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]

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DATE: DEC 20 2012 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 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 belonging to the Southern Baptist Convention and the Romanian Baptist Association. 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 worship director. The director determined that the petitioner had not established how it intends to compensate the beneficiary.

On appeal, counsel submits a brief and copies of the petitioner's financial documents.

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, 2015, 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, 2015, 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 basis for denial concerned the beneficiary's compensation. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(10) states:

> 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 [Internal Revenue Service] 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 filed the Form I-360 petition on July 8, 2011. On line 5d of the accompanying employer attestation, asked to describe "the proposed salaried and/or non-salaried compensation" for the beneficiary's position, the petitioner stated: "Total annual compensation of $20,400, comprised of the following: cash compensation of $7,200.00; paid cost of automobile, auto insurance and registration ($300/month); paid cost of apartment housing, including all utilities and taxes ($800/month)." The petitioner claimed that its pastor was the only paid employee at the time of filing. The petitioner also claimed seven volunteer workers (including the beneficiary).

The petitioner submitted a bank statement showing an average balance of over $35,000 for May 2011. A "Consolidated Balance Sheet" showed the following figures as of December 31, 2010:

Current Assets:	
Total petty cash	$675.00
Operating checking	37,150.15
Inventory	10,350.00
Total current assets	48,175.15
Total Current Liabilities	8,500.00
Fund Balance:	
Beginning fund balance	257,561.82
Net income for the year	36,272.00
Total fund balance	293,833.82

The petitioner also submitted an "Income and Expense Summary" for 2009 and 2010, and a "Budget Proposal" 2011. Together, the documents showed the following figures:

	2009 (actual)	2010 (actual)	2011 (projected)
Beginning of the year balance	$5,503	$26,946	$36,272
Income	195,789	172,845	150,000
Expenses (total from itemized list)	174,346	163,519	138,600
Salary expenses	36,579	36,668	—
Salary	—	—	28,500
Salary Worship Director	—	—	26,000
End of the year balance	26,946	36,272	11,400

The petitioner has indicated that, since early 2008, the pastor has been the petitioner's only paid worker. Therefore, the salary amounts reported for 2009 and 2010 can only refer to the pastor's compensation.

The "Consolidated Balance Sheet" and "Income and Expense Summary" both show the sum of $36,272 at the end of 2010, but in very different contexts. The "Income and Expense Summary" shows the sum as an end-of-year cash balance, representing the surplus left over after adding income to the beginning of the year balance, and then subtracting expenses. The "Consolidated Balance Sheet," on the other hand, characterized that same sum as "Net Income for the Year." That document showed the end-of-year cash reserves as $37,825.15 (adding petty cash to the petitioner's bank balance).

The director issued a request for evidence (RFE) on February 7, 2012, instructing the petitioner to submit, among other things, evidence to meet the compensation requirements in the regulation at 8 C.F.R. § 204.5(m)(10). In response, the petitioner submitted copies of IRS Form W-2 Wage and Tax Statements issued to another church worker in 2006-2008. [redacted] and member of the petitioner's accounting department, stated that the worker held the beneficiary's intended position from January 1, 2006 to February 28, 2008. The documents show that the petitioner paid the worker $16,800 in 2006, $16,800 in 2007 and $2,800 in 2008, a steady rate of $1,400 per month. Quarterly tax returns from 2006 are consistent with this rate of pay, showing $4,200 per quarter. Dorin Radu explained that there are no tax records from after the departure of the prior worship leader because the pastor of the church "was a contractor and was responsible to pay his own taxes. In addition, please note that he retired on 04/30/2011."

Although the petitioner claims that the worker held the same position that the petitioner now offers to the beneficiary, a copy of the worker's 2007 income tax return lists the other worker's occupation as "music education."

