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



**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 08 196 51465 Office: CALIFORNIA SERVICE CENTER Date: **APR 08 2010**

IN RE: Petitioner:
Beneficiary:



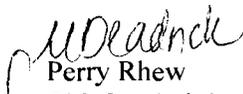
PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:



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.


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 on appeal. The AAO will withdraw the director's decision. Because the petition cannot be approved without further evidence, the AAO will remand the petition for further action and consideration.

The petitioner 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 "Global Preacher/Bhakti Yoga Teacher." The director determined that a compliance review verification visit failed to verify the existence of the petitioner, that it had extended a bona fide job offer to the beneficiary, and that it had the ability to pay the beneficiary the proffered wage.

On appeal, the petitioner submits materials in which it attempts to clarify the negative determinations made by 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).

The U.S. Citizenship and Immigration Services (USCIS) 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 petitioner filed the petition on July 7, 2008. The Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, did not indicate the petitioner's address. Rather, in Part 1, where the petitioner is required to provide its address, the petitioner listed the address of counsel. Its letterhead, however, listed its address as [REDACTED] which was identified in its correspondence of December 22, 2008 as its administrative offices. The petitioner also provided an address in Houston, Texas at [REDACTED] that it stated was "for religious worship and congregational preaching only."

On February 9, 2009, an immigration officer visited the address at [REDACTED] in Houston for the purpose of conducting a compliance review verification. The investigator was not able to obtain entrance into the locked building but determined from looking through a window that the organization was not operating as a church. The investigating officer stated that from his vantage point, he was able to observe "some pamphlets on a bulletin board, as well as a price list of some sort for donations." The investigating officer did not indicate that he attempted to contact the petitioner for admittance or that he visited the site on another occasion.

In a Notice of Intent to Deny (NOID) dated February 26, 2009, the director advised the petitioner of the results of the compliance review and determined that the documentation submitted by the petitioner was insufficient to establish that it had extended a bona fide job offer to the beneficiary, including a failure to provide specific terms of compensation, and that it had the ability to pay the proffered wage.

In response, the petitioner submitted a March 26, 2009 letter from its president, [REDACTED] in which he stated that the address on [REDACTED] is the organization's temple room and that:

We hold our regular weekly devotional programs in this temple room on Saturdays from 6 p.m. to 9 p.m. and sometimes on Fridays from 7 p.m. to 9 p.m. for Mantra Meditation and Kirtan/devotional hymns and offerings. If any members of our congregation wish to visit our temple room during other hours, they have been instructed to approach the Secretary of one of our prominent members ... at their

office located at [REDACTED] . . . [The] Secretary opens up the temple room at [REDACTED] to allow the devotees to perform their viewing and worship during regular business hours. In addition, our society also operates a Bhakti Yoga Club at the University of Houston, Texas.

The petitioner provided copies of documentation advertising its presence at the Blalock Road address.

As it relates to the beneficiary's prior compensation, the petitioner also submitted a copy of a December 17, 2008 letter from its accountant in New Delhi, India, who stated that the beneficiary had been paid a monthly salary of Rs2,2000 from July 2006 to March 2007 and Rs3,000 from April 2007 to July 2008. The accountant further stated that the petitioner had provided the beneficiary with free housing, clothing, food and transportation. The petitioner also provided a copy of the financial statements for 2007 and 2008 for the petitioner's parent organization in India. In a March 25, 2009 letter, the petitioner's director, [REDACTED], stated that the beneficiary had been paid \$1,500 per month for his services.

The director denied the petition on April 25, 2009, reiterating the findings of the investigating officer and concluding that the petitioner had failed to "provide the terms of payment for services or other remuneration" and that the petitioner had failed to establish that it had the ability to pay the beneficiary the proffered wage.

The regulation at 8 C.F.R. § 204.5(m)(12) states, "If USCIS decides to conduct a pre-approval inspection, satisfactory completion of a site inspection will be a condition for approval of any petition." This does not mean, however, that a single visit to an empty building is an automatic and irrebuttable basis for denial of the petition. It does not prove or imply that the petitioner does not exist, and it is not a sufficient basis to conclude that no valid job offer exists for the beneficiary.

The petitioner's explanation for the absence of staff on the day of the investigating officer's visit is not implausible. The record does not reflect that the investigating officer attempted any other means of verification, including calling the petitioner. While we agree with the director that the visit to the petitioner's address did not verify the petitioner's claims, we find however that the compliance review visit was at best, inconclusive, and a follow-up visit may be in order.

Additionally, we find other issues of concern. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

After the petition's July 2008 filing date but before the April 2009 denial, new regulations replaced the existing regulations at 8 C.F.R. § 204.5(m) as of November 26, 2008. The director's decision

does not cite to these new regulations, and there are additional requirements that the petitioner must meet before the petition can be approved.

The new USCIS regulation at 8 C.F.R. § 204.5(m)(7) requires the petitioner to complete, sign and date a detailed attestation regarding the petitioning entity, the job offer, and other important information. The petitioner did not initially submit such an attestation, because it was not yet required at the time. The director must request, and the petitioner must provide, this required attestation.

The new regulation at 8 C.F.R. § 204.5(m)(10) requires the petitioner to submit 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 Internal Revenue Service (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 regulation at 8 C.F.R. § 204.5(m)(11) requires the petitioner to document the beneficiary's prior employment. The petitioner must submit IRS documentation, such as an IRS Form W-2 or certified copies of income tax returns, to establish qualifying employment that occurred in the United States.

Further, the petitioner's documentation indicates that it has been granted tax exempt status under section 501(c)(3) of the Internal Revenue Code (IRC) as an organization described in sections 509(a)(1) and 170(b)(1)(A)(vi). An organization that qualifies for tax exemption as a publicly supported organization under section 170(b)(1)(A)(vi) of the IRC can be either religious or non-religious. The burden of proof is on the petitioner to establish that its classification under section 170(b)(1)(A)(vi) under the IRC derives primarily from its religious character, rather than from its status as a publicly supported charitable and/or educational institution.

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.

The petitioner has not submitted sufficient documentation to establish that its tax exempt status under section 501(c)(3) of the IRC derives primarily from its religious character, rather than from its status as a publicly supported charitable and/or educational institution. While the petitioner indicates that it is affiliated with a religious organization exempt from income tax in India, it provided no documentation that its parent organization enjoys a tax exempt status under section 501(c)(3) of the IRC.

Because the petitioner has not yet met the above requirements, the director cannot approve the petition. Nevertheless, because these requirements did not yet exist at the time of filing, the director must request the necessary evidence before the director can deny the petition based on the lack of that evidence. Supplementary information published with the new regulations 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).

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.