

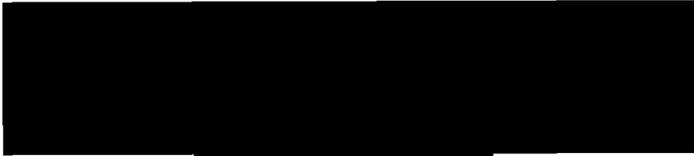
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAY 06 2010
WAC 07 083 52694

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)

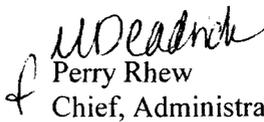
ON BEHALF OF PETITIONER:



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. 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 an associate pastor. The director determined that the petitioner had not established how it intends to compensate the beneficiary and that it has extended a qualifying job offer to 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 how it intends to compensate the beneficiary..

The 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 [Internal Revenue Service] 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 a January 8, 2007 letter, the petitioner stated that the beneficiary would be compensated at the rate of \$21,600 annually plus “living accommodation.” The petition was filed on January 31, 2007. Therefore, the petitioner must establish that it had the ability to compensate the beneficiary the proffered wage as of that date.

With the petition, the petitioner submitted copies of its unaudited financial statements for 2005 and 2006 and copies of its monthly banking statements for August 2006 through March 2007. The petitioner also submitted copies of seven processed checks made payable to the beneficiary in the amount of \$1,800 and dated approximately once a month from August 31, 2006 to March 4, 2007. The petitioner provided copies of the beneficiary’s IRS Forms 1040, U.S. Individual Income Tax Returns, on which he reported self-employment income of \$3,600 for 2004, and \$21,600 in 2005 and 2006, and copies of the beneficiary’s monthly banking statements with deposits that correspond to the dates and amounts of the checks issued by the petitioner.

In response to a March 22, 2007 request for evidence (RFE), the petitioner stated that it did not file tax returns or pay its employees wages reportable on IRS Form W-2. The petitioner submitted copies of processed checks, indicating that it paid the beneficiary \$1,800 in May, June and July of 2006. The petitioner alleged in its April 23, 2007 letter that “documents show [that] we have been regularly remunerating the beneficiary for his services in addition to paying him occasional additional allowances. However, the documentation does not support the petitioner’s assertions. The petitioner submitted a copy of its unaudited “Year 2006 Final Accounting,” which indicates that it had a revenue shortfall of \$21,234 under its budgeted amount and that it paid its associate pastor (the position allegedly held by the beneficiary) \$19,800 instead of the \$21,600 it budgeted and the amount it alleges it paid the beneficiary in 2006. The “Year 2005 Final Accounting” shows a similar shortfall; however, the petitioner did not itemize its expenses for the year. Therefore, it is unclear if it paid the beneficiary the salary it alleged. 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).

During an August 17, 2007 compliance review verification visit conducted by an immigration official with the United States Citizenship and Immigration Services (USCIS), the petitioner’s

pastor, [REDACTED], informed the investigating officer that the petitioner had only one full-time employee [REDACTED] and three part-time employees, including the beneficiary. After reviewing the petitioner's current bank statement, the investigator concluded that the petitioner did not have sufficient funds to pay all of its employees a full-time salary. The investigator found that the petitioner paid its part-time employees "from \$1,000 to \$1,800 per month" in addition to paying [REDACTED] and another employee. In his description concluding his investigation, the investigator attributed a statement to [REDACTED] that the petitioner did not "have sufficient income to support" all of its employees full-time. The report indicates that the investigator also reached this conclusion based on a review of one of the petitioner's bank statements.

In an October 23, 2007 Notice of Intent to Deny (NOID), the director notified the petitioner that the compliance review verification indicated that the petitioner did not have the ability to pay the beneficiary. In a November 13, 2007 letter submitted in response, [REDACTED] denied that he had stated the petitioner did not have sufficient funds to support all of its employees on a full-time basis. [REDACTED] stated that the petitioner's budget reports indicate that it "has always had surpluses at the end of the fiscal years, even after having paid all the remunerations to all the listed employees and expenses." [REDACTED] also points to the church's ownership of the church building, claiming equity of more than \$1 million dollars.

The petitioner also submitted copies of its monthly bank statements for January through October 2007, with copies of processed checks showing that, in addition to the payments noted previously, it also paid the beneficiary \$1,800 twice in December 2006, and approximately once a month in January, March, and July through October 2007.