An April 18, 2012 amendment to the beneficiary's job offer indicated that the beneficiary "shall receive $20,400 gross per year," which "shall comprise the entire compensation that [the beneficiary] shall receive from the church," in lieu of the previously stated combination of salary and allowances to cover various expenses. The petitioner's "Budget Proposal 2012" included the following figures:

Surplus [carried over from] 2011	$25,000
Income	154,500
Total expenses	169,500
Salary, Pastor	36,000
Salary and fringe benefits, Worship Director	26,000
Health insurance	7,200
Surplus	10,000

The petitioner did not explain the nature of the $5,600 in "fringe benefits" beyond the $20,400 salary. Without explanation, this reference to fringe benefits appears to contradict the statement that the $20,400 salary "shall comprise the [beneficiary's] entire compensation." Health insurance is clearly not one of these "fringe benefits," because it appears separately in the budget.

The petitioner submitted a copy of the IRS Form 1099-MISC Miscellaneous Income statement that it issued to its pastor for 2011, as well as a Social Security record of the pastor's compensation from 1994 to 2010. The document does not identify the employer(s), but counsel, on appeal, asserts that the petitioner employed the pastor from 1994 until his retirement in 2011. Together, the Social Security and IRS documents show the following figures:

1994	$1,706.00	2003	$37,083.00
1995	5,888.40	2004	46,161.00
1996	4,886.34	2005	9,634.00
1997	7,491.85	2006	18,941.00
1998	25,498.01	2007	15,158.00
1999	28,818.44	2008	17,533.00
2000	28,444.80	2009	17,492.00
2001	4,479.80	2010	16,476.00
2002	2,970.00	2011	17,500.00

The 2009 and 2010 figures are substantially lower than the amounts listed as "salary expenses" on the petitioner's "Income and Expense Summary," which did not distinguish between salary and related expenses. The petitioner's 2011 budget, submitted previously, indicated that the petitioner expected to pay $28,500 in "salary," not including the beneficiary's planned compensation. The AAO acknowledges the petitioner's assertion that the pastor retired at the end of April 2011, but his reported pay for 2011 is comparable to the full-year figures for 2006-2010. This evident undercompensation of the church's only paid worker is of obvious concern when evaluating the petitioner's intention and ability to compensate the beneficiary, especially when coupled with the overall declining trend in the petitioner's income.

The director denied the petition on June 4, 2012, stating that the petitioner had not adequately demonstrated its ability to meet the stated terms of employment. The director noted the amended terms of compensation, which seemed "to indicate that the petitioner was not capable of showing verifiable evidence of the ability to provide the beneficiary with an automobile and housing." The change in terms did not affect the amount of compensation, only its form; the net total would remain $20,400 per year. Furthermore, the petitioner had not initially promised to provide an automobile or housing. Rather, the petitioner pledged to cover their "cost." The only substantive change is that the beneficiary would cover these expenses using money from the petitioner, rather than have the petitioner make the payments on the beneficiary's behalf. The changed terms of compensation, therefore, show minimal net effect. By itself, this change would not warrant denial of the petition.

The director acknowledged the submission of the 2006 quarterly wage reports and the previous worship director's IRS Forms W-2, but found them to be "outdated" and that these "funds . . . have already been expended and are not readily available for compensation of the beneficiary." Counsel, on appeal, correctly notes that the documentation of the former worship director's salary "was not presented as proof that the same funds . . . are also available to pay the beneficiary." Rather, the USCIS regulation at 8 C.F.R. § 204.5(m)(10) specifies that evidence regarding compensation "may include past evidence of compensation for similar positions." Counsel states: "if the petitioner had the ability to compensate in the past for similar positions it is likely that it will also have the ability to pay for similar positions in the future."

The issue of greatest concern arising from the old IRS Forms W-2 is that they show a salary of $16,800 per year, considerably less than the $20,400 now offered to the beneficiary. The evidence of the previous worship leader's compensation does not show the petitioner's ability to pay the higher salary now offered to the beneficiary.

