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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: NOV 21 2011 OFFICE: NEBRASKA 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, Nebraska Service Center, denied the employment-based immigrant visa petition. The director treated the petitioner's appeal as a motion, and reopened the proceeding. The director again denied the petition, and the petitioner filed another appeal. The Administrative Appeals Office (AAO) withdrew the director's decision and remanded the petition for further action and consideration. The director denied the petition for a third time, and certified the decision to the AAO for review. The AAO affirmed the denial of the petition. The matter is now before the AAO on a motion to reconsider. The AAO will grant the motion and affirm its prior decision.

The petitioner is a Christian church of the Ethiopian Orthodox 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 head deacon. The director determined that the petitioner had not established that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing date of the petition. The AAO, in its most recent decision, affirmed the finding that the petitioner had not established the required experience, because (1) the petitioner failed to submit sufficient evidence of compensation, and (2) the beneficiary was in violation of his nonimmigrant status for much of the relevant two-year period.

On motion, the petitioner submits a brief from counsel and copies of various supporting documents.

Four months after the petitioner filed the motion, the petitioner submitted a letter from a church official. The AAO cannot accept this letter as an integral part of the motion. The instructions to the Form I-290B Notice of Appeal or Motion stated: "Although a petitioner may be permitted additional time to submit a brief and/or evidence to support an appeal, no such provision applies to motions. Any additional evidence must be submitted concurrent with the motion." There is no provision to allow the petitioner to supplement a motion to reconsider months after its filing.

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).

At issue in this proceeding is the beneficiary's past experience. At the time the petitioner filed the petition, the USCIS regulations at 8 C.F.R. §§ 204.5(m)(1) and (3)(ii)(A) required the petitioner to establish that the beneficiary continuously engaged in qualifying religious work throughout the two years immediately preceding the petition's filing date.

During this proceeding, USCIS revised the regulations pertaining to special immigrant religious worker petitions. 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.

The AAO incorporates its June 17, 2011 decision here by reference. A brief summary follows.

The petitioner filed the Form I-360 petition on August 20, 2004. On that form, the petitioner answered "no" when asked whether the beneficiary had ever worked in the United States without authorization. In a letter accompanying the initial submission, [redacted], the petitioner's Parish Council Chairman, stated that the beneficiary had served as the petitioner's head deacon "from August 2002 to the present. . . . From July 2001 to August 2002, he provided his services as Head Deacon to the [redacted]."

The beneficiary initially entered the United States as a B-2 nonimmigrant visitor on March 12, 2001, with no authorization to work for any United States employer. Beginning September 11, 2002, the beneficiary held R-1 nonimmigrant religious worker status, permitting him to work for the Ethiopian Church of Michigan (using the name Saint Tekle Haimanot Ethiopian Church) in Southfield, Michigan. The petitioner filed a nonimmigrant petition on the beneficiary's behalf, the approval of which authorized the beneficiary to work for the petitioner effective March 10, 2003.

The USCIS regulation at 8 C.F.R. § 214.2(r)(6) (2003) stated, in part: "Any unauthorized change to a new religious organizational unit will constitute a failure to maintain status." The AAO concluded: "Any work that the beneficiary performed for the petitioner prior to March 10, 2003 was not authorized under United States immigration law."

In an April 26, 2010 letter, [redacted], chairman of the petitioner's parish council, stated that the beneficiary worked "voluntarily from July 15, 2001 – July 14, 2002 with the [redacted] Upon the reorganization of the Church, he continued volunteering his services from August 3, 2002 – September 10, 2002 with [the petitioner] until he was granted the R1 status," and then held a "salaried position" with the petitioning church "[f]rom September 11, 2002 – August 20, 2004."

Copies of IRS Form W-2 Wage and Tax Statements indicated that the petitioner paid the beneficiary $4,950 in 2003 and $6,600 in 2004, consistent with nine months' pay in 2003 and a full year's pay in 2004 at the claimed rate of $550 per month. Copies of pay receipts dated between April 2003 and January 2005 showed monthly payments of $500, not $550. The petitioner submitted only nine pay statements for 2003. The AAO stated:

> The evidence, therefore, does not support [redacted] claim that the beneficiary served in a "salaried position" with the petitioner since September 2002. Instead, it strongly suggests a March 2003 hiring date (with his first paycheck appearing the following month), coinciding with when USCIS first authorized the beneficiary to work for the petitioner as an R-1 nonimmigrant.

The AAO also found that the petitioner did not submit IRS documentation of the beneficiary's claimed 2002 compensation, and that the petition had not addressed the issue of the beneficiary's lack of employment authorization during part of the two-year qualifying period.

On motion, counsel states:

> the AAO mixed up the basic facts of this case and then raised new issues that the Petitioner had not had a chance to address. . . . The USCIS decision also made several legal errors, including its conclusions about the evidence required to show the requisite two years experience, and regarding the R-1 beneficiary's status in the US, which has never been at issue in this case.

