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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]

DATE: MAY 1 0 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.

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, Texas Service Center (TSC), denied the employment-based immigrant visa petition. The Director, California Service Center (CSC) reopened the petition and again denied it. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is an international Christian ministry affiliated with the Assemblies of God denomination. 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 assistant pastor at its headquarters location in Lighthouse Point, Florida. 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. In addition, the director determined that the petitioner had not submitted the required employer attestation.

On appeal, the petitioner submits a letter from a church official, an employer attestation, and various other exhibits.

In this decision, the term "prior counsel" shall refer to [redacted], who represented the petitioner prior to the filing of the current appeal. The term "counsel" shall refer to the present attorney of record.

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 . . . ; 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 under consideration concerns the beneficiary's past experience. The petitioner filed the Form I-360 petition on May 31, 2005 with the TSC. At the time of filing, the U.S. Citizenship and Immigration Services (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.

In a letter accompanying the initial filing, [redacted], secretary of the petitioning organization, stated:

> The Petitioner is affiliated with [redacted], the [redacted] in the United States (website www.confradeb.com) which also officially represents CGDAB – The General Council of Assemblies of God in Brazil (website www.cgdab.com.br). . . .
>
> The Beneficiary has many years of experience serving his community and the Assemblies of God. The Beneficiary['s] ministry experience includes the following activities:
>
> * * *
>
> 2001-2002 Youth and Worship Team Leader of [the petitioner's] [redacted]
>
> 2002-2004 Local Pastor of [the petitioner's] [redacted]
>
> 2004 [The petitioner's] Youth Pastor
>
> 2005 [The petitioner's] Youth Couples Pastor
>
> Furthermore, the Beneficiary has held the [redacted]
>
> Currently the Beneficiary is the Assistant Pastor at [the petitioner's] [redacted]

A copy of the beneficiary's résumé agrees with the list in [redacted] letter. Copies of church publications identified the beneficiary as a district secretary of the [redacted]

The petitioner submitted a printout of the home page from [redacted] The text on the page is in the Portuguese language, but prominently includes the petitioner's [redacted] address.

The petitioner submitted copies of many, but not all, of the pay receipts that the petitioner and/or [redacted] (at the same address) issued to the beneficiary from 2002 to 2005. The earliest pay receipts from the petitioner show a weekly salary of $300, which dropped to $200 in late 2003,

and later dropped again to $150 during a gap in the record before returning to $200 in late 2004. The pay receipts from [redacted]A show payments in increments of $300 in 2003, $320 in 2004 and $420 in 2005, although the fragmentary records suggest that [redacted]A did not pay the beneficiary on a continuous basis.

On July 5, 2005, the TSC director issued a request for evidence (RFE), instructing the petitioner to submit, among other things, Internal Revenue Service (IRS) certified copies of the beneficiary's income tax returns and accompanying documents "for the two years preceding the filing of this petition." The petitioner's response included various IRS documents. For 2002, an IRS Form W-2, Wage and Tax Statement, showed that the petitioner paid the beneficiary $4,200, and an IRS Form 1099-MISC Miscellaneous Income statement showed $2,270.59 in additional payments from the petitioner. It is not clear why the petitioner reported some of this amount on Form W-2, and the rest on Form 1099-MISC, but the two-year qualifying period does not include any part of 2002 so this question is not directly relevant to the question at hand.

For 2003, the petitioner submitted an IRS Form W-2 and an IRS printout of the beneficiary's income tax return, both of which showed $14,600 in wages. That amount matches the year-to-date total on the beneficiary's December 29, 2003 pay receipt from the petitioner.

The petitioner did not provide IRS Forms W-2 or 1099 for 2004, but the amounts shown on the IRS printout of the beneficiary's income tax return are consistent with the pay receipts from the petitioner and from [redacted]. The printout shows $8,500 in wages, matching the year-to-date total shown on the December 27, 2004 pay receipt from the petitioner. Separately, under business income, the printout showed $6,720 in gross receipts, an amount equal to 21 payments of $320 each. The petitioner documented 13 $320 payments from [redacted] to the beneficiary in 2004, dated between September and November. At first glance, the petitioner appears to have submitted receipts for 14 such payments, but closer examination shows that the petitioner submitted receipt number 1164, dated September 13, 2004, twice. Therefore, the beneficiary's reported business income is consistent with his rate of payment from [redacted], but the petitioner did not show that of the reported business income came from that source.