The director found that "[t]he quarterly wage reports and [the pastor's] social security record are outdated and do not show an ability to compensate the beneficiary." Counsel, on appeal, states that the records "are not outdated" because the pastor "worked as a W-2 employee for the petitioner between 1994 through 2010 and, then, in 2011, the year of his retirement, he worked as a 1099 subcontractor." The record contradicts counsel's claim that the pastor received IRS Forms W-2 until 2010. Dorin Radu stated that the former pastor was a contractor, but referred to no earlier change in employment status. The quarterly returns for 2006 consistently stated the "Number of employees" as "1," and indicated that the one employee received $4,200 per quarter, or $16,800 for the year. This amount matches the total shown on the former worship director's Form W-2 for 2006, and it does not match the former pastor's total 2006 compensation shown on the Social Security report. Therefore, all the evidence indicates that counsel is incorrect, and that the former pastor was not a salaried employee (rather than a contractor) in 2006.

The director correctly observed that the single submitted bank statement represents only a snapshot of the petitioner's finances. To address this objection, the petitioner submits copies of additional bank statements from December 2010 through May 2012. The AAO will consider these materials on appeal, because the director had not specifically requested these statements earlier. The statements show average monthly balances in excess of the petitioner's proposed annual salary. Counsel states that these balances prove that the petitioner has ample funds available to pay the beneficiary's salary. It is significant, however, that the petitioner was not paying a salary to any worship leader during the period covered by the statements. Such a salary would have represented a regular drain on the balance that the statements do not reflect. To offset that drain, the petitioner would need to show consistent growth in the bank balance, from month to month, at least equal to the amount of the beneficiary's salary. The bank statements do not show such a pattern. Following the pastor's retirement in late April 2011, the petitioner's bank balance went from $35,567.81 on May 1, 2011 to $46,280.36 on May 1, 2012. If the petitioner had been paying the beneficiary's proposed $20,400 salary during this time, this gain of less than $9,000 would become a loss of

nearly $10,000. The cost of the unspecified "fringe benefits" would have subtracted another $5,400.

With respect to the budget documents, the director noted that the petitioner submitted only a budget for 2011, with no documentation to show how the actual figures to date matched up with the petitioner's projections. A newly submitted "Income and Expense Statement" for fiscal year (FY) 2012 (ending May 31, 2012) and a new budget for FY 2013 shows the following figures:

	FY 2012	FY 2013
Surplus, beginning of year	$29,091	$45,866 [*sic*]
General contribution	123,043	147,750
Offering	5,253	5,250
Total Income	157,387	198,866
Expenses	111,501	169,300
Surplus, end of year	45,886	29,566

The end of year surplus for FY 2012 does not match the beginning of year surplus for FY 2013. More importantly, the statements both count the beginning of year surplus as "income," even though it is not new money – it is, rather, the remainder of the previous year's income, after expenses. Subtracting that surplus, and considering only new income, the petitioner's own figures show that, in FY 2012, the petitioner brought in $16,795 in net new income after expenses – an amount insufficient to cover the beneficiary's salary. For FY 2013, the petitioner's expected new income falls short of the petitioner's expected expenses by $16,300, in the process consuming about a third of the petitioner's surplus. The surplus left over from the previous year provides a one-time reserve that merely delays, rather than prevents, a net loss.

Furthermore, the petitioner's anticipated hiring of the beneficiary and a new pastor accounts for the expected increase in expenses (and then some), but the petitioner has not explained the anticipated increase in income in FY 2013. The previously submitted financial documents showed an overall decline in income since 2009.

For the reasons explained above, the AAO will affirm the director's finding that the petitioner has not sufficiently established how it intends to compensate the beneficiary. The materials submitted on appeal serve to compound, rather than resolve, the director's concerns.

Beyond the director's decision, review of the record shows another ground for denial. 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).

The U.S. Citizenship and Immigration Services (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 date of the petition.

The USCIS regulation at 8 C.F.R. § 204.5(m)(11) reads, in pertinent part:

> *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. . . .
>
> If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

On line 5c of the employer attestation accompanying the petition, the petitioner stated: "Since August 9, 2003 and until present, alien works as a [redacted] with [redacted]" The beneficiary, however, did not spend the two-year qualifying period in Romania. Rather, part 3, line 13 of the Form I-360 petition indicates that the beneficiary entered the United States on July 10, 2009, and held F-2 nonimmigrant status as the spouse of an F-1 nonimmigrant student.

