

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

Date: DEC 13 2012

Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

Petitioner:

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:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

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 youth director/counselor. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a letter from Father [REDACTED] pastor of the petitioning church and signatory of the petition, and a letter from [REDACTED] of Park Avenue Family Practice and Geriatrics in Yonkers, New York.

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 U.S. Citizenship and Immigration Service (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 petition was filed on November 9, 2011. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work in lawful immigration status throughout the two-year period immediately preceding that date.

The USCIS 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.

On the Form I-360 petition, the petitioner indicated that the beneficiary arrived in the United States on October 10, 2007 and that at the time of filing, he held R-1 nonimmigrant status expiring on October 10, 2012. In a letter accompanying the petition, the petitioner indicated that the beneficiary was currently employed by the petitioning church. The petitioner submitted uncertified copies of the beneficiary's Form 1040 tax returns and state tax returns for the years 2008, 2009, and 2010. The beneficiary's Schedule C forms indicated gross income of \$18,000 for each year, but the tax returns did not identify the source of the beneficiary's income.

On January 27, 2012, USCIS issued a Request for Evidence, requesting additional evidence regarding the beneficiary's past employment. The notice specifically instructed the petitioner to submit official copies of the beneficiary's Forms W-2 for the past two years, copies of the beneficiary's 2011 pay statements, copies of the petitioner's Forms W-3 for the past two years, and a copy of the beneficiary's earnings record from the Social Security Administration (SSA).

In a letter responding to the notice, the petitioner stated that it does not issue W-2 forms as its workers are considered independent contractors, but that the beneficiary paid taxes “on all his earnings which have been submitted with the original I-360 application.” The petitioner did not explain why a Form 1099 was not issued in lieu of the Form W-2. The petitioner submitted copies of 13 processed checks for \$1,500.00 made out to the beneficiary from the petitioning church between December 31, 2010 and December 24, 2011 on an approximately monthly basis. The petitioner also submitted the beneficiary’s SSA record covering the years 2008 to 2010. In addition to earnings reported as self-employment, the SSA record indicated that the beneficiary received earnings of \$231.90 from Spice Market NY LLC in New York, New York in 2009 and \$29,428.00 from Park Avenue Medical Family Practice & Geriatrics P C in Yonkers, New York in 2010.

The AAO notes that the amount of earnings listed on the beneficiary’s SSA record are not consistent with the earnings listed on his previously submitted Form 1040 tax returns. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On May 4, 2012, the director denied the petition. The director stated:

Service records show that the beneficiary entered the United States as a religious worker on an R-1 visa on October 11, 2007 and valid until October 10, 2010. A request to extend the beneficiary’s R-1 status was approved from October 11, 2010 and valid until October 10, 2012.

The director found that the beneficiary engaged in unauthorized employment with Spice Market and Park Avenue Medical Family Practice, thereby failing to maintain his nonimmigrant status. Therefore, the director found the evidence insufficient to establish that the beneficiary had the requisite two years continuous, lawful, qualifying work experience immediately preceding the filing of the petition.

On appeal, the signatory of the petition, [REDACTED] notes his own “ignorance of the technicalities and regulation of the R-1 Visa status,” and asserts that the beneficiary “did not intentionally and knowingly violate his status.” He states that Park Avenue Medical Family Practice is owned by [REDACTED] a member of the petitioning church, and that “more than three quarters” of the petitioner’s members are patients of the practice. [REDACTED] states that the petitioning church therefore provides a chaplain/counselor to the medical practice to see to the spiritual welfare of the patients. He asserts that the beneficiary’s work for Park Avenue Medical Family Practice has been in this role of chaplain on behalf of the petitioning church, and that “[REDACTED] [REDACTED] has compensated [REDACTED] through the income of his practice as a special donation to Virgin Mary Church.” The petitioner submits a letter from [REDACTED] which includes the same assertions regarding the beneficiary’s work and compensation.

Regarding the beneficiary's work for Spice Market, [REDACTED] asserts that it consisted of "four days of volunteered work performed as a favor to a friend of mine, [REDACTED], who was a manager of the restaurant," and that the beneficiary immediately returned to work at the petitioning church after completion of the four days. [REDACTED] states: "[REDACTED] was unaware of the arrangements discussed between [REDACTED] and myself."

The regulation at 8 C.F.R. § 274a.12(b)(16) states that "[a]n alien having a religious occupation, pursuant to § 214.2(r) of this chapter ... may be employed only by the religious organization through whom the status was obtained." The regulations at 8 C.F.R. §§ 214.2(r)(2) and (13) provide that "[a]n alien may work for more than one qualifying employer as long as each qualifying employer submits a petition plus all additional required documentation as prescribed by USCIS regulation" and that an R-1 nonimmigrant "may not be compensated for work for any religious organization other than the one for which a petition has been approved or the alien will be out of status."

