment authorization or lawful status, but asserts that USCIS should not apply that requirement to the beneficiary because it was not yet in force when the petitioner filed the petition in 2007. Counsel asserts that the beneficiary was not responsible for adjudicative backlogs that meant the petition was still pending when the regulations changed, and those delays "should not operate to penalize the [beneficiary]."

At issue here is not a penalty, in which a government agency initiates punitive action against a person. Rather, the petitioner has actively sought a benefit from a government agency that has the authority to decide who does and does not qualify for that benefit.

Counsel argues that the new regulations should not apply to this proceeding, because the petition was not pending on November 26, 2008. According to section 557(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 557(b), a decision is not final if "there is an appeal to, or review on motion of, the

agency within time provided by rule." Therefore, owing to the petitioner's timely and properly filed appeal, the petition was still pending on November 26, 2008.

Counsel contends that applying the new regulations to previously filed petitions is contrary to Congressional intent. The wording of the relevant legislation demonstrates Congress's interest in USCIS regulations and the agency's commitment to combating immigration fraud. Section 2(b) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391 (Oct. 10, 2008), reads, in pertinent part:

> *Regulations* – Not later than 30 days after the date of the enactment of this Act, the Secretary of Homeland Security shall –
>
> > (1) issue final regulations to eliminate or reduce fraud related to the granting of special immigrant status for special immigrants described in subclause (II) or (III) of section 101(a)(27)(C)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(C)(ii))

In proposing the requirement that all prior qualifying employment have been authorized and "in conformity with all other laws of the United States" such as the Fair Labor Standards Act of 1938 and "tax laws," USCIS explained that "[a]llowing periods of unauthorized, unreported employment to qualify an alien toward permanent immigration undermines the integrity of the United States immigration system." 72 Fed. Reg. 20442, 20447-48 (April 25, 2007). Accordingly, the adoption of the final rule requiring that all prior qualifying employment have been lawful clearly comports with the explicit instructions from Congress to "eliminate or reduce fraud." As we have previously noted, USCIS applied the new regulations to already-pending cases as well as new filings.

The October 2008 legislation extended the special immigrant nonminister religious program only until March 5, 2009. From the wording of the statute, it is clear that this extension was so short precisely because Congress sought to learn the effect of the new regulations before granting a longer extension. Congress has since extended the life of the program three times.[1] On any of those occasions, Congress could have made substantive changes in response to the regulations Congress ordered USCIS to publish, but Congress did not do so. Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). We may therefore presume that Congress has no objection to the new regulations as published, or to USCIS's interpretation and application of those regulations.

Furthermore, the wording of the above-quoted statute demonstrates Congress's interest in combating immigration fraud. In this regard, we recall an earlier AAO decision from November 2, 2005, dismissing an earlier appeal that the petitioner had filed with respect to an earlier petition. The A-file record of proceeding contains a copy of that decision. As supporting evidence for the earlier petition,

[1] Pub. L. No. 111-9 § 1 (March 20, 2009) extended the program to September 29, 2009. Pub. L. No. 111-68 § 133 (October 1, 2009) extended the program to October 30, 2009. Pub. L. No. 111-83 § 568(a)(1) (October 28, 2009) extended the program to September 29, 2012.

the petitioner had submitted photocopies of what purported to be the beneficiary's montly paychecks from late 2001:

Number	Amount	Check date	Processing date (on back of check)
[redacted]	$1,500.00	9/12/2001	12/19/2001
[redacted]	1,500.00	10/17/2001	12/20/2001
[redacted]	1,500.00	11/15/2001	12/21/2001
[redacted]	1,500.00	12/19/2001	12/24/2001

The AAO noted, on closer inspection, altered dates on the first two checks. The original date on check 1527 was "12-12-01," with a "9" handwritten over the first "12." Similarly, the date "12-17-01" on check 1528 shows a "0" handwritten over the first "2." The "11/15/01" date on check 1529 shows no alteration, but the beneficiary did not present the check for payment until late December. The consecutive numbering of the four checks, along with their processing all during the same week in late December 2001, argues strongly that the petitioner prepared all four checks at, or very near, the same time.

Furthermore, the petitioner's December 2001 bank statement shows four $1,500 deposits that month, which correlate closely to the processing of the beneficiary's four paychecks:

Transaction	Transaction date
Deposit	12/18/2001
Check [redacted]	12/19/2001
Deposit	12/20/2001
Check [redacted]	12/20/2001
Deposit	12/20/2001
Check [redacted]	12/21/2001
Deposit	12/21/2001
Check [redacted]	12/24/2001

Other bank statements likewise show deposits, in the exact amount of the beneficiary's paycheck, just before the beneficiary presented the paycheck for processing (and after the dates on the checks themselves). The record does not identify the source(s) of these deposits. In a December 13, 2004 letter, [redacted] claimed that the petitioner maintains "a separate account to deposit donations [from] our members wishing to earmark their donation specifically for payment of our music workers," but this does not explain the alteration of the 2001 checks, or the petitioner's practice of issuing a paycheck to the beneficiary, then depositing the exact amount of that paycheck into the account just before the bank processed that paycheck.

In the same letter, [redacted] stated that "all of our workers, including myself, are voluntary, except for our music workers and janitorial help." ([redacted] supports himself through a car rental business.) Thus, the only non-janitorial workers whom the petitioner claims to pay are those for whom the petitioner has sought immigration benefits.

Citing the above information in its 2005 dismissal notice, the AAO concluded that the petitioner's credibility was suspect. The petitioner did not respond to the above findings by the AAO. The petitioner chose, instead, to file a new Form I-360 petition (its third) on the beneficiary's behalf.

In support of the petition, the petitioner submitted a letter dated October 23, 2007, in which the petitioner claimed that the beneficiary "has been continually employed by [the petitioner] on a full-time, paid basis since May 2000 to the present time." The petitioner has not addressed the AAO's prior written findings regarding the altered checks and bank statements, which appear to show funds deposited into the petitioner's bank account just long enough to be paid back out as paychecks to the beneficiary. The petitioner has not resolved the credibility issues that arose in the context of the earlier petition.

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.

Further review of the record raises another issue. 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).

USCIS inquiry showed that the petitioner's other claimed "music worker," apart from the beneficiary, was a trained electrician, who was also the beneficiary of a Form I-140 immigrant worker petition, filed by an electrical contractor. On the basis of information that USCIS obtained regarding that other petition, USCIS concluded in September 2007 that the petitioner had failed compliance review verification. This failure is, itself, grounds for denial of the petition under 8 C.F.R. § 204.5(m)(12); the record shows a failed compliance review that casts doubt on the petitioner's overall credibility, and no subsequent successful compliance review on behalf of the current beneficiary. We note that this compliance review identified the beneficiary as a "deacon [and] choir member [who] leads Bible study," and the electrician as the petitioner's "music director."

Finally, we note that the regulation at 8 C.F.R. § 204.5(m)(7) requires the intending employer to execute a detailed attestation concerning the employer, the beneficiary, and the job offer. The record does not contain this required document.

We note that the petitioner has filed a Form I-140 Immigrant Petition for Alien Worker, seeking to classify the beneficiary as a professional or skilled worker under section 203(b)(3) of the Act, 8 U.S.C. § 1187(b)(3). That petition has a priority date of June 14, 2007. USCIS approved that petition on June 23, 2009. The dismissal of the present appeal is without prejudice to any further proceedings that may arise from the approved immigrant petition.

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.