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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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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:

NOV 10 2010

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:



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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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
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 dismiss the appeal.

The petitioner is a national Baptist denominational organization. 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 of [REDACTED] in Westminster, California. The director determined that the petitioner had not established that the beneficiary had the required two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel and documentation relating to the beneficiary's outside work.

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 . . . ; and
- (iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(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) requires that the beneficiary's qualifying experience, if acquired in the United States, must have been authorized under United States immigration law.

The petitioner filed the Form I-360 petition on September 12, 2007. The beneficiary entered the United States on February 16, 2006, under an R-1 nonimmigrant religious worker visa to work at the Vietnamese Baptist General Conference Church. The record indicates that this 2006 entry was not the beneficiary's first entry into the United States.

Copies of pay receipts show that the petitioner paid the beneficiary \$1,111 per month in 2007. IRS Forms W-2 (Wage and Tax Statement) and 1099-MISC (Miscellaneous Income) showed the following payments to the beneficiary in earlier years:

Year	IRS Form	Employer	Gross pay
2005	W-2	The petitioner	\$12,800.40
2005	1099-MISC	LSCRC	9,750.00
2006	W-2	The petitioner	13,233.20
2006	W-2	LSCRC	12,000.00

Uncertified copies of the beneficiary's federal income tax returns show the following totals:

Year	Wages/Salaries	Business Income
2005	\$12,800	\$1,730
2006	25,233	668

The petitioner did not submit copies of Schedule C, Profit or Loss from Business, for either return. As a result, the petitioner's initial submission did not identify the source(s) of the beneficiary's claimed business income. The beneficiary's 2005 payments from [REDACTED], reported on IRS Form 1099-MISC, may account for some or all of the claimed business income for that year, but in 2006 LSCRC reported the beneficiary's salary on IRS Form W-2. That amount appears on the 2006 tax return as wages rather than as business income.

On November 29, 2007, the director instructed the petitioner to submit, among other things, IRS-certified copies of the beneficiary's 2005-2006 tax documentation, and evidence of the beneficiary's employment history during the September 2005-September 2007 qualifying period. In response, Rev. [REDACTED], international director of the petitioner's [REDACTED] stated: "The beneficiary has only worked for the [petitioner] by means of the [REDACTED] during this period."

IRS documents, including Forms W-3, Transmittal of Wage and Tax Statements, indicate that the beneficiary was [REDACTED] only paid employee in 2006 and 2007. [REDACTED] paid the beneficiary \$12,000 in 2006 and \$15,000 in 2007. The petitioner also resubmitted copies of the beneficiary's 2005 and 2006 income tax returns, but the copies were not IRS-certified as the director had requested.

In a notice dated April 1, 2009, the director instructed the petitioner to submit "official [IRS] printouts for both W-2s and Federal Tax Returns for 2006, 2007, and 2008 of the beneficiary," as well as "an itemized record from the Social Security Administration" to "show the employers the beneficiary has worked for since his or her Social Security Card was issued." The director advised the petitioner that the director would deny the petition if the petitioner failed to submit the requested documentation.

The petitioner's response included an IRS printout of the beneficiary's 2006 income tax return. This printout repeats the claim of \$668 in business income shown on the 2006 tax return submitted

previously. According to the transcript, the beneficiary had claimed gross receipts of \$668, with no expenses, from an unnamed business with employer identification number (EIN) [REDACTED]

The petitioner also submitted copies of signed income tax returns with accompanying Schedules C. Schedule C for 2008 indicated that the beneficiary reported a net loss of \$825 from business attributed to Union College of California. \$1,450 in gross income was offset by expenses including \$1,632 in depreciation of a 2002 Lexus. This activity took place after the 2005-2007 qualifying period.

The 2007 Schedule C reflected a "sales commission" from [REDACTED], but the beneficiary claimed no net income or loss from that activity. This Schedule C shows [REDACTED] as [REDACTED] – the same EIN shown on the beneficiary's 2006 EIN transcript. Therefore, the evidence, taken together, shows that the beneficiary reported income from [REDACTED] in 2006, during the qualifying period.

The beneficiary's Social Security Administration transcript does not identify [REDACTED] as an employer, but it shows that the beneficiary reported "self-employment" income of \$1,598 in 2005 and \$617 in 2006.

The director denied the petition on July 8, 2009, stating that the beneficiary "has been engaged in unauthorized employment" in violation of his R-1 nonimmigrant status. An alien in R-1 nonimmigrant status may be employed only by the religious organization through whom the status was obtained. *See* 8 C.F.R. § 274a.12(b)(16). More generally, the USCIS regulation at 8 C.F.R. § 214.1(e) provides that a nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status.