Further, the regulation at 8 C.F.R. § 214.1(e) provides that a nonimmigrant may engage only in such employment as has been authorized. Any unlawful employment by a nonimmigrant constitutes a failure to maintain status.

Regardless of any relationship between the petitioning church and the beneficiary's outside employers, the beneficiary was not authorized to engage in employment with any organization other than the named R-1 employer without first obtaining authorization through the filing of a separate Form I-129 petition.

The petitioner argues that the beneficiary's violation of his R-1 status was unintentional. However, the regulation at 8 C.F.R. § 204.5(m)(4) requires that the beneficiary must have been in lawful immigration status during the qualifying period and the regulation at 8 C.F.R. § 204.5(m)(11) requires that the beneficiary's employment in the United States during that time must have been authorized under immigration law. The regulations make no provision for any exception to these requirements and the AAO does not have authority under the Act or the regulations to make such an exception.

For the reasons discussed above, the AAO agrees with the director's determination that the petitioner failed to establish that the beneficiary has the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition.

As an additional matter, the AAO finds that the petitioner has not established that the beneficiary will be employed in a qualifying position. The AAO may deny an application or petition that fails to comply with the technical requirements of the law 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 USCIS regulation at 8 C.F.R. § 204.5(m)(2) provides that in order to be eligible for classification as a special immigrant religious worker, an alien must:

(2) 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 following occupations as they are defined in paragraph (m)(5) of this section:

- (i) Solely in the vocation of a minister of that religious denomination;
- (ii) A religious vocation either in a professional or nonprofessional capacity; or
- (iii) A religious occupation either in a professional or nonprofessional capacity.

The regulation at 8 C.F.R. § 204.5(m)(5) states, in pertinent part:

(5) Definitions. As used in paragraph (m) of this section, the term:

Minister means an individual who:

- (A) Is fully authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct such religious worship and perform other duties usually performed by authorized members of the clergy of that denomination;
- (B) Is not a lay preacher or a person not authorized to perform duties usually performed by clergy;
- (C) Performs activities with a rational relationship to the religious calling of the minister; and
- (D) Works solely as a minister in the United States, which may include administrative duties incidental to the duties of a minister.

Religious occupation means 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.

Religious worker means an individual engaged in and, according to the denomination's standards, qualified for a religious occupation or vocation, whether or not in a professional capacity, or as a minister.

On the Form I-360 petition, Part 2. Classification Requested, the petitioner indicated that the beneficiary will be working as a minister. In Part 8, Employer Attestation, the petitioner stated that the beneficiary's title would be "Youth Director/Counselor," and described his proposed daily duties as follows: "Oversee all matters of the youth/young adults. Assist the pastor with the life and functions of the Church and her Parishioners." As a description of the beneficiary's qualifications for the position, the petitioner indicated that the beneficiary holds Bachelor's degrees in Philosophy and Civil And Ecclesiastical Theology, as well as a Master's degree in Theology. The petitioner identified itself as affiliated with the denomination of "Antiochian Orthodox Archdiocese."

In a letter accompanying the petition, the petitioner additionally stated the following with regard to the beneficiary's position and qualifications:

His experience shows that he is authorized **to assist in celebrating Divine Liturgy, the Sacraments, and all other liturgical services, preach, teach, administer to the needs and demands of the many youth in our parish, such as Sunday School students and staff, our teens, young adults, and visit the sick in their homes and in hospitals.** ...

He is a great candidate for ordination to the diaconate which will include a raise in salary.

(Bold emphasis added. Italics emphasis in original). The petitioner also submitted copies of the beneficiary's diplomas as listed on the petition.

It is not clear whether the proffered position of youth director/counselor is a ministerial position or a religious occupation. The definition of “minister” at 8 C.F.R. § 204.5(m)(5) does not include lay preachers, but rather requires that an individual be “fully authorized by a religious denomination ... to conduct such religious worship and perform other duties usually performed by authorized members of the clergy of that denomination.” The petitioner indicated that the beneficiary “is a great candidate for ordination,” and is authorized “to assist in” all liturgical services. However, the petitioner has not submitted evidence regarding the denomination’s standards regarding qualifications to perform duties usually reserved for the clergy in order to establish that the beneficiary meets such qualifications.

Alternately, in order for a position to qualify as a religious occupation, the regulations require that the duties “must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination.” The petitioner failed to submit evidence that the position of youth director/counselor is recognized as a religious occupation within the Antiochian Orthodox denomination. Accordingly, the petitioner has not established that this position meets the definition of “religious occupation” under the 8 C.F.R. §204.5(m)(5). The AAO does not find that the position of youth director/counselor could never meet the eligibility requirements of a religious occupation, only that the petitioner has not yet demonstrated that the beneficiary’s position qualifies as a religious occupation.

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.