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



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **AUG 04 2010**
WAC 06 276 53914

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

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 \$585. 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
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) remanded the matter for consideration under new regulations. The director again denied the petition and, following the AAO's instructions, certified the decision to the AAO for review. The AAO will affirm the director's decision.

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 music minister/choir director. The director determined that the petitioner had not established that the beneficiary was a member of the same religious denomination and worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the petition and how it intends to compensate the beneficiary.

The petitioner submits no additional documentation on certification.

On November 26, 2008, 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), U.S. Citizenship and Immigration Services (USCIS) promulgated a rule setting forth new regulations for special immigrant religious worker petitions. 73 Fed. Reg. 72276 (Nov. 26, 2008). The director erroneously based part of her decision on obsolete regulations that were no longer in effect at the time of the decision. Nonetheless, the petitioner was put on notice of the new regulations and allowed time in which to meet the new evidentiary requirements. Further, the AAO will consider all evidence of record. Accordingly, we find that the director's reliance on the superseded regulations is harmless error.

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).

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 is whether the petitioner has established that the beneficiary was a member of the same denomination for two full years immediately preceding the filing of the visa petition. The regulation at 8 C.F.R. § 204.5(m) provides, in pertinent part:

To be eligible for classification as a special immigrant religious worker, the alien (either abroad or in the United States) 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.

The regulation at 8 C.F.R. § 204.5(m)(5) provides: "Denominational membership means membership during at least the two-year period immediately preceding the filing date of the petition, in the same type of religious denomination as the United States religious organization where the alien will work."

Accordingly, the petitioner must establish that the beneficiary was a member of the same denomination of the prospective employer for at least two years immediately prior to the filing of the petition. The petition was filed on September 18, 2006. Therefore, the petitioner must establish that the beneficiary was a member of its denomination for the two years immediately preceding that date.

In its August 28, 2006 letter submitted in support of the petition, the petitioner, through its rector, [REDACTED], stated that the beneficiary had been a member of the [REDACTED] in Kenilworth, New Jersey since July 1997. The petitioner further stated that it is part of the Episcopal religion. The petitioner submitted a May 28, 2006 letter from the [REDACTED], signed by the [REDACTED], who certified that the beneficiary had been "ministering" with the church as its music director since September 2003. The petitioner submitted no documentation to establish a relationship between its Episcopal denomination and the [REDACTED].

In a December 11, 2006 request for evidence (RFE), the director instructed the petitioner to "provide documentary evidence to establish whether a connection exists between the PETITIONER and any other church the beneficiary has worked for the prior two years." In response, the petitioner submitted a February 28, 2007 letter in which [REDACTED] stated that the beneficiary "is a member of the [REDACTED] which is in communion with the Episcopal Church in the United States," and that "oversight of the Marthoma congregations in the United States was given to the Episcopal Church Bishops" through an "agreement of intercommunion." Documentation submitted about the [REDACTED] indicates that it is a "reformed Eastern Syrian Christian Orthodox Church" and supports [REDACTED] statement regarding its relationship to the Episcopal Church in the United States. However, in a letter submitted in support of a Form I-129, Petition for a Nonimmigrant Worker, [REDACTED] stated that the beneficiary "had been a faithful member of the [REDACTED] Kerala, India, since March 1985." The petitioner provided no documentation that the [REDACTED] [REDACTED] were of the same denomination. Further, the petitioner submitted no documentation that the beneficiary was a member of the [REDACTED] during the two-year qualifying period. In response to a second RFE from the director, dated April 4, 2007, the petitioner reiterated its claim that the beneficiary was a member of the [REDACTED] but again failed to provide documentation to support its claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner also stated that the beneficiary was "received into the Episcopal Church" on January 15, 2004 and submitted a certificate to that effect.

In denying the petition, the director noted that the beneficiary was remunerated for his work by the [REDACTED] until January 2007. On appeal, the petitioner submitted a copy of a February "31" 2007 statement from the [REDACTED] of Kerala, India, signed by the [REDACTED], certifying that the beneficiary had been a member of the church "for the past ten years." This statement obviously contradicts the statement of [REDACTED], who stated that the beneficiary had been a member of the [REDACTED] since 1985. It also contradicts the petitioner's initial statement that also stated that the beneficiary was a member of the [REDACTED]. 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 petitioner provided no additional documentation in response to the director's Notice of Intent to Deny (NOID) issued following the AAO's remand and submitted no documentation on certification.

Because of the conflicting claims and documentation, the petitioner has failed to establish that the beneficiary was a member of the same religious denomination for two full years immediately preceding the filing of the visa petition.

