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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: JAN 03 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 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, California Service Center, denied the employment-based immigrant visa petition and it 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 pastoral assistant. 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 and that he would be employed in a religious occupation or vocation.

Counsel argues on appeal that the director failed to address the "overwhelming" documentation that the beneficiary is, in fact, a pastoral assistant and not a janitor. Counsel submits a brief in support of the appeal.

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

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(5) defines "religious occupation" as 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.

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 April 9, 2008. 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 record reflects that the petitioner filed a previous Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, on behalf of the beneficiary on March 2, 2006 (USCIS receipt number [redacted] as a religious instructor and pastoral assistant. The petition was approved on May 18, 2006. At the time, the beneficiary was working in the United States pursuant to an R-1 nonimmigrant religious worker visa.

On August 30, 2007, an immigration officer (IO) visited the petitioner's premises for the purpose of verifying the petitioner's claims in the petition. The IO reported that the beneficiary was reportedly replacing a pastoral assistant that had left three years earlier but that on August 20, 2007, the petitioner "submitted documents listing the beneficiary as a 'janitor.'" The IO referred to an unsigned and undated "employees list," submitted on the petitioner's letterhead, that identifies the beneficiary as a "janitor" whose duties were to "Maintain[] our church building. Repair as necessary." The IO also reported that the petitioner had filed 11 previous religious worker petitions for pastoral assistants, including two, [redacted] who were still working at the church at the time. USCIS records indicate that the director revoked approval of the March 2006 petition on January 18, 2008. Counsel states that "[r]ather then appeal, the church elected to file another I-360 petition on [the beneficiary]'s behalf." However, USCIS records reflect that the petitioner appealed the revocation of the approval of the petition. The appeal of that decision is addressed in a separate decision.

The petitioner filed the instant petition on April 9, 2008. On July 24, 2008, the director notified the petitioner of her intent to deny the petition based on the results of the August 30, 2007 onsite inspection and the employee list that identified the beneficiary as a janitor. In response to the Notice of Intent to Deny (NOID), the petitioner referenced documentation submitted in response to the director's Notice of Intent to Revoke (NOIR) the 2006 petition, including a letter from "church employees and members confirming [the beneficiary's] employment as Pastoral Assistant" and "that the actual janitorial work was performed by others." The petitioner stated that only "a very minor component of [the beneficiary's] duties" involved "approv[ing] the employment of outside janitors and gardeners and approv[ing] payments to them.

Documentation in the record includes letters from three of the petitioner's pastors, a member of the elder board, the director of its mission department, members who stated they attended the beneficiary's bible study groups, and [redacted] who identified himself as a member of the [redacted] Bible Church who had attended the petitioner's "midweek early morning prayer/study service" since 2004. All attest to the beneficiary's work as a pastoral assistant. According to Mr. [redacted]

> [The beneficiary] arranged for a translator, specially for me because, as far as I know usually I am the only non-Korean attendant to these services, called me whenever I did not show up for several days, has visited me . . . . when recently I was hospitalized, he has helped develop our friendship by having lunch together more than once, also has provided valuable spiritual guidance from the Word of God.

The AAO notes that none of those attesting to the beneficiary's services provides independent or objective testimony. 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). The individuals writing letters in support of the petition are either directly associated with the petitioner or, in the case of Mr. [redacted], a friend of the beneficiary. In its November 26, 2007 response to the director's NOIR, the petitioner stated:

> We submitted a petition for another religious worker with a different attorney office and we were instructed to submit a list of all employees, position titles, and their duties in our organization on November 27, 2006. The law office who was working on that particular petition mistakenly listed the beneficiary . . . as the churches [sic] janitor on the employees list . . . The law office . . . did not confirm the positions with the Senior Pastor or the other religious worker before submitting the document. . . . [The beneficiary] is in charge of the janitorial department and takes care of all the janitorial expenses.