The petitioner does not claim that the beneficiary performed qualifying religious work during the two years immediately preceding the filing date of the petition. The petitioner, however, cited the USCIS regulation at 8 C.F.R. § 204.5(m)(4), which states 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.

The petitioner and the beneficiary's former employer in Romania have asserted that the beneficiary was on a two-year sabbatical from her July 2009 entry until the July 2011 filing date, and the director did not dispute this assertion. Therefore, the petitioner must establish the beneficiary's continuous, qualifying experience from July 2007 to July 2009, the two years immediately preceding the beginning of her sabbatical.

A translated letter from [redacted] Church, [redacted] Romania, indicated that the beneficiary worked at that church in "the full time position of Music and Worship Director" beginning in August 2003.

The petitioner has not submitted tax documentation of past compensation, which is the standard required under the regulation at 8 C.F.R. § 204.5(m)(11), or any explanation for its absence. Instead, to establish the beneficiary's employment prior to her 2009-2011 sabbatical, the petitioner submitted translated photocopies of monthly pay receipts from [redacted] These pay receipts do not establish two years of continuous experience. The monthly payments (in Romanian lei) were irregular in amount, which is inconsistent with a fixed, full-time work schedule:

Month/year	Amount	Month/year	Amount	Month/year	Amount
7/2007	250	3/2008	350	[11, 12/2008]	[none]
8/2007	200	4/2008	305	1/2009	500
9/2007	200	5/2008	200	2/2009	400
10/2007	570	6/2008	187	3/2009	225
11/2007	234	7/2008	150	4/2009	200
12/2007	310	8/2008	150	5/2009	250
1/2008	570	9/2008	100	6/2009	300
2/2008	350	10/2008	150	7/2009	150

Nothing from any official of [redacted] explains this fluctuation in the beneficiary's monthly compensation. Apart from the irregular amounts, which vary by more than a factor of five, there is no evidence of any salary payments in November or December 2008. The petitioner failed to account for this two-month gap. The regulation at 8 C.F.R. § 204.5(m)(4) permits a break that "did not exceed two years," but the beneficiary's 2009-2011 sabbatical took up the entire two years. The regulations do not permit the beneficiary's qualifying employment to stretch indefinitely into the past, interrupted by a series of breaks that are less than two years each, but take up more than two years in the aggregate.

The petitioner submitted a copy of the beneficiary's résumé. That document, presumably prepared by the beneficiary herself, indicated that she was the worship director at [redacted] from 2003 to 2009. It also, however, listed other activities during the same period. The beneficiary claimed to have been a singer from 1998 to 2009, performing at [redacted] The beneficiary also claimed to have been a music teacher at [redacted] from 2008 to 2009. This claim of concurrent employment raises questions about the claim that the beneficiary worked continuously for [redacted] during the two years preceding her 2009-2011 sabbatical.

In the February 2012 RFE, the director instructed the petitioner to submit copies of the beneficiary's 2009 and 2010 income tax returns. In response, counsel observed that the beneficiary did not work in the United States and therefore "did not have any income to report for 2009, 2010, and 2011." The director did not specifically request the beneficiary's United States income tax returns. The

basic nature of the request was for tax documentation to establish the required two years of continuous, qualifying employment. The petitioner had previously claimed that the beneficiary earned income in Romania in 2009 (and in previous years). The petitioner has not submitted any tax documentation from Romania or accounted for its absence.

In the absence of definitive documentation, such as the beneficiary's tax documents, the record does not contain sufficient evidence to show what proportion of her income the beneficiary derived from her church work rather than from secular sources during the relevant period. Given this lack of evidence, the two-month gap in the submitted pay records, and the irregular amounts of the payments, the petitioner has not persuasively established that the beneficiary performed two years of continuous, qualifying religious work at Holy Trinity from July 2007 to July 2009. This finding amounts to a second, independent basis for denying the 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.