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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

[redacted]

C1

DATE: MAR 0 5 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 pastor. The director determined that the petitioner had not established that it is a bona fide nonprofit religious organization, that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the petition, or how it intends to compensate the beneficiary.

Counsel asserts on appeal that the U.S. Citizenship and Immigration Services (USCIS) "erroneously concluded that the beneficiary had not been employed lawfully as a religious worker for the two years preceding the filing of the . . . petition," "erred in determining the petitioner failed to provide verifiable evidence of how they intended to compensate the beneficiary," and "made a derogatory finding as to the nonexistence of the church which is contrary to the evidence of record." Counsel submits a letter and additional documentation 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 [IRC] 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 it is a bona fide nonprofit religious organization.

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

> *Tax-exempt organization* means an organization that has received a determination letter from the IRS [Internal Revenue Service] establishing that it, or a group that it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the IRC of 1986 or subsequent amendments or equivalent sections of prior enactments of the IRC.

Additionally, the regulation at 8 C.F.R. § 204.5(m)(8) provides:

> *Evidence relating to the petitioning organization.* A petition shall include the following initial evidence relating to the petitioning organization:
>
> (i) A currently valid determination letter from the . . . (IRS) establishing that the organization is a tax-exempt organization; or
>
> (ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or
>
> (iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3) of the [IRC] of 1986, or subsequent amendment or equivalent sections of prior enactments of the [IRC], as something other than a religious organization:
>
> (A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;
>
> (B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;
>
> (C) Organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization; and
>
> (D) A religious denomination certification. The religious organization must complete, sign and date a religious denomination certification certifying that the petitioning organization is affiliated

with the religious denomination. The certification is to be submitted by the petitioner along with the petition.

With the petition, filed on June 12, 2009, the petitioner submitted a copy of a December 30, 2005 letter from the IRS addressed to the petitioner at [redacted] granting the petitioner tax-exempt status as a nonprofit religious organization under sections 501(c)(3) and 170(b)(1)(A)(i) of the IRC. The petitioner also submitted a copy of its articles of incorporation filed with the California Secretary of State on April 8, 2005 and a copy of a State of California Form SI-100, Statement of Information, filed with the state on February 26, 2009, listing the petitioner's address as [redacted] the address listed on its Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. The petitioner also submitted the following documentation that reflects the West 6th Street address:

1. A 2008 membership list.

2. Its telephone statements for March and April 2009.

3. Church programs dated in March and April 2009.

4. Undated photographs that the petitioner identifies as the front and back of the church. One photograph shows a building with the number [redacted] Two others show signs with the petitioner's name and telephone numbers on them and what appears to be entrance to a parking lot. The photographs appear to be an enlarged and more detailed section of the photograph of the building. The remaining photographs depict individuals in meetings and what appears to be a church service.

5. A March 16, 2009 letter from the [redacted] certifying that the petitioner has been a member of the [redacted] since September 2008.

6. Bank statements for January, February and March 2009. Checks written to the beneficiary in 2008 show an address of [redacted] as do copies of the State of California Employment Development Department Form DE 6, Quarterly Wage and Withholding Report, dated in 2005, 2006 and 2007. Checks written to the beneficiary in 2009 reflect the [redacted] as well as the IRS Form W-2, Wage and Tax Statement, that the petitioner issued to the beneficiary in 2008.

On August 5, 2009, an immigration officer (IO) visited the petitioner's premises for the purpose of verifying the petitioner's claims. The IO reported that he did not find that petitioning organization at the address shown on the Form I-360, that there were no visual signs of the petitioner's presence at the location, that he spoke with a maintenance worker who reported that the petitioner was not a tenant, and spoke to a "long time tenant" who stated that the petitioner "had moved out of the building, and that a dance studio [is] now located in Suite 205." The IO concluded that the petitioner did not exist at the address identified on the Form I-360.

On January 4, 2010, the director notified the petitioner of her intent to deny the petition based on the results of the IO's visit and the petitioner's failure to provide USCIS with a new address. The director instructed the petitioner to provide copies of the beneficiary's Social Security Earnings Record and evidence that the beneficiary's services were needed, including information on the petitioner's paid and volunteer staff, the size of the congregation, and the specific duties the beneficiary would be performing.