The TSC director denied the petition on November 2, 2005, stating that the beneficiary's low compensation in 2004 did not appear to be consistent with continuous employment. On appeal from that decision, prior counsel argued that the pay stubs showed that the beneficiary worked for the petitioner for all of 2004, and that the TSC director failed to take the beneficiary's payments from [redacted] into account.

The petitioner's 2005 appeal included, for the first time, the beneficiary's complete 2004 payroll receipts from the petitioner. These receipts showed that the petitioner paid the beneficiary only $150 per week from January through September of 2004. The receipts also showed the same 13 previously documented payments from [redacted] As before, the petitioner submitted two copies of receipt number 1164.

The petitioner did not explain why it halved the beneficiary's weekly salary, from $300 to $150, at the beginning of 2004. This significant drop in compensation suggests a corresponding drop in work performed. The petitioner claimed that the beneficiary worked full-time during that period, but $150 pay for 35 or more hours of work would mean that the petitioner paid the beneficiary no more than $4.29 per hour, at a time when the federal minimum wage was $5.15 per hour. The substantial drop in the beneficiary's compensation for most of 2004 is, therefore, not consistent with the petitioner's claim that the beneficiary's work continued from 2003 without significant change or interruption.

For reasons unexplained, the TSC director did not forward the appeal to the AAO for consideration. Instead, in early 2009, the TSC director forwarded the record to the CSC. By that time, USCIS had 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. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

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 revised 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 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.

The CSC director reopened the proceeding and issued a new RFE on August 15, 2009, advising that the director would deny the petition if the petitioner did not submit newly required evidence, including "evidence showing the beneficiary has been authorized to work for [redacted]." The director also repeated the TSC director's previous assertion that the beneficiary's payroll documentation is not consistent with the petitioner's claim that the beneficiary worked full time during the two-year qualifying period.

In response, prior counsel asserted that [redacted] "headquarters is located at the same premises" as the petitioner, and "[t]he services [the beneficiary] performed were related to his duties as Assistant Pastor." The petitioner submitted IRS tax return transcripts for 2003 through 2005, and prior counsel stated that the beneficiary's total wages for each of those years exceeded the federal minimum wage then in effect. By relying only on the annual totals, prior counsel ignored that the beneficiary's weekly paychecks for most of 2004 did not reflect full-time employment at or above the minimum wage.

The IRS transcripts included an IRS Form 1099-MISC showing that [redacted] paid the beneficiary $6,720 in 2004, an amount matching the beneficiary's reported gross income for that year. The 2005 transcripts included two Forms W-2 showing $12,932 in wages from the petitioning church, with Employer Identification Number (EIN) [redacted], and $17,200 from [redacted] EUA, with EIN [redacted].

[redacted], senior pastor of the petitioning church, stated that "Confradeb-EUA . . . is in reality an initiative of our main church in Lighthouse Point," but "was registered with the Labor Department under a different EIN number." The implication is that the beneficiary's duties with [redacted] were actually duties with the petitioner, even though the beneficiary received separate compensation from two nominally separate entities.

The petitioner submitted copies of corporate records, identifying [redacted] as the president of the petitioning church and of [redacted]. The two entities, however, did not share any other corporate directors. [redacted] is clearly not simply another name for the petitioning church; it is a legally separate corporation that happens to have the same president as the petitioning church, but an otherwise completely different leadership structure.

The director denied the petition on October 14, 2009, in part because the petitioner had not satisfactorily established the beneficiary's continuous, authorized employment throughout the 2003-2005 qualifying period. The director stated that [redacted] operates as a different entity having another employer identification number," and that the petitioner had not shown that USCIS had authorized the beneficiary to work for that entity. The director also stated that the tax documents in the record "were not certified by the IRS, as required."