On appeal, [REDACTED] the petitioner's mobilization coordinator, states: "A further inquiry into certain facts would have revealed that the basis for the denial did not exist." The initial appeal statement contains no elaboration on this claim, but indicates that details will follow in a later brief.

Subsequently, the petitioner has submitted a letter from [REDACTED] president of the [REDACTED] at Union College of California, who states: "We . . . had requested [the beneficiary] to help teach one class . . . to fulfill the academic requirements for pastoral students of our B.A. program. He was not on payroll and not an employee. We expressed our appreciation to him with a one time payment of \$1,450.00 only." Whether or not the beneficiary was officially an employee of the college, he received payment in exchange for services rendered and thereby engaged in employment. The Board of Immigration Appeals has ruled that an alien who "receives compensation in return for his efforts" is "employed" for immigration purposes. *See Matter of Hall*, 18 I&N Dec. 203, 205 (BIA 1982). Nevertheless, as we have already noted, this activity took place in 2008, after the petitioner had already filed the petition. Therefore, this unauthorized employment took place after the two-year qualifying period.

Regarding the beneficiary's earlier work for [REDACTED] counsel states: "The beneficiary was a consumer of a [REDACTED] fruit drink distributed by [REDACTED] and agreed to refer his friends to the company to purchase its products. In return for such referrals the beneficiary was offered a small

commission.” The record does not support counsel’s apparent attempt to portray these sales commissions as an ancillary result of recommending a beverage to his friends. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

██████████, tax senior at ██████████, stated that the beneficiary “earned a commission in the amount of \$127.00 during tax year 2007 as an independent distributor of ██████████ products.” The petitioner submits copies of computer-printed statements, showing that the beneficiary received sales commissions during the early months of 2007, during the qualifying period. The statements identify the beneficiary as a “Distributor” with the “Paid Rank” of “Pref. Representative” and a “Distributor ID” number. It is one thing to “refer [one’s] friends” to a particular product; it is quite another thing to sell that product for a commission.

Counsel states that the beneficiary “received commission of no more than \$127.00 in total” from ██████████, but the record shows that the beneficiary also reported \$668 in ██████████ commissions on his 2006 tax return. The beneficiary’s R-1 nonimmigrant status permitted him to work “solely” as a minister. *See* section 101(a)(27)(C)(ii)(I) of the Act. The beneficiary’s unauthorized work as a commissioned fruit juice salesman violated his R-1 nonimmigrant status.

Counsel, on appeal, cites section 245(k) of the Act, which reads:

An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 203(b) (or, in the case of an alien who is an immigrant described in section 101(a)(27)(C), under section 203(b)(4)) may adjust status pursuant to subsection (a) and notwithstanding subsection (c)(2), (c)(7), and (c)(8), if –

- (1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;
- (2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days –
 - (A) failed to maintain, continuously, a lawful status;
 - (B) engaged in unauthorized employment; or
 - (C) otherwise violated the terms and conditions of the alien’s admission.

The above language refers to adjustment of status, not to the immigrant visa petition process that precedes adjustment. The statutory language, above, plainly applies only to “[a]n alien who is eligible to receive an immigrant visa.” Without an approved petition, the beneficiary is not yet an alien who is

eligible to receive an immigrant visa. An alien cannot claim adjustment-related benefits on the basis of a denied petition. *Cf. Matter of Al Wazzan*, 25 I&N Dec. 359, 366-67 (AAO 2010).

Nothing in section 245(k) of the Act requires USCIS to approve an immigrant petition when the beneficiary of that petition is ineligible for the classification sought. The law does not require USCIS to approve every immigrant petition filed on behalf of an alien who intends to seek section 245(k) relief. Rather, such relief presupposes an already-approved immigrant petition. Without an approved immigrant petition, the beneficiary has no basis for adjustment of status, and therefore section 245(k) relief does not apply.

Furthermore, section 245(k) of the Act applies only to aliens who failed to maintain status for 180 days or less. The beneficiary first failed to maintain status in 2006, when he first began performing commissioned work for [REDACTED]. By the petition's filing date in September 2007, the beneficiary had been in violation of his status for well over 180 days. Therefore, he would not qualify for section 245(k) relief even if it were relevant to this proceeding.

For the above reasons, we agree with the director's finding that the beneficiary failed to maintain nonimmigrant status, and therefore worked without authorization during the two year period immediately preceding the filing of the petition.

We also note an omission in the record. 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).

The regulation at 8 C.F.R. § 204.5(m)(7) requires the petitioner to submit a detailed attestation regarding the petitioner, the beneficiary, and the job offer. The record does not contain this required attestation, without which USCIS cannot properly approve the petition.

The AAO will dismiss the appeal 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 met that burden.

ORDER: The appeal is dismissed.