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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

C1

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date AUG 12 2010

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.

Thank you,

[Redacted]

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 withdraw the director's decision. Because the record, as it now stands, does not support approval of the petition, the AAO will remand the petition for further action and consideration.

The petitioner is a Baptist 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 (also called worship leader). The director determined that the petitioner had not established that the position qualifies as a religious occupation.

On appeal, the petitioner submits arguments from counsel and various witness letters.

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 sole issue in the director's decision is whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(5) defines "religious occupation" as an occupation that meets all of the following requirements:

(A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination.

(B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.

(C) The duties do not include positions that are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible.

(D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

The petitioner filed the Form I-360 petition on March 30, 2009. In an accompanying attestation, the petitioner listed the beneficiary's duties:

1. Developing and arranging musical selections on a weekly basis for our church choir and congressional [*sic*] music that would uplift and advance religious themes of the sermon or special occasions such as baptism, child dedication, weddings, and funeral...etc.
2. Conducting church choirs, training choir members during rehearsals, using knowledge of conducting techniques, music theory, and religious themes, creating variations of religious music and composing music for religious services;
3. Preparing and training Praise teams for church services;
4. Ministering one of sizable small groups as a "cell" pastor;
5. Directing congregation in music activities;
6. Conducting and training church's musical bands, and orchestra;
7. Coordinating various musical activities;
8. Arranging musical portion of religious services in consultation with leader of congregation and pastor;
9. Selecting and performing music to suit to religious services, accommodating talent and ability of choir members;
10. Leading out congregation in singing religious songs and music during religious services;
11. Transcribing musical compositions and melodic lines to adapt them to or create a particular style for group and conducting instrumental accompaniment.

The petitioner's initial submission included a letter from [REDACTED] senior pastor of [REDACTED] [REDACTED] (where the beneficiary worked prior to joining the petitioner's congregation), who stated that the beneficiary "was ordained by me . . . on May 6, 2005 for the [REDACTED] since our church congregation recognized his devotion, and call from above to be a minister."

[REDACTED] of the petitioning church, stated that the beneficiary “has been working together with me side by side for planning divine worship service every Sunday[] and mid-week church service on every Friday and other special occasions. He has made significant contribution in enhancing style, quality and spiritual atmosphere of our church worship, especially divine worship.”

The petitioner submitted copies of the beneficiary’s diplomas, including an “Advanced Pastoral Ministry Diploma” from [REDACTED], Dallas, Texas, in May 2002. The same month, [REDACTED] ordained the beneficiary “as a minister of the Gospel.” In December 2008, [REDACTED] awarded the beneficiary a master’s degree in Worship Leadership.

On April 21, 2009, the director requested “evidence that the duties primarily relate to a traditional religious function and that the position is recognized as a religious occupation within the denomination,” as well as “evidence that the duties are primarily related to, and clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.”

In response, counsel repeated the list of duties submitted previously, and asserted that music has traditionally “been [an] integral and indispensable part of life, worship, and fellowship of the church.” The question here is not simply whether music is important to church services. The petitioner must also show that its religious denomination traditionally recognizes the position of music minister to be a paid occupation, rather than a duty typically relegated to a volunteer from the congregation.

The petitioner submitted copies of job announcements from various churches, each seeking a “worship pastor,” a job title in the same category as “music minister” and “worship leader.” Only one announcement referred to the church’s denomination as “Baptist - Other” not specifying any particular denomination in the Baptist family of denominations. That announcement, from [REDACTED] in Bowie, Maryland, indicated: “The primary responsibilities of the Worship Pastor include but are not limited to: leading congregational worship in the morning services, directing various choirs, vocal ensembles and worship teams and directing orchestral and instrumental ensembles.”

The director denied the petition on July 8, 2009, stating: “The petitioner failed to provide supporting documentation to establish that the duties of the proffered position relate to a traditional religious function and that the position is recognized as a religious occupation within the denomination.” The director further stated: “Lay persons who have completed some prescribed course of religious training and who possess some type of certification or qualifications issued by the denomination fill religious occupations,” whereas “[v]olunteers from the congregation” traditionally perform “activities [that] require only a modest time commitment and no specialized religious training or education.”

On appeal, counsel argues that the beneficiary qualifies as a minister, and therefore should not be subject to the separate requirements that apply to religious occupations. While the beneficiary is an ordained minister, there is no indication that the beneficiary’s intended duties are those of a minister as defined in the USCIS regulation at 8 C.F.R. § 204.5(m)(5), which restricts the term “minister” to an individual who:

- (A) Is fully authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct such religious worship and perform other duties usually performed by authorized members of the clergy of that denomination;
- (B) Is not a lay preacher or a person not authorized to perform duties usually performed by clergy;
- (C) Performs activities with a rational relationship to the religious calling of the minister; and
- (D) Works solely as a minister in the United States, which may include administrative duties incidental to the duties of a minister.