In response to the director's NOID issued on remand, the petitioner provided a copy of its 2008 IRS Form 990-EZ, Short Form Return of Organization Exempt from Income Tax; copies of processed checks indicating that it paid the beneficiary \$2,000 in January and twice in March of 2009; and copies of the beneficiary's 2008 IRS Form 1040, U.S. Individual Income Tax Return on which he reported \$21,600 in self-employment income.

The regulation at 8 C.F.R. § 204.5(m)(10) states that evidence of compensation may include past evidence of compensation; 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. The petitioner did not provide copies of any IRS Form 1099-MISC that it provided to the beneficiary or copies of the beneficiary's certified tax returns. Additionally, it did not explain why it was unable to provide this documentation. The petitioner is free to submit other kinds of documentation such as bank statements or expense reports, but only in addition to, rather than in place of, the types of documentation required by the regulations.

The petitioner's evidence indicated that it had occasionally paid the beneficiary an average of \$1,800 per month during 2006 and 2007. The documentation does not establish that the petitioner consistently paid the beneficiary on a monthly basis. Further, there is no verifiable

evidence that it paid the beneficiary \$21,600 per year in the past, as it provided contradictory evidence of its compensation to the beneficiary. Additionally, the petitioner submitted no evidence that it provided the beneficiary with housing or a housing allowance, as it outlined in its January 8, 2007 letter. Accordingly, the petitioner has failed to establish how it intends to compensate the beneficiary.

The second issue on certification is whether the petitioner established that it has extended a qualifying job offer to the beneficiary. The regulation at 8 C.F.R. § 204.5(m)(2) requires that the alien must be coming to the United States to work in a full time (average of at least 35 hours per week) compensated position in one of the qualifying occupations.

In its January 8, 2007 letter, the petitioner stated that the beneficiary's duties as associate pastor "has been and will continue to serve mainly our church's Education Department with the ministry of student[s] and young adult," which it stated was "one of the most important parts of our church." The petitioner further described the duties of the proffered position as follows:

In early morning services, held on Mondays through Saturdays, [the beneficiary] will continue to give sermons, lead worship services and conduct weekly orientation classes for the new registered members. Moreover, [he] will continue to proctor special classes, which consist of comprehensive orientation of our church's history, Bible study and personal counseling, to new congregants. [The beneficiary] will also continue to be responsible for performing baptisms and weddings as well as for rendering spiritual and personal counseling to our congregants. He is also expected to make himself available on short notice for consultation to individuals in need of guidance or support. [He] will also continue to conduct group Bible study and lead worship service and prayer meeting for the youth group. Lastly, [he] will continue to coordinate all the matters of the Education Department including training teachers, preparing Bible study material and annual events such as VBS, retreats, Bible Quiz and educational activities including making budget for the Education Department.

In its April 23, 2007 response to the director's March 22, 2007 RFE, the petitioner stated that the duties of the associate pastor encompassed more than 40 hours per week as follows:

Sunday:	7:30AM~8:30AM	Attend NCPC ministerial meeting;
	8:30AM~1:00PM	Prepare and attend Sunday Worship service and direct and coordinate Sunday School programs;
	1:30PM~4:00PM	Lead Sunday School programs for adults (Outdoor activities and Bible study). Teach gospel and give sermon.
Monday:	Day off	

Tuesday:	5:40AM~7:00AM	Prepare and lead Early Morning Worship service;
	10:00AM~1:00 PM	Prepare sermons and materials for adult worship service;
	2:00PM~5:00 PM	Make calls to absentees on Sunday Worship service.
Wednesday:	5:40AM~7:00AM	Lead Early Morning Worship service and give sermons;
	8:30AM~12:30 PM	Attend NCPC ministerial workers' meeting; Mentor and fellowship with church workers;
	2:00PM~5:00 PM	Visit new congregation members, especially adult and senior members, spread God's message and counsel their faith;
	7:30PM~9:00 PM	Attend Wednesday Worship service.
Thursday:	5:40AM~7:00AM	Lead Early Morning Worship service and give sermons;
	9:00AM~12:00PM	Make and revise overall listing for districts and plan and review education department's activities;
	2:00PM~5:00PM	Prepare bible Study materials and questionnaire for Saturday Worship service for adults and small group meetings.
Friday:	5:40AM~7:00AM	Lead Early Morning Worship service and give sermons;
	9:00AM~12:00PM	Finalize sermons and manuscripts for adult worship services
	6:30PM~10:00PM	Lead and attend Friday night prayer meeting and give sermons and counseling.
Saturday:	5:40AM~7:00AM	Lead Early Morning Worship service and give sermons;
	2:00PM~4:00PM	Train and teach cell group leaders and Sunday School teachers.

