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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

[redacted]

C1

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 09 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 employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 cantor. The director determined that the petitioner had not established that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the petition.

On appeal, counsel asserts that the director failed to provide the petitioner with notice of adverse information used to deny the appeal as required by the regulation at 8 C.F.R. § 102.2(b)(16(i). Counsel indicated on the Form I-290B, Notice of Appeal or Motion, that he would submit a brief and/or additional evidence within 30 days. As of the date of this decision, however, more than 15 months after the appeal was filed, no further documentation has been received by the AAO. Therefore, the record will be considered complete as presently constituted.

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 is whether the petitioner has established that the beneficiary worked continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m) provides that to be eligible for classification as a special immigrant religious worker, the alien must:

> (4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. A break in the continuity of the work during the preceding two years will not affect eligibility so long as:
>
> > (i) The alien was still employed as a religious worker;
> >
> > (ii) The break did not exceed two years; and
> >
> > (iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.

Therefore, the petitioner must show that the beneficiary worked 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 21, 2009. Accordingly, the petitioner must establish that the beneficiary was continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

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

> *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 an addendum to the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, the petitioner stated:

> [The beneficiary] has not worked in a religious capacity with the church during the past two years due [to] injuries that she suffered following a lightning strike . . . which severely limited her ability to continue in her religious duties with the church. Due to the severity of her injuries, the church found it to be in her best interest to discontinue her immediate work responsibilities and postpone her return until such time as she felt physically and mentally capable to occupy this position.

In his letter accompanying the petition, counsel stated:

> Until 2009, [the beneficiary] has been medically unable to work in this specific job position since September 2006 due to injuries that she suffered after being struck by lightning. Following the strike, she was diagnosed by [redacted] who has provided a statement indicating that she suffered from "post strike headaches, vertigo and decreased hearing." As a result, she could not continue working at her church as a Catechism teacher [until] January 2009."
>
> According to USCIS' own internal memoranda, a break in employment if significant is only allowed if it was beyond the person's control. Letter, [redacted]. In this instance, given the seriousness of the injuries sustained by [the beneficiary], the lingering aftereffects of the lightning strike, her time away from the church during her recovery should not be viewed as a basis to exclude her from eligibility for I-360 approval.

The petitioner submitted a May 13, 2009 letter from the [redacted] in Parma, Ohio, signed by its chancellor [redacted], who stated that the beneficiary was employed by the diocese from January 1, 1997 to September 13, 2006 as a cantor and choir director. [redacted] stated, "For reasons of health, she resigned from this position." The petitioner also submitted a May 12, 2009 statement from [redacted], who

stated that the beneficiary was struck by lightning on September 13, 2006 and suffered "post strike headaches, vertigo and decreased hearing lt side, and as such could not continue working at her church as a catechism teacher till January 2009." The petitioner submitted no documentation to establish that Dr. [redacted] is the beneficiary's treating physician and that his conclusion that she was prevented from doing her previous work was a medical diagnosis or a self diagnosis reported to him by the beneficiary.

In denying the petition, the director determined that "the evidence submitted shows that the beneficiary was not employed as a religious worker from September 14, 2006 until sometime in January 2009." The director correctly noted that the regulation at 8 C.F.R. § 204.5(m)(4) permits a break in the continuity of the qualifying work period provided that the break did not exceed two years and that the beneficiary was still employed as a religious worker. The director stated, "The evidence of the records shows that the beneficiary resigned from her position with the Ukrainian [redacted] on September 13, 2006."

On appeal, counsel asserts that "neither the Petitioning organization, nor the Beneficiary have any notice as to what records the Service is alluding to or on what basis the Service presumes that the Beneficiary 'resigned from her position.'" Counsel's argument is specious. The information relied upon by the director was submitted by the petitioner. If the information is incorrect, the error belongs to the petitioner and not the director for relying on evidence provided by the petitioning organization.

The petitioner does not address the beneficiary's continuous work experience on appeal. As previously noted, the petitioner submitted insufficient documentation to establish that a physician actually diagnosed and treated the beneficiary for a disability that prevented her from working. Furthermore, the letter from [redacted] was issued in 1992 and was based on superseded regulations. New regulations promulgated on November 26, 2008 permit a break in the continuity of the work experience provided the break does not exceed two years and that the beneficiary continues to be employed as a religious worker. The regulation does not require that the qualifying religious work correspond precisely to the type of work to be performed. In the instant case, the petitioner has submitted no documentation to establish that the beneficiary worked at all during the qualifying period, and specifically, it provided no documentation to establish that the beneficiary was employed as a religious worker.

Accordingly, the petitioner has failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the visa petition.

Beyond the decision of the director, the petitioner has not established how it intends to compensate the beneficiary. The regulation at 8 C.F.R. § 204.5(m)(10) provides that the petitioner must submit:

> *Evidence relating to compensation.* 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 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 stated on the Form I-360 that it will pay the beneficiary $1,000 per month. The petitioner submitted a copy of its March 2009 monthly bank statement indicating that it had a balance of $1,098.16, down from $8,365.88 the previous month, and a document indicating that it had $22,764.34 in a certificate of deposit (CD) that was scheduled to mature on February 11, 2009. The petitioner submitted no documentation to establish that the funds in the CD are available for the beneficiary's salary. Further, even if available, the funds would only compensate the beneficiary for less than two years. The petitioner has failed to submit verifiable documentation, as required by the above-cited regulation, to establish how it intends to compensate the beneficiary.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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).

The petition will be denied 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.