That definition makes it clear that an alien qualifies for classification as a minister based on his or her duties, rather than based on ordination alone. A list of the beneficiary's predecessors at the petitioning church indicates that some, but not all, of the petitioner's previous music ministers have been ordained ministers. [REDACTED] on appeal, asserts: "The position of Music minister . . . is one that is almost exclusively reserved for the ministerial trained personnel." The qualifier "almost" shows that the position is not the exclusive province of ministers. We will, therefore, consider the beneficiary's position under the standards of a religious occupation rather than those of a ministerial position.

The petitioner submits a letter from [REDACTED] writing "to confirm the traditional role of a musical director in Southern Baptist churches." [REDACTED] outlines the history of music directors and worship leaders in the denomination, and states that, while the denomination leaves specific duties to "the discretion of the local church . . . we can testify to the validity of a minister of music/worship as an authentic ministerial position for a church and especially so for a church as large as" the petitioning church.

With respect to the director's remarks about specialized training, the regulations (substantially revised in November 2008) include no provision that a religious occupation must require specific religious or theological training. Even if such a requirement existed, the record amply documents the beneficiary's own specialized religious training, culminating in a master's degree in "Worship Leadership." If Baptist universities offer an advanced degree in the beneficiary's field (which is clearly not secular), then the existence of such a degree is good evidence that Baptist denominations consider a position in that field to be a religious occupation.

The preponderance of available evidence indicates that the Southern Baptist denomination recognizes the position of music minister (essentially synonymous with worship leader) as a religious occupation rather than as an occasional duty entrusted to a volunteer from the congregation. We must, therefore, withdraw the director's finding to the contrary. Because the decision rests solely on that one finding, we must also withdraw the denial decision.

Although we will withdraw the denial decision, we cannot approve the petition. 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 (9<sup>th</sup> 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).

The 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 USCIS regulation at 8 C.F.R. § 204.5(m)(11) reads:

*Evidence relating to the alien's prior employment.* Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:

- (i) Received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns.
- (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.
- (iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.

If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

The petitioner must establish that the beneficiary worked continuously throughout the two year qualifying period. Furthermore, because the beneficiary was in the United States during that entire period, the petitioner must show that the beneficiary's work was authorized under United States immigration law. First, we will examine the issue of the beneficiary's work and compensation.

In an introductory letter, [REDACTED] stated that the beneficiary “came to our church [in] October 2008 and has been voluntarily serving our church as the music minister since December 2008.”

[REDACTED] stated that the beneficiary “has worked for our church as the music minister from April 2, 2004 until September 31, 2008. . . . He worked for our church for about five years with R-1 status, which our church sponsored as well.” We note that September has only 30 days, and therefore there was no September 31, 2008.

Counsel, in an introductory letter, repeated [REDACTED] dates (including the erroneous reference to “September 31”):

Beneficiary . . . has been serving and receiving compensation as a [REDACTED] [REDACTED] church of Dallas . . . since April 2, 2004 until September 31 [sic], 2008 with his R-1 status. He has been working as a volunteer music minister for the Petitioner from December, 2008, which is for more than two years immediately prior to the filing of this I-360 petition.

The petitioner submitted copies of Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements, showing that [REDACTED] paid the beneficiary \$18,000 per year in both 2006 and 2007, as well as copies of processed checks showing the beneficiary’s salary for the first two months of 2008. The petitioner did not explain why the checks stopped at that point, when the beneficiary is said to have worked at [REDACTED] through September 2008. Therefore, evidence of compensated employment ceases in the earliest months of 2008, more than a year before the petition’s March 2009 filing date.

The petitioner did not claim that the beneficiary engaged in qualifying employment after September 2008. Rather, the petitioner has asserted that the beneficiary worked for the petitioner “as a volunteer.” The petitioner does not claim that the beneficiary received any compensation, monetary or otherwise, for work that he performed between October 1, 2008 and March 30, 2009. The regulation at 8 C.F.R. § 204.5(m)(11) clearly requires the position to have been compensated unless the alien was self-supporting, and clause (iii) of that regulation sets forth specific requirements that the petitioner must meet to establish self-support. The petitioner has not submitted evidence to meet those requirements.

When USCIS published its new regulations in 2008, the supplementary information published with those regulations made it clear that USCIS placed strict limits on acceptable forms of non-compensated religious work: “USCIS will . . . to preserve its ability to prevent fraud, permit self-supporting religious workers only under very limited circumstances.” 73 Fed. Reg. 72276, 72278 (Nov. 26, 2008). These efforts to prevent fraud, required by Congress under section 2(b)(1) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008), would clearly be undermined if USCIS adopted the position that an alien can avoid the regulations’ strict and specific documentary requirements simply by claiming to have been an unpaid volunteer, whose work, by nature, left no documentary record.

