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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]

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 22 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:

[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,

✓ 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 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 operates a number of Southern Baptist churches. 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 the pastor of Life Renewal Christian Ministries. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel, photographs, and copies of various documents.

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) reads, in part:

- (11) *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.

The petitioner filed the Form I-360 petition on January 17, 2007. The Form I-360 indicated that the petitioner's address was on [REDACTED]. The form showed the same address for the beneficiary's residence.

In a letter dated December 11, 2006, the petitioner's senior pastor, [REDACTED], stated that the beneficiary began working for the petitioner in "June of 2004," after changing his nonimmigrant status to that of an R-1 nonimmigrant religious worker. [REDACTED] stated that the beneficiary's "work in the last two years has included but is not limited to conducting religious services every Sunday and leading prayer gatherings and bible studies every week."

On June 21, 2007, the director instructed the petitioner to submit additional "evidence of the beneficiary's work history beginning January 17, 2005, and ending January 17, 2007," including "evidence that shows monetary payment" and "copies of the beneficiary's IRS Forms W-2 (Wage and Tax Statement) for 2005 and 2006." The director also requested evidence of religious activity at the address shown on the Form I-360 petition.

In response, the petitioner, in an unsigned statement, indicated that the beneficiary "is not merely confined to an 8 to 5 job description. . . . He is sometimes called to visit members of the congregation outside of the normal working hours. In a given week however he is regularly assigned to conduct bible studies at the homes of members of the church."

Providing more detail about the petitioner's weekly activities, the petitioner stated:

[W]e have regular religious service every Sunday from 10:00am to 11:30am at [REDACTED]. . . . Other regular ministries are the Prayer Meeting every Friday from 10:00pm to 11:00pm or Saturdays from 7:30am to 8:30am, youth bible study every Friday at 7:30pm to 9pm and adult bible study every Thursday at 5:30pm to 7:30pm [at the beneficiary's home]. There are also Bible Studies every Tuesday at 8:00pm to 9:30pm in the [REDACTED] located at [REDACTED], Wednesdays at 8:00pm to 9:30pm [at] [REDACTED] and Fridays at 12:00pm to 2:00pm [at] [REDACTED].

[REDACTED] signed a document describing the "[d]aily and weekly activity of the Pastor," indicating that activities take place at various locations, including "the community hall of the [REDACTED] at the

Grove” and “the residence of a member at North Hollywood.” The information, overall, is consistent with the schedule described above.

The petitioner submitted several church bulletins. One, dated March 2005, refers to meetings in San Diego, Van Nuys, North Hollywood, and other cities on various days of the week.

The petitioner stated that the address on the petition form “is the residence and office of the beneficiary and that all the religious activities of the church were conducted in rental/lease properties in and around the Van Nuys area.” The petitioner submitted documents indicating that the petitioner previously rented space for its weekly worship services from a [REDACTED] facility from August 2004 to March 2005, and then a [REDACTED] from March 2005 to June 2005, leaving each space as the congregation’s growth forced the petitioner to seek larger accommodations. Paperwork relating to these rentals shows the signatures of the beneficiary and his spouse.

The petitioner submitted photographs relating to the beneficiary’s work, including exterior photographs of the [REDACTED]. In these photographs, there are no visible signs referring to the petitioner or indicating that any church operates inside the center. Other photographs appear to show prayer meetings and other gatherings at private homes.

Documents in the record show that the petitioner rents an “Auditorium, Closet space, and one Classroom” from the [REDACTED]. A letter accompanying the lease specified that the petitioner was renting “the Auditorium 9:00 am. to 1:00 pm, Room 3/A upstairs for 2 hours usage, and a storage closet.” References to “Sundays” suggest that the petitioner leased the space only on that one day each week.

As evidence of the beneficiary’s compensation, the petitioner submitted photocopies of paychecks, all but six of which were unprocessed, from the petitioner dated between July 2005 and December 2006, each in the amount of \$750. Other checks, from roughly the same period, are said to account for the beneficiary’s other expenses such as gasoline and housing. Some of the checks were payable to the beneficiary’s spouse, or to the beneficiary and his spouse jointly. The beneficiary’s spouse appears to have signed many of these checks.

The petitioner also submitted copies of bank statements (for the same account number shown on the paychecks) from December 2004 through May 2005. The checks and bank statements show the beneficiary’s address as the petitioner’s mailing address.

The petitioner submitted photocopies of IRS Form W-2 Wage and Tax Statements, showing that the petitioner paid the beneficiary \$10,927 (plus \$5,450 for “parsonage” and “utilities”) in 2005, and \$17,280 (plus \$15,600 for “parsonage”) in 2006. As with the checks, the address given for the petitioner is the same Sylmar Avenue address claimed for the beneficiary’s residence.

In early April, 2008, a USCIS officer traveled to the address shown on Form I-360 in an effort to verify the beneficiary’s employment and ongoing religious activity at that address. The officer “noted that this location was a family residence,” and left after no one answered the door. The officer’s notes indicate

that the visit occurred on "Friday, April 2, 2008," but April 2 fell on a Wednesday in 2008. It is not clear whether the site visit occurred on Wednesday, April 2, or Friday, April 4. The officer indicated that the visit took place shortly after 11:00 a.m. If this was on a Friday, the beneficiary would have been on his way to North Hollywood for the noon Bible study class.

The following Friday, April 11, 2008, the officer visited [REDACTED] and noted "the signs advertised Bernardi Multipurpose Senior Center and not [the petitioning] Church." The officer spoke to [REDACTED] the executive director of the BMSC, who "stated that she believed that [the petitioner] leased a room from them on Sundays" and that the beneficiary "was the one who signed the lease." [REDACTED] also stated that "she wasn't certain if [the petitioner] used the space during the week." Examining the room leased by the petitioner, the officer noted "there were no signs that this space was used for Worship Services by" the petitioner. The officer concluded that the petitioner had failed the compliance review.

