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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 25 2009
WAC 07 014 52698

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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:
This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.
If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and 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 failed the site verification visit. The director further determined that the petitioner had failed to establish that the beneficiary had been a member of the petitioner's religious denomination for two full years prior to the filing of the petition, that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition, and that it has the ability to compensate the beneficiary.

On appeal, counsel states that neither petitioner nor counsel received the director's Notice of Intent to Deny (NOID) prior to receiving the notice of denial and therefore was unable to respond to the grounds for the proposed denial set forth in the NOID. Counsel submits a letter and additional documentation in support of the appeal.

The record does not reflect that the director's NOID, dated September 8, 2008, was sent to the petitioner. The record does reflect, however, that the NOID was sent to counsel at her address of record. In a letter also dated September 8, 2008, counsel informed U.S. Citizenship and Immigration Services (USCIS) of the petitioner's change of name. While the letter reflects a different address for counsel, neither counsel nor the petitioner notified USCIS of a change of address prior to the date of issuance of the NOID. Counsel indicated in her letter that the petitioner remained at the same address as listed on the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant.

The regulation at 8 C.F.R. § 103.5a(c) provides:

In any proceeding which is initiated by the Service, with proposed adverse effect, service of the initiating notice and of notice of any decision by a Service officer shall be accomplished by personal service.

Pursuant to 8 C.F.R. § 103.5a(a)(2), personal service may be effected by any of the following:

- (i) Delivery of a copy personally;
- (ii) Delivery of a copy at a person's dwelling house or usual place of abode by leaving it with some person of suitable age and discretion;
- (iii) Delivery of a copy at the office of an attorney or other person including a corporation, by leaving it with a person in charge;

- (iv) Mailing a copy by certified or registered mail, return receipt requested, addressed to a person at his last known address.

The record reflects that USCIS properly served counsel with the NOID at her address of record. Accordingly, counsel's argument that neither she nor the petitioner received a copy of the NOID is without merit. USCIS is not responsible for errors or delay in service that may have been committed by the U.S. Postal Service. The petitioner was properly put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

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).

As required under section 2(b)(1) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008), USCIS promulgated a rule setting forth new regulations for special immigrant religious worker petitions which became effective on November 26, 2008. Supplementary information published with the new rule specified: "All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be

denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

We note that the director issued her decision prior to the effective date of the regulation. The petitioner had not filed an appeal as of November 26, 2008. Accordingly, the petition is subject to the requirements of the new regulations. Although the petitioner was not granted an opportunity to submit additional documentation required by the regulation, for the reasons discussed below, we find that this is harmless error.

The first issue to be discussed is whether the petitioner failed the site verification review.

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 record reflects that on July 21, 2008 and again on July 22, 2008, USCIS attempted to conduct a compliance review at the petitioner's address as listed on the Form I-360 petition. The investigator observed that the name of the organization at that address, while apparently a church, was not that of the petitioner. The investigator called the petitioner's number as listed on the Form I-360; however, an automated message informed him that the number had changed and he was given a forwarding number. Messages left at the new number on at least two occasions were not returned. On one occasion, an individual answered the phone and stated that she was the wife of the individual who signed the Form I-360. On another occasion, the answering machine message acknowledged the number was that of the individual who signed the petition on behalf of the petitioning organization.

In her NOID, the director informed the petitioner that since USCIS was unable to verify the organization's existence, the petitioner had failed to establish that the beneficiary had been continuously engaged in full-time religious employment for two full years immediately preceding the filing of the visa petition.

On appeal, counsel asserts:

Regarding the difficulties with the referenced site checks and the messages left supposedly with the wife of the signatory; it appears that most of the difficulties were primarily due to a number of physical moves of the petitioner. This fact was noted in a letter from the petitioner in a response to request of evidence in a related Form I-129 that the petitioner (WAC0719050321) filed for the beneficiary. The petitioner acknowledges that they should have promptly notified CIS of any address changes, and they did not always do so. They realize they are at fault in that regard but they are also willing to do what is necessary so that the Immigration Service will be satisfied that their petition for the beneficiary is bona fide.

Due to circumstances beyond their control, the petitioner had to move its location in VA and Maryland on several occasions. When this petition was initially filed, the petitioner's address was [REDACTED]. The church moved to [REDACTED] after selling their property in VA. They moved from that address in April of 2007 to [REDACTED]. They had to move again in September of 2008 when they relocated to their present address of [REDACTED].

Thus, it appears that the main reason that CIS had problems trying to contact the petitioner was because the petitioner had moved and changed telephone numbers. The signatory . . . also does not believe that the messages were left directly with his wife as she does not personally recall any such message. He believes that the message was left with a messaging service that had her recorded voice.

Counsel's argument is without support in the record and without merit. First, the address the petitioner listed on the Form I-360, which was filed on October 16, 2006, was the [REDACTED] address, not the [REDACTED] address as alleged by counsel. Further, in her September 8, 2008 letter in which she notified USCIS of the petitioner's name change, counsel indicated that the petitioner's address was in Camp Springs at the same address listed on the Form I-360. This letter was dated two months after the investigator attempted to verify the petitioner's location at the given address. Additionally, whether messages were left with the wife of the individual who signed the petition or on an answering machine is of no import. What is important is that the number was the one listed for the petitioning organization and acknowledged as being that of the petitioner's representative who signed the petition. However, no one returned the investigator's calls.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS 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 record does not establish that the petitioner existed at the location and during the time frame it alleged on its petition. Accordingly, it has not satisfactorily completed the verification process and the petition may not be approved.