In response, counsel stated that the information obtained by IO was in error and that the dance studio is the petitioner's lessor. The petitioner submitted a January 19, 2010 letter from [redacted] on the letterhead of [redacted] identified herself as the "owner/landlord" and confirmed that the petitioner had leased the property since May 2008. [redacted] further stated:

> Dance studio and the church have joint usage of the premises, and use the premises on different dates and times.
>
> The premises is [*sic*] used as a sanctuary for the formal worship service (Monday – Saturday : 5 : 00 AM- 7 : 00 AM ; Sunday : 5 : 00 AM – 3: 00 PM, and as needed and reserved for special religious activities). Office hour [*sic*] is kept daily.

The petitioner also submitted copies of the previously submitted photographs. The petitioner provided a copy of the beneficiary's Social Security Earnings Record, which shows that he received compensation from the petitioner at the address listed on the Form I-360.

In denying the petition, the director stated that although the petitioner provided documentation that it shared a lease with a dance studio, the letterhead reflected only a dance studio and that the petitioner failed to provide any current photographs of its activities at the location. The director also noted that the IO reported he saw no signage to indicate the presence of the petitioning organization at that location.

Counsel asserts on appeal that the documentation provided, including the IRS determination letter, the letter from [redacted] the photographs, and the Statement of Information, establishes that the petitioner exists as a church at the location stated on its Form I-360. The regulation at 8 C.F.R. § 204.5(m)(12) provides:

> *Inspections, evaluations, verifications, and compliance reviews.* The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may

> include the organization headquarters, satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

The evidence does not sufficiently establish that the petitioner existed at the location indicated on the Form I-360 at the time the IO conducted his visit on August 5, 2009. The IO saw no indication that the church existed and was informed by a maintenance man that the petitioner was not a tenant and by another tenant that the petitioner had moved out. In response to the director's Notice of Intent to Deny (NOID) the petition, the petitioner provided a letter stating that it shared leased spaces with the dance studio located at that address. However, the letter did not provide the terms and conditions of the lease and did not indicate whether the petitioner was a sub-lessee or a co-lessee of the property. Furthermore, it provided no additional photographs to show it existed at the stated location on August 5, 2009.

The record does not establish that the petitioner has successfully completed a compliance review and does not sufficiently establish that it existed on the date the IO visited the property. When a job offer is the basis for immigration, there must be a high degree of certainty that the employment will not end or be modified because the employer is no longer able to meet the terms agreed upon in the job offer. It must be established with some degree of certainty that the petitioner is viable to the point where the beneficiary's employment will not end or change because the petitioner is unable to meet the terms. In the instant case, the petitioner has not satisfactorily demonstrated that it continues as a bona fide nonprofit religious organization and capable of providing the beneficiary with full-time employment.

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

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 June 12, 2009. 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 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.

The petitioner indicated on the Form I-360 that the beneficiary last arrived in the United States on July 13, 2004 in an R-1 nonimmigrant religious worker status that was valid until January 31, 2009. In its June 9, 2009 letter submitted in support of the petition, the petitioner stated that the beneficiary had served as the senior pastor of the church since he became a member. As discussed

previously, the petitioner submitted copies of the beneficiary's Social Security Earnings Record, checks, and an IRS Form W-2 establishing that the petitioner has paid the beneficiary since 2005.

In denying the petition, the director stated:

> USCIS records indicate the beneficiary's nonimmigrant religious worker status expired on 1/31/2009, after which date the beneficiary failed to maintain lawful non-immigrant status. Although the petitioner filed an I-129 petition timely on 11/18/2008 to extend the beneficiary's non-immigrant religious worker status, the I-129 petition was not properly filed on the ground that the form was a self petition and there was a failure to establish that the beneficiary would be working in the United States at the request of the petitioner. Therefore, the record does not show that the beneficiary has been performing full-time work in lawful immigration status law as a religious worker for at least the two-year period immediately preceding the filing of the petition.

On appeal, counsel asserts that the petition falls within one of the three categories set by the court in *Ruiz-Diaz v. U.S.*, (W.D. Wash., June 11, 2009). Counsel, however, misstates the holding of *Ruiz-Diaz*, in which the court addressed the issue of the concurrent filing of the Form I-485, Application to Register Permanent Resident or Adjust Status, with the Form I-360. The court invalidated the USCIS regulation at 8 C.F.R. § 245.2(a)(2)(i)(B), which barred concurrent filing of the Forms I-360 and I-485 for religious workers. On August 20, 2010, the Ninth Circuit of Appeals reversed and remanded the district court's decision. *Ruiz-Diaz v. U.S.*, 618 F.3d 1055 (9th Cir. 2010).