The petitioner stated that it had a congregation of "nearly 120 members," down from the "350 registered members" that it alleged it had in its January 8, 2007 letter submitted in support of the petition. The petitioner identified nine leadership positions in the church: senior pastor, responsible for the whole church; associate pastor, "one of two individuals second in charge of our church assisting our Senior Pastor;" associate pastor and education pastor (the position held by the beneficiary), "the other of two individuals second in charge of our church assisting our Senior Pastor," and is "responsible for leading and helping the spiritual growth of the adult

members of our church;” education pastor, “responsible for the religious education of young adults and teens who plans and implements church activities;” missionary pastor, “responsible for church broadcasting and visiting sick members;” evangelist/missionary, “responsible for children’s religious education and the administrative support;” evangelist/missionary, “responsible for church music and choir;” evangelist/missionary, “responsible for assisting and visiting new members and home worship services;” and evangelist/missionary, “responsible for district and home prayer services.” Not all of the positions are compensated, including the associate pastor position not held by the beneficiary.

The duties attributed to the beneficiary appear to encompass those of both the associate pastor and the education pastor, and the record does not clearly indicate those duties actually performed by the beneficiary. In its January 8, 2007 letter, the petitioner stated that the position of associate pastor held by the beneficiary is “second only to our Senior Pastor,” and that the beneficiary would continue “to serve mainly our church’s Education Department with the ministry of student and young adult.” However, in describing the church hierarchy, the petitioner identifies another education pastor who is “responsible for the religious education of young adults and teens.” Additionally, the beneficiary’s work schedule provided by the petitioner leaves little work for the senior pastor and the other associate pastor, especially with a congregation of only 120 members. Therefore, it is not clear that the schedule reflects a true division of labor within the petitioning organization.

According to the investigator who conducted the compliance review verification visit, [REDACTED] advised that the petitioner employed only one full-time employee, himself, and that all other employees worked part time. [REDACTED] advised the investigator that the beneficiary of this petition worked 4-5 hours on Saturday and 8 hours on Sunday, and that he worked during the weekday for a church unaffiliated with the petitioning organization.

In response to the director’s NOID, [REDACTED] denied that he told the investigating officer that the beneficiary only worked part time. [REDACTED] stated in a November 18, 2007 declaration, “I tried to explain that [the beneficiary] is not required and is not physically present at the church all the time, except on Sundays, because his duties requires that he spends much of his time outside of the church.” The petitioner also submitted declarations from two other members of the church, who stated that they were present during [REDACTED] interview with the investigating officer, and confirmed that he told the investigator that the beneficiary “is not required and is not physically present at the church all the time.” In a November 17, 2007 declaration, [REDACTED] stated that the beneficiary is at the church all day on Sunday and “more or less half a day on Saturday.” [REDACTED] in a November 17, 2007 declaration, stated that the beneficiary was at the church all day on Sundays and “more or less half a day on Saturdays and Wednesdays.”

In denying the petition, the director noted that these times were inconsistent with hours outlined in the work schedule for the beneficiary provided by the petitioner in its April 23, 2007 response to the director’s RFE. That schedule indicated that the beneficiary was required to be in the church every morning, except on his day off, to lead early morning service and deliver sermons.

The schedule also indicated that on Fridays, the beneficiary led and attended night prayer meeting, gave sermons and counseling, and attended Wednesday worship service. The petitioner provided no explanation or documentation as to where the beneficiary performed other duties such as attending ministerial meetings and training of Sunday school teachers.

In response to the director's NOID issued on remand, the petitioner repeated the beneficiary's schedule as outlined above, and states that the beneficiary will be employed "more than 40 hrs a week." However, the declarations of [REDACTED], [REDACTED] and [REDACTED] support the investigator's findings that the beneficiary worked as a part-time employee for the petitioner. All clearly state that the beneficiary worked at the church for less than 35 hours per week, and while all state that the beneficiary's job duties did not require him to be present at the church all of the time, it is not clear from the schedule provided what duties, other than visiting members, are performed outside of the church facilities.

Accordingly, the petitioner's evidence is insufficient to establish that the proffered position will offer full time employment to 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 July 8, 2009 is affirmed. The petition is denied.