However, the petitioner submitted no documentation from counsel in the referenced proceeding to verify that it was counsel's error. The record of proceeding for the Form I-360 filed on March 2, 2006 contains a January 30, 2008 letter from [redacted] who stated that the petitioner filed a Form I-360 on his behalf and that the lawyer contacted him for information about other religious workers who had been petitioned for by the petitioner. Mr. [redacted] stated that he "provided the attorney incorrect information about [the beneficiary's] job title, mistakenly implying that his main duties involved maintenance/janitorial tasks." This explanation lacks credibility. First, it is unlikely that counsel would have contacted the beneficiary of a petition for information on the number of previous petitions filed by a petitioner. Second, the list is of the petitioner's employees, not a list of previous beneficiaries of petitions. Third, Mr. [redacted] confusion about the beneficiary's job title could only have arisen if the beneficiary was engaged in janitorial or maintenance work. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The AAO notes also that the petitioner initially alleged that it provided a list of its employees and that the attorney of Mr. [redacted] petition redrafted the document without confirming the information with the petitioner "or the other religious worker."

The petitioner also submitted copies of receipts that it alleges is evidence that it paid for maintenance and gardening services. The documents include receipts signed by [redacted] (sp), [redacted] from November 2004 to March 2008, in varying amounts from $250 to $750. Most were in the amount of $500 or $625; none indicated the purpose of the receipts. Additionally, a September 29, 2006 invoice from an unidentified company for gardening, with a fee of $250, reveals an obvious alteration in the name and address of the customer. Other documents, which include a proposal for connecting a fire pipe to a hose valve, an invoice for connecting a fire hose line, a proposal for painting, an invoice for air conditioner

maintenance and an invoice for an air conditioner repair, are all for major repairs and maintenance and do not rebut the statement that the beneficiary serves as a janitor with the petitioning organization. The petitioner submitted no documentation of any individual or company that was responsible for the day-to-day maintenance and care of its physical plant.

Counsel asserts that the evidence in the record regarding the beneficiary's theological training is "obviously consistent with his employment as a Pastoral Assistant and inconsistent with his employment as a janitor." Education alone is insufficient to establish that an individual works in his or her educational field.

The petitioner has submitted insufficient documentation to establish that the beneficiary was employed continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the visa petition.

The second issue is whether the petitioner has established that the beneficiary will be employed in a qualifying religious occupation or vocation.

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 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.

As discussed above, the petitioner has provided insufficient documentation to establish that the beneficiary has worked in a qualifying religious work. Consequently, this casts doubt on whether the beneficiary seeks to enter the United States for the purpose of engaging in a religious occupation or vocation. Counsel argues that another onsite visit to the petitioning organization and an interview with church officials and the beneficiary would be appropriate in this case. Interviews or another onsite inspection of the petitioner's premises would not resolve the issues in this case as the petitioner has had many opportunities, after notice by USCIS, to correct the deficiencies in the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel further asserts that the director's decision "violates the rule set forth in the Shirdel case that findings of fraud cannot be made lightly." Counsel cites *Matter of Shirdel*, 19 I&N Dec 33 (BIA 1984) in which the BIA stated, "We closely scrutinize the factual basis for a possible finding of excludability under the first clause of section 212(a)(19) for fraud in the procurement

of entry documents since such a finding perpetually bars an alien from admission." As counsel noted, this provision of the statute is now incorporated in section 212(a)(6)(C), 8 U.S.C. §1182(a)(6)(C). Counsel's argument, however, is without merit. First, the director did not find fraud in the instant case, and second, the issue of excludability is not an issue in this Form I-360 proceeding.

Beyond the decision of the director, the petitioner has failed to meet the requirements of the regulation at 8 C.F.R. § 204.5(m)(7), which requires the petitioner to submit a detailed attestation with details regarding the petitioner, the beneficiary, the job offer, and other aspects of the petition. The record contains no such attestation.

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.