The second issue presented is whether the petitioner has established that the beneficiary worked continuously in a qualifying religious occupation or vocation for the 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. As discussed previously, the petition was filed on September 18, 2006. 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.

In its August 28, 2006 letter, the petitioner stated that the beneficiary had been employed as music minister/choir director with the [REDACTED] pursuant to an R-1 visa, and that prior to that he worked for 10 years in a similar capacity in India. The petitioner provided a copy of the beneficiary's approved R-1 visa issued on September 25, 2003 with an expiration date of September 24, 2006, and a copy of his Form I-94, Departure Record, indicating that he entered the United States in February 2005 and January 2006 in an R-1 status. The petitioner submitted no documentary evidence with the petition to establish that the beneficiary worked during the qualifying period. In her December 2006 RFE, the director instructed the petitioner to:

Provide evidence of the beneficiary's work history for the years 2004, 2005, 2006. Provide experience letters written by the previous and current employers that include a breakdown of duties performed in the religious occupation for an average week. Include the employer's name, specific dates of employment, specific job duties, number of hours worked per week, form and amount of compensation, and level of responsibility/supervision. In addition, submit evidence that shows monetary payment, such as pay stubs or other items showing the beneficiary received payment. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported himself during the two-year period or what other activity the beneficiary was involved in that would show support.

The director also instructed the petitioner to submit additional documentary evidence from the beneficiary:

Submit copies of your Form(s) 1040 for the 2004, 2005, and 2006 (if available) tax year(s), along with all of the Schedules and Attachments for each year. Also provide all of your Form W-2's for each of the above year(s). . . . Also, submit your three most recent pay stubs. If you are not currently working for petitioner, explain why.

In response, the petitioner submitted a January 21, 2007 letter from the [REDACTED] of New Jersey in which [REDACTED] stated that the beneficiary had served as its music

director since September 2003. [REDACTED] provided a list of the beneficiary's duties and stated that they encompassed almost 60 hours per week. The petitioner also provided copies of checks made payable to the beneficiary by the [REDACTED] dated approximately once every two weeks beginning on December 2, 2005 until May 2006, and on December 25 and 31, 2006 and January 21, 2007. The checks were drawn for \$250 each with the exception of May 28, 2006 and December 28, 2006, each of which was for \$500. None of the checks indicate that they were processed by the bank. In another letter dated January 21, 2007, the treasurer of the [REDACTED] stated that, in 2006, the beneficiary received \$500 per month paid bi-weekly, a \$1,000 cash gift during Easter and a similar cash gift during Christmas, which made his total income from the church for the year \$8,000.

The petitioner provided copies of the beneficiary's uncertified IRS Form 1040, U.S. Individual Income Tax Return, for the years 2004 and 2005, along with the corresponding state tax returns for the State of New York. The beneficiary reported \$6,000 in business income in 2004 and \$8,400 in 2005. None of the forms are signed or dated by the beneficiary, and each IRS Form 1040 is dated by the preparer after the end of the tax year (April 15).

In response to the director's second RFE, issued on April 4, 2007, which requested more details on the beneficiary's work history and requested a copy of the beneficiary's certified federal tax return for 2005, the petitioner stated that the beneficiary began "volunteering his time and talent" to the petitioning organization on January 15, 2004 and that he had volunteered "on a full time basis from March 15, 2004." The petitioner provided a weekly work schedule for the beneficiary reflecting that he worked a total of 40 hours per week, including 9 hours on Sunday participating in Sunday services and choir practice. This information contradicts that provided by [REDACTED] who stated that the beneficiary worked nearly 60 hours per week with the [REDACTED]

including at least 5 hours on Sunday during worship services. 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. at 591-92. We note that the beneficiary received his normal compensation from [REDACTED] during the time that he allegedly worked full time with the petitioning organization.

Regarding the beneficiary's tax returns, counsel stated that the beneficiary had requested but had yet to receive a certified copy of his 2005 federal tax return and that he had "submitted copies of all tax returns in his possession." The beneficiary provided a document that he stated reflected his income for 2004 through 2006. He reported that he received a total of \$5,700 in 2006 from the [REDACTED] the petitioner and friends. He also reported receiving \$5,900 in 2005 and \$2,550 in 2004 from the same sources. However, the information provided by the beneficiary is inconsistent with information provided by the [REDACTED] and information contained on his IRS Forms 1040 for 2004 and 2005. 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. *Id.* We note that there had been no previous claim that the beneficiary was provided with housing as part of his compensation with [REDACTED]

However, the record contains a June 1, 2007 statement from [REDACTED], submitted in

response to the director's April 2007 RFE, stating that the beneficiary has been his tenant since October 2003 under an arrangement with the [REDACTED] the petitioner and himself. 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).