With limited exceptions, the beneficiary of an initial petition for R-1 nonimmigrant status must be compensated either by salaried or nonsalaried compensation, and the petitioner must provide verifiable evidence of such compensation. If there is to be no compensation, the petitioner must provide verifiable evidence that such non-compensated religious workers will be participating in an established, traditionally noncompensated, missionary program within the denomination, which is part of a broader international program of missionary work sponsored by the denomination. The petitioner must also provide verifiable evidence of how the aliens will be supported while participating in that program.

*Id.* at 72278. The regulation at 8 C.F.R. § 214.2(r)(11)(ii) spells out the nature of acceptable self-supported work:

(A) If the alien will be self-supporting, the petitioner must submit documentation establishing that the position the alien will hold is part of an established program for temporary, uncompensated missionary work, which is part of a broader international program of missionary work sponsored by the denomination.

(B) An established program for temporary, uncompensated work is defined to be a missionary program in which:

- (1) Foreign workers, whether compensated or uncompensated, have previously participated in R-1 status;
- (2) Missionary workers are traditionally uncompensated;
- (3) The organization provides formal training for missionaries; and
- (4) Participation in such missionary work is an established element of religious development in that denomination.

(C) The petitioner must submit evidence demonstrating:

- (1) That the organization has an established program for temporary, uncompensated missionary work;
- (2) That the denomination maintains missionary programs both in the United States and abroad;
- (3) The religious worker's acceptance into the missionary program;
- (4) The religious duties and responsibilities associated with the traditionally uncompensated missionary work; and

- (5) Copies of the alien's bank records, budgets documenting the sources of self-support (including personal or family savings, room and board with host families in the United States, donations from the denomination's churches), or other verifiable evidence acceptable to USCIS.

The petitioner has not established, or even claimed, that the beneficiary's 2008-2009 work meets the above requirements.

The regulation at 8 C.F.R. § 204.5(m)(4) indicates that certain breaks or interruptions in the continuity of an alien's employment are acceptable, but the regulation strictly limits the nature of acceptable interruptions. Under that regulation, 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.

Here, only condition (ii) applies. After September 2008 at the latest, the beneficiary was no longer employed as a religious worker (volunteer work not constituting "employment"), and the nature of the break was not for further religious training or sabbatical. Therefore, the evidence indicates that the beneficiary did not continuously engage in qualifying employment throughout the two-year period immediately preceding the petition's filing date.

Next, we consider whether the beneficiary was authorized to work throughout the two-year qualifying period. On the Form I-360 petition, instructed to show the beneficiary's current nonimmigrant status and its expiration date, the petitioner indicated that the beneficiary was an R-1 nonimmigrant religious worker. For the expiration date, the petitioner stated "Pending."

The record shows that the beneficiary's R-1 status took effect on April 2, 2004. Under the regulation then in effect at 8 C.F.R. § 214.2(r)(4), the beneficiary's initial admission was limited to three years. Accordingly, [REDACTED] applied for an extension of the beneficiary's R-1 status on March 30, 2007. This extension, if approved, would have been limited to two years, because section 101(a)(15)(R)(ii) of the Act limits R-1 admission to "a period not to exceed 5 years." The beneficiary's R-1 status, therefore, could not lawfully be further extended past April 1, 2009.

The petitioner's initial submission documented the March 30, 2007 application for extension of the beneficiary's status. It did not, however, show the outcome of that application. USCIS records show

that the application, receipt number [REDACTED], was still pending in March 2009 when the petitioner filed the Form I-360 petition, and was later denied.

Under 8 C.F.R. § 274a.12(b)(20), while a timely application for extension of stay is pending, R-1 nonimmigrants are authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay. This automatic extension of employment authorization expired on November 27, 2007, 240 days after the beneficiary's authorized period of stay expired on April 1, 2007. Because USCIS never approved the application for extension of stay, the beneficiary's continued employment at [REDACTED] after November 27, 2007 was not authorized under United States immigration law.

We add, briefly, that expiration of R-1 nonimmigrant status is not among the valid grounds listed at 8 C.F.R. § 204.5(m)(4) for interruption of the beneficiary's work during the qualifying period.

For the above reasons, the available evidence strongly indicates that the beneficiary worked without authorization between November 2007 and March 2009 – most of the two-year qualifying period. This is, by itself, a facially disqualifying factor and grounds for denial of the petition. Nevertheless, the director did not mention this ground in the July 2009 denial notice, and therefore the petitioner has not had the opportunity to address this ground on appeal. Any new decision by the director must take this issue into account.

Therefore, the AAO will remand this matter for a new decision. 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 Administrative Appeals Office for review.