On November 26, 2008, while the petition was pending, USCIS published new regulations that applied not only to new petitions, but to any petitions still pending on that date. Supplementary information published with the new rule specified: "All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

On February 19, 2009, the director informed the petitioner of USCIS' intent to deny the petition. The director did not cite any of the new regulations or the new documentary requirements. Instead, the director based the notice solely on the finding that "the petitioning entity appears to be at the [BMSC] on Sundays only. . . . The petitioner has not submitted evidence demonstrating that the beneficiary is working 40 hours per week."

In response, the petitioner submitted letters from several witnesses, including BMSC officials, attesting to the beneficiary's full-time employment at BMSC and other locations. [REDACTED] writing almost a year after the 2008 site inspection, stated that she had "come to know [the beneficiary] as [a] full time religious worker of the church."

The petitioner also submitted copies of processed checks, many of which establish payment during the two-year qualifying period. This evidence establishes that the petitioner paid the beneficiary \$1,300 per month. This amount is equal to \$15,600 per year, the salary shown on the beneficiary's 2007 IRS Form W-2. (Only the first few weeks of 2007 fell during the qualifying period.)

The director denied the petition on April 13, 2009, stating: "The evidence submitted is insufficient to establish that the beneficiary has the prerequisite work experience for the job offered." The director discounted the various witness declarations, stating that they did not overcome the information from the site inspection and that the witnesses did not establish how they had knowledge of the beneficiary's full work schedule. With regard to the processed checks, the director stated:

The back[s] of the checks show that they were cashed by the beneficiary. However, the checks do not demonstrate that the funds were subtracted from the petitioner's checking account. Without a copy of the petitioner[s] monthly bank statements, the petitioner has not demonstrated that the religious organization was compensating the beneficiary for his services.

On appeal, the petitioner submits IRS-certified copies of the beneficiary's 2005 and 2007 income tax returns, and an IRS transcript of the beneficiary's 2006 income tax return, consistent with the petitioner's prior submissions. The petitioner also submits copies of bank statements. These bank statements are the source for the images of processed checks submitted previously. Because those images showed not only that the beneficiary had signed his paychecks, but also that the bank had processed the checks for payment, it is not clear why the director concluded that "the checks do not demonstrate that the funds were subtracted from the petitioner's checking account." Some confusion may have resulted from the bank's recycling of check numbers, resulting in two different checks appearing on two different statements, but with the same check number.

The director has cited the compliance review report as evidence that the petitioner's claims are not credible. When considering the compliance review report, it is important to note that, in that report, Ilene Parker verified that the petitioner did indeed lease space at the BMSC once a week, and that the beneficiary was the pastor. The officer noted the absence of church signs in the leased space, but the absence of permanent signs would be consistent with part-time use of rented space.

Also, by the time the site visits took place in April 2008, the petitioner had already advised USCIS that the address on the Form I-360 was the beneficiary's residence, that the petitioner rented space from the BMSC, and that most of the beneficiary's weekly activities took place at members' homes and other locations in the greater Los Angeles area. Therefore, the information obtained during the site inspections appears to be consistent with the petitioner's prior claims. The director did not explain how those site inspections serve to discredit the petitioner's claims.

The record consistently establishes that the petitioner employed the beneficiary throughout the two-year qualifying period, which overcomes the only stated ground for denial. The AAO will withdraw that ground and, because the denial rests only on that one basis, the underlying denial decision.

Nevertheless, additional information and evidence are necessary in order to determine whether or not the director should approve the petition. The AAO can raise issues not identified 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).

As we have already noted, new regulations went into effect in November 2008. The new regulations introduced several new evidentiary requirements. The regulation at 8 C.F.R. § 204.5(m)(7) requires the petitioner to submit a detailed attestation concerning the petitioner, the beneficiary, and the job offer.

Because the petitioner filed the Form I-360 petition before the new regulations went into effect, the initial filing did not include this required attestation. The director must allow the petitioner a reasonable opportunity to meet this requirement.

Also, the regulation at 8 C.F.R. § 204.5(m)(12) states: "If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition." The director concluded that the petitioner had failed a previous site inspection, but, as we have shown, the available evidence indicates that USCIS's findings during that inspection were basically consistent with the petitioner's prior claims. If the director performs or has performed a new site inspection and/or other investigation or compliance review, and concludes that the findings do not establish eligibility, then the director must advise the petitioner of this information before issuing a new decision. "If an on-site inspection yields derogatory information not known to the petitioner, USCIS will issue a Notice of Intent to Deny (NOID) the petition. See 8 CFR 103.2(b)(16). The petitioner may then submit additional documentation that may rebut the derogatory evidence." 73 Fed. Reg. 72276, 72283 (Nov. 26, 2008).

We note that the regulation at 8 C.F.R. § 204.5(m)(10) reads:

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.

At the time of filing, the petitioner indicated that the beneficiary would receive "an annual salary of \$33,600 plus transportation and miscellaneous expenses." The record includes an IRS Form W-2 showing that, in 2007 (the year the petitioner filed the petition), the petitioner paid the beneficiary \$34,821.00 (some of which was in the form of a housing allowance). Processed checks in the record show payments to the beneficiary in varying amounts at irregular intervals, consistent with reimbursement for "miscellaneous expenses" as originally described. The petitioner appears, therefore, to have satisfied this new requirement, but the director has the discretion to request further evidence in this regard. See 8 C.F.R. § 103.2(b)(8).

Therefore, the AAO will remand this matter to the director 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.