Regarding the petitioner's corporate identity, counsel states:

> Due to a dispute among church members some members were ousted and new parish council members were elected in August 2002. The new parish council members completed all the required paper work such as . . . notifying IRS of the name change and addition of "[redacted] Orthodox Church remained the same congregation . . . with some of the same leaders. It was by judicial order in January 2003 that the church had to obtain new IRS Tax Id number and new Michigan Corporation Identification number.

In its decision of June 17, 2011, the AAO stated:

> Several months later, on January 30, 2003, the petitioner filed a Certificate of Assumed Name with the State of Michigan, adopting the name "Saint Teklehaimanot Ethiopian Orthodox Tewahdo Church in Michigan," which is similar to the assumed name under which the church in Southfield petitioned for the beneficiary in 2002. The record shows that the church in Southfield uses a different employer identification number (EIN), [redacted], than the present petitioner, whose EIN is [redacted]. The web site of Michigan's Department of Licensing and Regulatory Affairs lists both churches as currently active corporations, with different addresses, and indicates that the two churches have, at times, used real or assumed names that are nearly or fully identical.
>
> Whatever affiliation may exist between the two churches, they are separate corporations and separate organizational units within the denomination. The beneficiary's authorization to work for the petitioner's organizational unit (through a separate nonimmigrant petition) did not take effect until March 10, 2003.

(Footnote omitted.) Counsel's assertion that the petitioner is "the same congregation" where the beneficiary had worked in 2002 fails to take into account the continued existence of two separate corporations with two separate EINs. The petitioner submits no documentation of the January 2003

"judicial order" to explain either the nature of that order or the circumstances that led to it. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has not submitted sufficient documentation of the schism to support its self-serving version of the events described. The creation of a new corporation, with a new EIN, while the old corporation continues to exist even eight years later, does not readily support the claim that the two organizations are one and the same. The petitioner has not shown that it is the same corporate entity that first petitioned for the beneficiary in 2002.

Counsel acknowledges that the petitioner filed articles of incorporation in 2003 and obtained a new EIN, but claims: "Besides these administrative changes, which were mostly mandated per court order, there were no other changes made to the church organization." Despite counsel's attempts to minimize the significance of "these administrative changes," the original, pre-2003 organization still exists, and therefore the petitioner cannot be a continuation or successor to that organization in any sense relevant to this proceeding. The unsupported assertion that the petitioner only filed new articles of incorporation due to a barely-described "court order" does not obscure or minimize the legal effect of that filing, which was to create a new corporation, legally distinct from the original entity that filed the first nonimmigrant petition in 2002.

Furthermore, the USCIS notice reporting the approval of the Southfield church's original petition showed that the beneficiary's R-1 status would be valid from September 11, 2002 to September 10, 2005. The petitioner, however, filed a new petition just a few months later in early 2003. The 2003 petition would have been redundant if the petitioner was the same entity that filed the 2002 petition. The only reason to file a new petition in 2003 would be to account for a change of employment.

Counsel contends that the 2003 filing was an "R-1 extension request" notifying USCIS "of the official name change." The approval of the 2002 filing, however, granted the beneficiary R-1 nonimmigrant status through September 10, 2005. The 2003 petition resulted in an earlier expiration date of March 9, 2005. Therefore, the net result did not include any extension of stay.

Counsel observes: "Since the filing of the I-360 petition in question, neither [the petitioner's] name nor its structure as a church organization changed. . . . [The petitioner] has remained the same organization since January 30, 2003." This does not show that the petitioner worked for the same employer since September 2002. Indeed, counsel effectively acknowledged the change of organization that took place in early 2003. The petitioner has remained the same organization since it first filed its articles of incorporation in January 2003, but this is irrelevant to the matter at hand.

For the reasons stated above, the AAO affirms its prior finding that the beneficiary changed employers in 2003, before USCIS approved a petition to allow that change of employment.

Other questions surround the beneficiary's claimed work in the months before March 2003. The AAO, in its June 17, 2011 decision, stated:

> The petitioner did not submit the requested IRS documentation of the beneficiary's 2002 compensation, or explain its absence. This omission, by itself, precludes approval of the petition. 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). . . .
>
> The petitioner's response to the certified decision does not address the director's finding that, as a B-2 nonimmigrant, the beneficiary was not authorized to work as a deacon during the early months of the qualifying period. Because this finding is disqualifying all by itself, the omission is significant. The petitioner has not adequately demonstrated the beneficiary's claimed salaried employment between September 2002 and March 2003, a period when the beneficiary's R-1 nonimmigrant status required him to work for a different employer than the petitioner.

On motion, counsel states that the petitioner has documented most of the beneficiary's compensation, and that it is "unfair" to expect evidence to cover the balance of the qualifying period. Counsel asserts that "the regulations allow for flexibility in the type of evidence that can be used." The regulation at 8 C.F.R. § 204.5(m)(11)(i) states that, if the beneficiary "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." Counsel does not explain where the "flexibility" lies in the regulatory requirement that the petitioner "must submit IRS documentation."