Nonetheless, in accordance with the district court's decision, USCIS implemented a policy tolling the accrual of unlawful status and unauthorized employment until September 9, 2010. The requirements for tolling unlawful presence and unauthorized work are set forth in a memorandum from [redacted]

1. For those who had previously submitted a concurrently filed Form I-360 with a Form I-485 or Form I-765 and whose applications were rejected pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B), and who refiles the Form I-360 and Form I-485, the periods of unlawful presence and unauthorized work were tolled from either the filing date of the Form I-360 or November 21, 2007, whichever was earlier, until September 9, 2009.

2. For any alien who had an approved or pending Form I-360 with USCIS as of June 11, 2009 (the date of the district court's decision), the period of unlawful presence and unauthorized work was tolled from the date the Form I-360 was filed until September 9, 2009.

3. For any alien who filed a new Form I-360 on or after June 11, 2009, the period of unlawful presence and unauthorized work was tolled from the date the Form I-360 was filed to September 9, 2009.

It is to this memorandum that counsel refers. Counsel alleges that as the petition was filed on March 17, 2009, it falls within the provisions of the second category listed above. Counsel's statement regarding the filing date of the petition is in error; the record reflects that the petition was filed on June 12, 2009 and therefore was not pending on the date of the district court's decision. However, the petition falls within the provision of the third category above, and the beneficiary's period of unauthorized work is tolled from June 12, 2009 to September 9, 2009, which is outside of the qualifying period for the petition. Any unauthorized work performed by the beneficiary in the United States interrupts the continuity of his work experience for the purpose of this visa petition.

Counsel further asserts that:

> [U]nder the provisions of 245(k) [of the Act,] the beneficiary is allowed 180 days of unauthorized employment. In this case, the time period between January 31, 2009 and March 17, 2009 is tolled. Further, a timely Form I-129 petition was filed. It is precisely for these instances that the provisions of 235(k) were promulgated.

Section 245(k) of the Act applies at the adjustment stage, not the petition stage, and provides that an alien may adjust status if, subsequent to his "lawful admission has not, for an aggregate period exceeding 180 days . . . engaged in unauthorized employment." The present proceeding is not an adjustment proceeding. Neither the statute nor the regulation requires USCIS to approve every petition filed on behalf of aliens who may potentially be eligible for relief under Section 245(k) of the Act. Without an approved petition, the beneficiary has no basis for adjustment of status, and therefore section 245(k) relief never comes into play.

The regulations at 8 C.F.R. § 204.5(m) say nothing about what benefits are or are not available to the beneficiary at the adjustment stage. The director found that the beneficiary's lack of lawful status during the two-year qualifying period prevents the approval of the present petition. The beneficiary's hypothetical eligibility for section 245(k) relief at the adjustment stage does not require approval of the petition before the beneficiary has even reached that stage.

The petitioner has failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the visa petition.

The third issue on appeal is whether the petitioner established how it will compensate the beneficiary. The regulation at 8 C.F.R. § 204.5(m)(10) provides that the petitioner must submit:

> *Evidence relating to compensation.* 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 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 stated on the Form I-360 that it would pay the beneficiary $2,000 per month. The record reflects that the petitioner has paid the beneficiary the proffered compensation since 2007. The director's concerns center on the fact that the beneficiary is the only employee of the petitioning organization and signs his own paychecks. The director noted that the petitioner provided no evidence of its source of income.

There is nothing in the record to support the director's conclusion. As noted, the beneficiary is identified as the petitioner's only employee and, as pastor, it is reasonable for him to be responsible for signing checks on behalf of the petitioning organization. The petitioner's organization of its finances is outside of the AAO's purview. The checks were made payable to the beneficiary on the petitioner's account and were honored by the bank. Accordingly, the petitioner has submitted sufficient documentation in accordance with the above-cited regulation to establish how it intends to compensate the beneficiary. The director's decision to the contrary is therefore withdrawn.

Nonetheless, the petitioner has submitted insufficient documentation to establish that it existed as a bona fide nonprofit religious organization on August 5, 2009 and that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the petition.

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.