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Office of Administrative Appeals MS 2090
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[REDACTED]

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAR 26 2010**
WAC 07 084 52228

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
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 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 Sikh minister. The director determined that the petitioner had not established that the beneficiary has been working continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the visa petition and verifiable evidence of how the petitioner intends to compensate the beneficiary.

The petitioner submitted no additional documentation on certification.

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 on certification is whether the petitioner has established that the beneficiary has been working continuously in a qualified religious occupation or vocation for the two 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 had 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 January 29, 2007. Accordingly, the petitioner must establish that the beneficiary had been 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 [Internal Revenue Service] 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.

With the petition, the petitioner submitted several documents regarding the beneficiary's work as a Sikh priest. However, all of these documents are dated prior to the qualifying period. Therefore, they are not relevant in determining whether the beneficiary worked continuously in a qualifying religious occupation for the two years immediately preceding the filing of the petition.

In a March 19, 2007 request for evidence (RFE), the director instructed the petitioner to:

Provide evidence of the beneficiary's work history beginning January 29, 2005, and ending January 29, 2007, only. 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.

In response, the petitioner submitted a May 29, 2007 letter from the Sikh Dharma of New York signed by [REDACTED] which stated that the beneficiary had been employed by the petitioning organization since February 1, 2004, and that he "and his Jatha function as the Sikh Ministers to the Sikh congregation there and serve the congregation full-time in that capacity." The letter then outlined the beneficiary's duties, including early morning services, evening prayers, teaching religious scriptures, preparing services, meeting with and counseling congregants, officiating at ceremonies such as weddings, funerals, baby naming, turban tying, and house blessings. The petitioner provided no other documentary evidence of the beneficiary's work during the qualifying period.

In denying the petition, the director noted that USCIS records indicate that the beneficiary was approved for R-1 nonimmigrant religious worker status for a period valid from January 30, 2004. The director further noted that USCIS records indicate that the beneficiary departed the United States on April 19, 2004 and returned on March 31, 2005, departed on November 28, 2005 and returned on February 26, 2006 and departed again on February 19, 2007. The director questioned

how the beneficiary could work for the petitioning organization from February 1, 2004 as claimed when he was not present in the United States.

On appeal, the petitioner submitted copies of IRS Form 1099-Misc, Miscellaneous Income, that it issued to the beneficiary in 2004 through 2006, reflecting nonemployee compensation of \$9,500, \$13,000 and \$13,000, respectively. The petitioner also provided copies of the beneficiary's tax transcripts that reflect these wages were reported to the IRS. In his December 18, 2007 letter accompanying the petitioner's appeal, counsel stated:

[T]he beneficiary was accorded a change of status to R1 status on January 24, 2004. He started working in R1 status on February 1, 2004. He decided to obtain an R1 visa in New Delhi. He and the other members of his priest group departed the United States on April 18, 2004 and applied for an R1 visa. Through no fault of his own, his return to the United States was delayed due to security clearance checks. He received his R1 visa on July 13, 2004. As soon as he was able to obtain a flight back to the United States with the other priests in his group, he flew back into the United States to resume his duties as a [Sikh] priest for [the petitioning organization].

The petitioner provided copies of the beneficiary's visa and Form I-94 records, reflecting that he received his R-1 visa in New Delhi on July 13, 2004 and entered the United States pursuant to that visa on July 29, 2004. While the Forms I-94 do not show when the beneficiary first departed the United States after his July 29, 2004 entry, the record reflects he reentered the United States on March 31, 2005, departed on November 28, 2005, and entered again on February 26, 2006. Thus, the evidence reflects that the petitioner was absent from the United States for at least 90 days during the qualifying period when he was allegedly in the employ of the petitioner. The petitioner provided no documentation of the beneficiary's work outside of the United States during these absences.

On December 16, 2008, the AAO remanded the petition for consideration and action pursuant to new regulations published on November 26, 2008. In response to the director's Notice of Intent to Deny (NOID), counsel submitted two requests seeking an extension of the period to submit the requested documentation. Counsel's second request asked for an extension to April 29, 2009. Regardless, as of the date of this decision, however, more than 10 months after the requested date, the petitioner has provided no additional documentation. The petitioner submitted no additional documentation on certification. It is noted that pursuant to the regulation at 8 C.F.R. § 103.2(b)(8)(iv), additional time to respond to a NOID may not be granted.

Accordingly, the petitioner has failed to establish that the beneficiary worked continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the visa petition.

The director further determined that the petitioner had not provided verifiable evidence of how it intended to compensate the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(10), promulgated on November 26, 2008, 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.

The director noted that the petitioner submitted copies of the beneficiary's IRS Forms 1099-MISC and copies of the his tax transcripts from the IRS, in addition to copies of its annual financial statements for the years 2004 through 2006. Each of the annual financial statements was accompanied by an accountant's compilation report. Noting that an accountant's compilation report is not an audit of the petitioner's financial records, the director found these reports insufficient to establish the petitioner's ability to compensate the beneficiary. However, the director does not note any deficiencies in the petitioner's evidence presented in the form of IRS Form 1099-MISC or the beneficiary's transcripts from the IRS. While the petitioner did not submit copies of the beneficiary's certified tax returns, no specific request was made for them. Accordingly, we withdraw this statement by the director. We note, however, that the petitioner did not provide a verifiable job offer to the beneficiary that specified his duties, hours of work or compensation, and did not otherwise establish the compensation for the proffered position. Thus, the petitioner has not established that the beneficiary will be working in a full time compensated position as required by 8 C.F.R. § 204.5(m)(2).

Beyond the director's decision, the petitioner also failed to provide the attestation required by 8 C.F.R. § 204.5(m)(7), which provides:

Attestation. An authorized official of the prospective employer of an alien seeking religious worker status must complete, sign and date an attestation prescribed by USCIS and submit it along with the petition. If the alien is a self-petitioner and is also an authorized official of the prospective employer, the self-petitioner may sign the attestation. The prospective employer must specifically attest to all of the following:

- (i) That the prospective employer is a bona fide non-profit religious organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation;
- (ii) The number of members of the prospective employer's organization;

- (iii) The number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion;
- (iv) The number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years by the prospective employer's organization;
- (v) The number of special immigrant religious worker and nonimmigrant religious worker petitions and applications filed by or on behalf of any aliens for employment by the prospective employer in the past five years;
- (vi) The title of the position offered to the alien, the complete package of salaried or non-salaried compensation being offered, and a detailed description of the alien's proposed daily duties;
- (vii) That the alien will be employed at least 35 hours per week;
- (viii) The specific location(s) of the proposed employment;
- (ix) That the alien has worked as a religious worker for the two years immediately preceding the filing of the application and is otherwise qualified for the position offered;
- (x) That the alien has been a member of the denomination for at least two years immediately preceding the filing of the application;
- (xi) That the alien will not be engaged in secular employment, and any salaried or non-salaried compensation for the work will be paid to the alien by the attesting employer; and
- (xii) That the prospective employer has the ability and intention to compensate the alien at a level at which the alien and accompanying family members will not become public charges, and that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization.

As discussed previously, counsel requested additional time in which to respond to the director's NOID. However, as of the date of this decision, the petitioner has provided no additional documentation.

The petitioner has failed to provide the attestation required by the regulation.

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).

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 July 8, 2009 is affirmed.