IRS documentation of the beneficiary's claimed 2002 employment is required evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The regulations are clear and unambiguous on this point, and there is no provision that the petitioner need not submit all of the required evidence, so long as the petitioner submits most of it.

Furthermore, as the AAO previously noted, the IRS documentation from 2003 does not appear to cover the entire year. Rather, it accounts for only nine monthly payments of $550 each, which is what the petitioner claimed the beneficiary was earning. Counsel's protest that "it is not required that every month be covered" does not explain this significant gap in the record.

Counsel maintains that "in 2010, the [beneficiary] had a very difficult situation trying to obtain the W-2's from the 2002 church records eight years later." Apart from being yet another unsupported claim, this assertion fails to account for the shortfall in the 2003 IRS documentation. The passage of time does not change the amount reported on a Form W-2 for a given year. The petitioner did not meet the regulatory requirement to submit IRS documentation to establish two years of qualifying employment. The AAO affirms its prior finding in this regard.

Going back further to the earliest weeks of the two-year qualifying period, counsel states "the AAO erred in ruling that [the beneficiary[worked without authorization while he was in B-2 status." Counsel repeats the petitioner's prior claim that the beneficiary worked "voluntarily . . . and did not receive any compensation," instead living off "personal savings and [support from] his brother-in-law."

In its June 2011 decision, the AAO stated:

> The petitioner cannot evade the evidentiary requirements simply by declaring the beneficiary to have been an unpaid, self-supporting volunteer. When USCIS revised the regulations for immigrant and nonimmigrant religious workers, in discussing the compensation requirements, USCIS stated that it would continue to allow self-supporting workers only under very limited circumstances. 73 Fed. Reg. 72276, 72282 (Nov. 26, 2008). USCIS specified that the self-supporting aliens are restricted "to those workers who are part of an established program for temporary, uncompensated missionary work which is part of a broader international program of missionary work sponsored by the denomination." *Id.* at 72278. The permissible conditions for self-support appear in the regulations at 8 C.F.R. § 214.2(r)(11). Accordingly, when viewed as a whole, the regulations do not allow for uncompensated qualifying experience except relating to certain missionaries.

Counsel observes "the time period at issue for the [beneficiary's] volunteering . . . was six years before the 2008 regulations were promulgated." The AAO has already explained that the 2008 regulations apply to all petitions pending on their effective date, and counsel has cited no authority to create a special exemption for the self-support provisions described above. (Counsel cites a 2004 court decision, which the 2008 regulations have superseded.)

Counsel states that the beneficiary's three weeks of uncompensated work "should not be the only basis for denying this otherwise approvable petition." As the AAO has shown at length, the petition is not "otherwise approvable." Counsel's panoply of irrelevant, peripheral claims and *ad hoc* excuses for fundamental gaps in the record do not overcome the serious, disqualifying issues that have come to light in this proceeding.

Counsel also notes that the regulation at 8 C.F.R. § 204.5(m)(4) permits a break in the two-year qualifying period. Counsel contends, therefore, that "the beneficiary's . . . work experience prior to coming to the US should qualify." Counsel does not explain what evidence, comparable to IRS documentation, is in the record to document this earlier experience.

Furthermore, the cited regulation places limits on the nature of a permissible break in qualifying experience, stating that 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.

The claimed break lasted less than two years, satisfying requirement (ii) above, but counsel has not shown that the petitioner meets either of the other two requirements. Counsel acknowledges that the beneficiary "was not gainfully employed" when he entered the United States on March 12, 2001 as a B-2 nonimmigrant visitor for pleasure. Therefore, it is not clear in what sense "[t]he alien was still employed as a religious worker." Also, the petitioner has not shown that "[t]he nature of the break was for further religious training or for sabbatical." Counsel asserts that the "break while [the beneficiary] was initially in the US furthered his religious career," but does not elaborate. The petitioner has claimed that the beneficiary began volunteering at the church in Southfield in July 2001, some four months after he arrived in the United States. Therefore, a significant gap remains, even if there were no question at all about the beneficiary's activities from July 2001 onward.

Counsel asserts that the beneficiary "remained in lawful status" "after the expiration of [his] R-1 visa." This claim is irrelevant to the issue at hand, because the petitioner's R-1 nonimmigrant status expired after the petition's August 2004 filing date, rather than during the two years before that date.

Counsel has alleged various errors of fact and law on motion, but the record does not show any errors that resulted in the denial of a petition that should have been approved. Key claims are unsubstantiated, and crucial assertions are not plausible on their face. The AAO will therefore affirm its prior finding, for each of the independent reasons articulated above.

ORDER: The director's decision of April 29, 2011 is affirmed. The petition remains denied.