U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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Date: MAY 11 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. 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 a youth pastor. 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. The director also determined that the petitioner had not extended a qualifying job offer as it failed to establish a need for the beneficiary's full time services.

On appeal, the petitioner submits a brief from counsel, a statement from the senior pastor of the petitioning church, an affidavit from the beneficiary, a copy of an email from an official at Princeton Theological Seminary, copies of the beneficiary's checking account statements, membership statistics of the petitioner, and photographs and publications relating to the activities of the petitioning church as well as copies of documents already in the record.

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 United States Citizenship and Immigration Service's (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 petitioner filed the petition on November 5, 2009. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work in lawful status throughout the two-year period immediately preceding that date. The regulation at 8 C.F.R. § 204.5(m)(4) also sets forth the requirements for an acceptable break in the continuity of an alien's religious work as follows:

> 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 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.

According to the evidence submitted by the petitioner with the Form I-360 petition, the beneficiary entered the United States on September 1, 2008 in F-1 student status. In a letter in support of the petition, the petitioner stated, in part:

> [redacted] is an ordained minister in the Presbyterian church in Korea, the same denomination as our Church. He served as a full time pastor in Korea for two years prior to his entry into the United States. Since his entry into the United States as a student, he has been studying at Princeton Theological Seminary, in Princeton, New Jersey, where he was awarded a Masters of Theology degree. He has worked for this denomination for the two years immediately preceding this application.

The petitioner submitted a letter from [redacted] in Korea confirming that it employed the beneficiary as a full-time pastor from January 1, 2006 to April 27, 2008. On the beneficiary's Form G-325A, Biographic Information, submitted with his concurrently filed Form I-485 on November 5, 2009, the beneficiary indicates that he was a student at Princeton Theological Seminary from May, 2008 to May, 2009, and had no employer from May, 2009 to the "present time." The record indicates that the beneficiary's F-1 status expired on May 23, 2009 upon completion of his studies. On July 31, 2009, the beneficiary applied for Optional Practical Training employment authorization pursuant to his F-1 status but the application was denied for untimely filing. In the letter in support of the Form I-360 petition, the petitioner asserted that the beneficiary had been incorrectly "advised that he had to obtain a full time position before he could file his application."

On April 21, 2010, USCIS issued a Notice of Intent to Deny the petition, in part based on the petitioner's failure to establish that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition. In the notice, USCIS noted that the beneficiary fell out of lawful status on May 23, 2009 after completion of his studies and when no further work or training was authorized. The director also noted an interruption in continuity of the beneficiary's employment immediately preceding the filing of the petition. The notice instructed the petitioner to submit documentation to establish the continuity of the beneficiary's employment during the qualifying period and also to establish that the beneficiary maintained his lawful status during that period.

In a letter dated May 20, 2010 responding to the notice, counsel for the petitioner indicated that the beneficiary was currently working full time for the petitioning church and also stated the following:

> [redacted] the beneficiary, worked as a full time paid pastor for more than two years. He then attended an academic program a Master of Theology at Princeton Theological Seminary until May 2009. A break in employment is allowed if it is

> beyond the person's control. [redacted] did apply for OPT, however, he did not get the proper advice from the Designated Officer and filed his request eight days late. The petition was denied. During the period from May 2009 until the applications were filed, [redacted] remained a minister, a religious worker. He is an ordained minister and will preach and pray whether employed or not. He does not lose his status as a minister. The period he was in school may also be considered carrying on his ministerial vocation inasmuch as it was in furtherance of his ministerial education.

On July 26, 2010, the director denied the petition, finding that the petitioner had not established the beneficiary's continuous, lawful, qualifying work experience during the two years immediately preceding the filing of the petition. The director found that the period of time between the completion of the beneficiary's studies and the filing of the petition did not meet the requirements of continuous, qualifying employment. She stated, in part:

> Although the beneficiary is an ordained minister, the issue of continuous lawful full time employment falls under 8 C.F.R. 204.5(m)(11), and can not [sic] be overlooked. It should be noted, the Service has taken the beneficiary's sabbatical to continue his education into consideration in regards to this matter. The issue is not filing for a change of status, or OPT in a timely matter.

The director stated that, although the petitioner asserted that the beneficiary's failure to maintain status was caused by the designated school official at Princeton Theological Seminary, the regulations make no provision "for a waiver due to wrongful or ineffective assistance of a representative who has not been accredited by USCIS." The director further noted that the petitioner had not submitted any evidence in support of the allegations regarding the purported wrongful advice from the school official.

On appeal, the petitioner submits an affidavit from the beneficiary asserting that the school official had advised him "that she would not sign the SEVIS form without an employment letter." The petitioner also submitted a copy of an email dated May 15, 2009 from the official at Princeton Theological Seminary, stating in pertinent part:

> I did check and your OPT application submitted during your grace period is fine.
>
> I do not have your letter of employment with your OPT salary information. You must that you have the funds to support your 3 dependents while you remain in the US.

In her brief, counsel for the petitioner asserts that the "ineffective assistance of counsel" argument can be extended to non-attorneys and that "the designated school official in this case should be considered as a 'representative' for the purposes of determination whether the beneficiary's untimely application for optional practical training should be excused."

The AAO is not persuaded by counsel's argument. There is no remedy available for an applicant who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. *See* 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)(requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel). The designated school official, although authorized to issue SEVIS Forms I-20 as pointed out by counsel, is not accredited and further was not acting as the beneficiary's representative but as an employee of the school. The AAO agrees with the director's determination that the beneficiary failed to maintain his lawful immigration status on May 23, 2009 following the completion of his studies where no further training was authorized. Accordingly, any work performed by the beneficiary after that date is not considered qualifying prior experience under 8 C.F.R. §204.5(m)(11).

Regarding the continuity of the beneficiary's religious work in the period between May 23, 2009 when he completed his studies and November 5, 2009 when the petition was filed, the petitioner asserts for the first time on appeal that the beneficiary worked as an unpaid full-time pastor for the petitioning church during this time. The AAO notes that no mention was made of this employment by the petitioner in the initial filing or in response to the request for evidence which specifically focused on the continuity of the beneficiary's employment. Further, on the Form G-325A, dated October 22, 2009, the beneficiary indicated "none" under employer for the period from May, 2009 until the "present time." 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).

The regulation at 8 C.F.R. § 204.5(m)(11) requires the beneficiary's previous religious work to have been compensated, either through salaried or non-salaried compensation, with limited exceptions for self-support outlined in the USCIS regulations at 8 C.F.R. § 214.2(r)(11)(ii). The circumstances for self-support involve the beneficiary's participation in an established program for temporary, uncompensated missionary work. The petitioner has not shown or claimed that the beneficiary participated in such a program. Regarding the petitioner's claim that the beneficiary's volunteer work within the United States is qualifying experience, any work performed by the beneficiary as a volunteer is not qualifying. In the preamble to the proposed rule, USCIS recognized that although "legitimate religious work is sometimes performed on a voluntary basis . . . allowing such work to be the basis for . . . special immigrant religious worker classification opens the door to an unacceptable amount of fraud and increased risk to the integrity of the program." *See* 72 Fed. Reg. 20442, 20446 (April 25, 2007). Accordingly, any time the beneficiary may have spent in the United States "working" as a volunteer for the petitioner cannot be considered qualifying employment.

Counsel alternately argues that, "even if [the beneficiary's] ministry for the petitioning congregation from June through November 2009 were not a qualifying religious work, it was 'further religious

training' and falls within the ambit of the 8 CFR 204.5(m)(4)" as an acceptable break. In support of this argument, counsel asserts the following:

> [D]uring his service at the petitioner congregation, the beneficiary worked and continues to work under immediate supervision, guidance, and tutelage of the senior pastor. (*See* Exhibit **C**) The beneficiary's prior experience did not prepare him for a bi-lingual ministry, or for a ministry geared specifically towards youth; in his engagement with the petitioning congregation, he, in fact, receives practical professional training as a minister.

In "Exhibit C," an affidavit from the beneficiary, he provides a detailed description of his responsibilities and schedule in his position at the petitioning church but does not mention any training received. The petitioner has not submitted any evidence beyond the assertions of counsel to support the assertion that the period from June, 2009 to November, 2009 qualifies as an acceptable break under 8 C.F.R. § 204.5(m)(4). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *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).

Furthermore, to the extent that the director stated that the period of the beneficiary's studies at Princeton Theological Seminary constituted an acceptable break in the continuity of work under 8 C.F.R. § 204.5(m)(4), the AAO withdraws that finding. The regulation requires that "the alien was still **employed** as a religious worker" during the break (emphasis added). Although counsel for the petitioner has argued that the beneficiary was continuously considered an ordained minister "whether employed or not," the regulations require continuous employment. The evidence submitted by the petitioner indicates that the beneficiary's employment with the church in Korea ended before he began his studies in the United States and his employment with the petitioner began after his studies had ended. Therefore, the petitioner has not established that the period of the beneficiary's studies constituted an acceptable break in religious work under the regulation.