In denying the petition, the director determined that the petitioner had not established that the beneficiary worked in a full-time, compensated position throughout the two-year qualifying period. The director noted that the petitioner had failed to provide copies of the beneficiary's 2006 tax return as requested. On appeal, counsel argued that the beneficiary's IRS Forms W-2 and pay stubs indicate that he was employed full time with the Indian Pentecostal Church and that he was also provided with "free room and board." In response to the director's NOID, issued following the AAO's remand, the petitioner provided a copy of the beneficiary's 2008 IRS Form 1040 and copies of pay stubs reflecting that it had paid the beneficiary in 2009. However, as this documentation is after the filing date of the petition, it is not evidence of the beneficiary's work during the two-year qualifying period. The petitioner submits no documentation on certification.

The petitioner has submitted contradictory evidence of the beneficiary's prior work experience. The record is unclear as to where the beneficiary worked and the amount of compensation that he received for that work during the qualifying period. Additionally, the petitioner failed to submit a certified copy of the beneficiary's 2005 tax return and a copy of his 2006 return as requested by the director. This alone is sufficient to deny the petition. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Further, although the new regulations do not require the petitioner to establish that the qualifying work is full time, the petitioner failed to provide sufficient documentation to establish that the beneficiary worked throughout the qualifying period. The petitioner failed to provide certified copies of the beneficiary's federal income tax returns or copies of any IRS Forms W-2 that it issued to the beneficiary, as required by the regulation at 8 C.F.R. § 204.5(m)(11)(i). Additionally, the checks provided by the petitioner as evidence of the beneficiary's work in 2005 and 2006 do not indicate that they were processed by the bank. Additionally, the checks do not reflect payments from June through November 2006.

Furthermore, even if the beneficiary worked for the petitioner in a volunteer capacity as claimed, volunteer work is not qualifying work experience for the purpose of this visa petition. The only religious workers who may qualify without an actual salary or in-kind support as evidence of their prior employment are those workers in an established missionary program under an R-1 or B-1 nonimmigrant visa. In this instance, the record does not establish that the beneficiary was in a missionary program or that he was an R-1 or B-1 nonimmigrant. *See* 72 Fed. Reg. 20442, 20446 (Apr. 25, 2007).

Accordingly, the petitioner has failed to establish 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 director also determined that the petitioner had failed to establish how it intends to compensate the beneficiary.

The petitioner stated that the beneficiary would receive a salary of \$18,000 per year. With the petition, the petitioner submitted a copy of an April 7, 1995 letter from the Diocese of New York, indicating that it had received in excess of \$369,000 from the sale of property. The letter indicated that the money was invested in a trust and that income from the trust would be paid to the petitioner on a quarterly basis. The petitioner also provided a copy of its December 2004 checking account statement and a copy of an unaudited profit and loss statement for 2005. In response to the director's December 2006 RFE, the petitioner also submitted a copy of its December 2006 checking account statement.

In her April 2007 RFE, the director instructed the petitioner to:

Submit evidence to establish that the petitioner had the ability to pay the beneficiary's wage. Evidence shall be in the form of audited financial statements or IRS-certified federal tax returns . . . Alternatively, the petitioner may submit well-documented evidence that it provided all of the beneficiary's living expenses during 2004, 2005, 2006.

In response, the petitioner submitted a copy of its 2005 profit and loss statement, indicating that it was audited by Gus Brummer and Edith Hager. However, the record does not reflect that these individuals are accountants, that they were otherwise qualified to audit the financial statements of the petitioner, or that the statements were audited according to generally accepted accounting principles.

In his letter accompanying the petitioner's response, counsel stated that the petitioner was exempt from filing income tax returns and that the beneficiary lived in free housing arranged by the [REDACTED] and the petitioning organization. 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 Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Although [REDACTED] stated that the beneficiary was his tenant, the petitioner provided no documentation of any expenditure it made on behalf of the beneficiary for the rent.

The new USCIS 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.

In response to the director's NOID issued following the AAO's remand, the petitioner provided copies of its monthly checking account statements for November 2006 through June 2007. The petitioner also provided a copy of the beneficiary's unsigned 2008 IRS Form 1040, on which he reported income of \$9,000 and copies of checks made payable to the beneficiary in the amount of \$850 and dated approximately every two weeks during April 2009 through June 2009. A petitioner, however, 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) and (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner failed to provide sufficient verifiable documentation to establish how it intends to compensate the beneficiary.

The petitioner has therefore failed to establish how it intends to compensate the beneficiary.

The AAO will affirm the certified denial 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. The petitioner has not sustained that burden.

ORDER: The director's decision of June 2, 2009 is affirmed.