The second and third issues presented on appeal are whether the petitioner has established that the beneficiary had been a member of its denomination and had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the 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:

(1) For at least the two years immediately preceding the filing of the petition have been a member of a religious denomination that has a bona fide non-profit religious organization in the United States.

(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 was a member of its religious denomination and has been working 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 October 16, 2006. Accordingly, the petitioner must establish that the beneficiary was a member of its denomination and 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.

In its September 15, 2006 letter submitted in support of the petition, the petitioner stated that the beneficiary had served as pastor with the church since August 2004, that it was prepared to provide him with "a full-time permanent position," and that he "has actively and continuously served as a full-time minister of the gospel and Pastor for more than 10 years now." The petitioner provided a list of the beneficiary's general duties indicating that he was to work approximately 52 hours per week. The petitioner also provided copies of Forms W-2 that it issued to the beneficiary in 2004 and 2005 and the corresponding IRS Forms 1040, U.S. Individual Income Tax Return, reflecting wages of \$8,000 and \$35,400, respectively. In response to the RFE, the petitioner also provided a copy of the beneficiary's Form W-2 and Form 1040 for 2006, reflecting wages of \$36,000.

In denying the petition, the director questioned the authenticity of the beneficiary's Forms W-2, stating:

According to the I-360 application, and confirmed by public records the beneficiary has lived in Providence Rhode Island since 1999. The beneficiary's current address is [REDACTED] The aforementioned address is [REDACTED]" [REDACTED]

[REDACTED.] It appears the beneficiary is self-employed at this address and has run the church since he arrived in the United States in 1999.

According to a previous filing, EAC9905550016, the beneficiary has acted as the pastor, of [REDACTED] since 1999. No evidence was provided to show the church in Rhode Island (where the beneficiary lives) and the church in Maryland are affiliated. It should be noted the distance between the two churches is 413 miles. The ability to work full time in Maryland while living for the last 9 to 10 years in Rhode Island does not seem plausible.

The director's decision assumes evidence not in the record. For example, although a petition was filed on behalf of the beneficiary in 1998, there is no evidence in the record to indicate that he remained continually in the United States subsequent to the AAO's dismissal of his motion to reopen on October 1, 2001. A copy of a Form I-94 indicates that he reentered the United States on April 12, 2004 pursuant to a B-2 visitor's visa. An R-1, nonimmigrant religious worker visa, filed by the petitioner, was approved for the beneficiary on August 25, 2004. The beneficiary's Form W-2 and Form 1040 for 2004 show an address in Silver Spring, Maryland. A letter from the petitioner dated January 1, 2005 indicated that it was offering the beneficiary an "employment upgrade:"

We the Executive Board . . . are giving you an offer to upgrade your position from Pastor to District pastor assigned to work 2 weeks out of every month at an affiliated church in Providence RI.

Since you have experience working with congregations in that city, you are assigned to the Position of District Pastor.

The beneficiary's address on his 2005 and 2006 Forms W-2 and federal tax returns show an address in Rhode Island but not the address indicated by the director. The record does not contain a copy of the public records used by the director to confirm the beneficiary's address in Providence, Rhode Island.

The director also questioned the authenticity of the Forms W-2 based on the inability of USCIS to verify the existence of the petitioning organization. We concur with the director on this issue. The record does not reflect that the petitioner existed at the location and during the dates that it claimed. Accordingly, the Forms W-2 indicating that the beneficiary worked for the petitioning organization during the qualifying period are questionable. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. I.N.S.*, 876 F.2d at 1220; *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. at 10; *Systronics Corp. v. INS*, 153 F. Supp. 2d at 1).

The petitioner has failed to establish 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 date of the petition. Further, as the existence of the petitioner during the qualifying period is in question, the

petitioner has also failed to establish that the beneficiary was a member of its denomination for the two years immediately preceding the filing of the visa petition.

For similar reasons, the director also determined that the petitioner had not established that it has the ability to compensate the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(10) provides:

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 director determined, and we concur, that the Forms W-2 purportedly issued to the beneficiary are not credible. The petitioner has not established that the beneficiary was employed by the petitioning organization during the two-year qualifying period. Although the petitioner provided copies of the beneficiary's tax return transcripts, they do not establish that the beneficiary's income was from the petitioner.

In response to the director's June 6, 2007 RFE, the petitioner submitted a copy of an accountant's unaudited compilation report for 2006, and copies of IRS Form W-3, Transmittal of Wage and Tax statements, signed by [REDACTED] indicating that the petitioner filed a single Form W-2 – the beneficiary's – from 2004 through 2006. We note that the petitioner's letter in support of the petition was signed by [REDACTED] as senior pastor. The Forms W-3 then raise the question as to compensation received by [REDACTED] and [REDACTED]. Furthermore, the 2005 and 2006 Forms W-3 indicated that the petitioner's address was in Camp Spring, Maryland, a fact that could not be verified by USCIS.

The petitioner has failed to establish its ability to compensate the beneficiary.

Additionally, the petitioner has not provided the attestation required by the regulation at 8 C.F.R. § 204.5(m)(7). As discussed previously, the petition was filed prior to the imposition of this requirement by the November 26, 2008 regulations. The petitioner did not submit the attestation with the appeal filed after the effective date of the regulations, nor was it requested by the director. However, the petitioner's failure to provide the attestation is harmless error as its submission would not overcome the grounds for denial 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.