Additionally, the regulation at 8 C.F.R. § 204.5(m)(11) sets for the evidentiary requirements regarding the beneficiary's prior employment. That regulation provides that, if the alien was employed outside the United States during the qualifying period, the petitioner must submit verifiable evidence comparable to IRS documentation regarding the alien's salaried or non-salaried compensation or verifiable evidence of self-support. With regard to the beneficiary's employment in Korea, the petitioner has only submitted a letter from the church stating the dates of employment.

For the reasons discussed above, the AAO agrees with the director's finding that the petitioner has not established that the beneficiary has the requisite two years of continuous, qualifying religious work in lawful immigration status for at least the two-year period immediately preceding the filing date of the petition.

The director additionally found that the petitioner had not extended a qualifying job offer as it failed to establish a need for the beneficiary's full time services. The AAO will withdraw the director's findings on this issue.

The Notice of Intent to Deny issued on April 21, 2010 stated in part:

> According to the petitioner, the church as [sic] approximately 87 members under the age of 17 years of age. The petitioner wishes to employ the beneficiary on a full time basis as Youth Pastor. Currently the petitioner has 5 employees for a congregation size of 270 members. This works out to one church employee for every 54 church members.
>
> Although the beneficiary would be working with the youth of the church, submit an explanation as to why the church requires one more full time staff member for a fully staffed organization.

In response to the notice, the petitioner, through counsel, explained that several of the petitioner's employees, including the bible teachers, are part time volunteers. The petitioner further asserted that many of the families belonging to the church include two working parents who have had to work longer hours because of the difficult economy, making it "most important that their youth have a safe and spiritual place to meet their friends and leaders." The petitioner additionally re-submitted evidence of its ability to compensate the beneficiary, including audited financial statements from 2008 indicating net assets of $4,053,261.41.

In the decision, the director cites the former regulation at 8 C.F.R. § 204.5(m)(4), no longer in effect as of November 26, 2008, regarding the requirements of a qualifying job offer. The director then quotes the petitioner's explanation of the need for the beneficiary's services as a youth pastor and states, in pertinent part:

> The question is "why do you need another full time staff member for a fully staffed organization." The statement above does not clearly state the need for another full time minister. There has not been an increase in membership, the church has not stated they are opening up an afterschool program. The petitioner has not stated how the new employee will be paid; especially with revenue down.
>
> The statement reflects staffing of an after school care, or an activities center. Merely stating both parents working does not provide adequate evidence of adding a full time employee to a fully staffed organization. Employment is a best business practice, and the ability for the employee to produce revenue for the organization.

On appeal, counsel for the petitioner asserts that, as a non-profit religious organization, the petitioner's hiring decisions are not based on the ability for the employee to produce revenue and notes that the petitioner has established its ability to compensate the beneficiary. The petitioner

submits detailed descriptions of the petitioning church's youth ministry programs and the responsibilities of the youth pastor from both the beneficiary and the senior pastor of the petitioning church. The petitioner also submits membership statistics as well as photographs and publications illustrating activities of the petitioning church, including activities related to the youth ministry programs.

The AAO is persuaded that the evidence submitted by the petitioner provides a logical and convincing explanation as to the petitioner's need for the beneficiary's services and its ability to offer the beneficiary a qualifying full time position.

The AAO notes that, in the decision denying the petition, the director stated that "[t]he burden of proof in these proceedings rests solely with the petitioner," citing Section 291 of the Act, 8 U.S.C. § 1361. On appeal, counsel for the petitioner argues that the instant proceeding does not fall under this provision of the act. Section 291 of the Act, 8 U.S.C. § 1361 states, in pertinent part:

> Whenever any person makes an application for a visa for any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document...

Counsel for the petitioner states the following:

> Since the instant case does not involve an application for a visa or any other document required for entry for the petitioner, nor is the petitioner a person in removal proceeding, INA § 291 does not support the proposition that "[t]he burden of proof in these proceedings rests solely with the petitioner."

The petitioner in this case has filed an employment-based immigrant visa and therefore has made "an application for a visa." The AAO finds that Section 291 of the Act, 8 U.S.C. § 1361 applies to the present proceeding.

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.