The AAO acknowledges that the petitioner had not submitted IRS-certified photocopies of the beneficiary's income tax returns. Nevertheless, the petitioner did submit IRS-prepared transcripts of those returns, which contain the same information that would have been contained in IRS-certified copies of the returns themselves. Therefore, the IRS was the source of the tax documents, and the transcripts are qualifying IRS documentation under the regulation at 8 C.F.R. § 204.5(m)(11).

On appeal, [redacted], vice president of the petitioning church, claims that [redacted] "headquarters is located at the same premises [as the petitioning church] . . . and has the same board of directors, having Senior Pastor [redacted] as president of both organizations." The petitioner's own submissions refute the claim that the two organizations share "the same board of directors," [redacted] being the only member to belong to both boards.

The regulation at 8 C.F.R. § 214.2(r)(6) that was in effect during 2003-2005 states, in part:

> A different or additional organizational unit of the religious denomination seeking to employ or engage the services of a religious worker admitted under this section shall file Form I-129 with the appropriate fee. . . . Any unauthorized change to a new religious organizational unit will constitute a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

The petitioner and [redacted] are clearly different organizational units, incorporated for related but distinct purposes and fulfilling different functions. The two entities are separately incorporated, with different EINs and mostly different boards of directors. The beneficiary holds different titles within the two organizations, each of which compensates him separately. No doubt the two organizations share a denominational affiliation, but it is clear that the two entities are different organizational units within that denomination. The AAO agrees with the director's finding that, by working as a paid official of [redacted] when his R-1 nonimmigrant status allowed him only to work as a minister for the petitioning church, the beneficiary failed to maintain that status.

With respect to the beneficiary's maintenance of status, the AAO notes that the IRS documents in the record do not indicate that the beneficiary reported any income from teaching work, and the record contains nothing from the [redacted] to clarify the nature of the beneficiary's work and compensation, if any, during that time. Nevertheless, it is significant that both the petitioner and the beneficiary stated that the beneficiary was a school teacher in the [redacted] from 2002 to 2004. Any such teaching work would have further violated the beneficiary's R-1 nonimmigrant status. The record does not contain sufficient evidence to permit a conclusion one way or the other on this matter, but it is of concern that both the petitioner and the beneficiary assert that the beneficiary was a school teacher during the qualifying period. Either the beneficiary engaged in disqualifying outside work, or else the petitioner and the beneficiary have provided false statements about the beneficiary's work history.

The second stated ground for denial concerns the petitioner's failure to submit an employer attestation, as required by the new regulation at 8 C.F.R. § 204.5(m)(7). That requirement did not exist at the time of the initial filing or the petitioner's first appeal in 2005, but was in place when the director issued the superseding RFE in August 2009. In that notice, the director instructed the petitioner to submit an employer attestation. The petitioner's response to the notice did not include this required document.

On appeal, the petitioner submits the required submission. In an accompanying letter, [redacted] quotes the director's notice of July 15, 2009, in which the director stated: "Should the petitioner choose to appeal the decision, the petitioner is required to submit the following evidence . . . ," followed by a list of required documents, including the attestation. Counsel states that the petitioner has provided those documents on appeal, "[f]ollowing the USCIS' recommendation."

A review of the regulations would reveal that the attestation is a required initial document, not a last resort to be submitted only on appeal, but the AAO agrees with counsel that the director, in the August 2009 notice, appeared to instruct the petitioner to withhold the attestation until the appeal. In light of this misleading instruction, the AAO will accept the attestation offered on appeal. The other stated ground for denial, however, remains in effect.

In the most recent addition to the record, the petitioner's new attorney submits the beneficiary's "recently **approved Labor Certification** as Clergy for" the petitioner (emphasis in original). The ETA Form 9089 employment certification, valid until August 17, 2011, may accompany certain immigrant petitions filed on Form I-140, but it is not part of a special immigrant religious worker petition filed on Form I-360, and its existence does not establish eligibility in the present matter. The petitioner is free to file a Form I-140 petition supported by the labor certification while it remains valid, but the AAO cannot and will not predict or guarantee the outcome of such a petition.

The AAO notes that, according to the labor certification, the beneficiary's position requires either a master's degree in theology or a bachelor's degree plus five years of experience. The petitioner had not previously indicated that the position requires any degree at all, and repeated submissions intended to establish the beneficiary's credentials made no mention of such a degree.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed.