

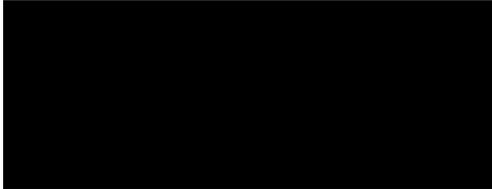
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: DEC 20 2011 Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

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, with a fee of \$630. 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, initially approved the employment-based immigrant visa petition. On further review, the director determined that the beneficiary was not eligible for the visa preference classification. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke (NOIR) approval of the petition and her reasons for doing so, and subsequently exercised her discretion to revoke approval of the petition on December 10, 2009. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fellowship of the Assemblies of God. 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 pastor. The director determined that the petitioner had not established that it operates in the capacity claimed in its petition and how it intends to compensate the beneficiary.

On appeal, counsel states that the director did not ask for evidence of how the petitioner would compensate the beneficiary. Counsel further states that the information regarding the petitioner's payment of rent was inaccurate and that there was a misunderstanding between the immigration officer (IO) regarding his outside employment. In support of the appeal, counsel submits a letter and a copy of a previously submitted statement from the beneficiary.

On November 26, 2008, the U.S. Citizenship and Immigration Services (USCIS) issued new regulations for special immigrant religious worker petitions. 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).

As the instant petition was not pending on November 26, 2008, it is not subject to the evidentiary requirements of the new regulation. Accordingly, the petition must be adjudicated based on the regulations in effect at the time the petition was filed. The director therefore erred in applying the new regulations to the instant petition. The petitioner, however, does not allege, and the record does not establish, that it has been prejudiced by the director's error. Furthermore, as the AAO conducts appellate review on a *de novo* basis, all of the evidence of record will be considered. 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., *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department of Homeland Security “may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.”

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.*

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 is whether the petitioner has established that it operates in the capacity claimed in the petition and therefore whether it has extended a qualifying job offer to the beneficiary.

In its January 19, 2006 letter submitted in support of the petition, which was filed on February 17, 2006, the petitioner stated that the beneficiary had worked for the petitioning organization under R-1 nonimmigrant religious worker status since June 4, 2002, and was currently working as a senior pastor at one of its church plants in San Jose, California. The petitioner provided uncertified copies of the beneficiary's unsigned and undated Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, for 2003 and 2004, on which he reported self-employment income \$17,600 and \$19,200, respectively. The beneficiary did not include an IRS Form 1099-MISC, Miscellaneous Income, to indicate the source of his income and listed his home address on the tax return as his place of business. Additionally, the returns indicate that they were prepared by the tax preparer on December 13, 2005. The director approved the petition on May 16, 2006 without requesting any additional documentation.

On July 5, 2007, an IO conducted an investigation at the location that the petitioner stated that the beneficiary was to work, [REDACTED]. The IO reported that the location was that of Immanuel Evangelical Lutheran Church, and that the Immanuel Church's administrative assistant stated that the petitioning organization had not paid its rent since May. The youth director for the Immanuel Church also stated that he had not seen the beneficiary at the location since May. The IO reported that he visited the beneficiary's apartment and was advised by his nephew that the beneficiary was at the airport for a job interview. When the beneficiary arrived, he told the IO that he had been to the airport to "fill out a form," and that "he had been employed since 2003 as a part-time eldercare worker for \$15 an hour."

In her May 31, 2009 NOIR, the director advised the petitioner of her intent to revoke approval of the petition based on the IO's findings. In response, the petitioner submitted a June 29, 2009 letter from the beneficiary, who stated that his congregation had leased space from the Immanuel Church from December 2005 through November 2008, but at times they were in arrears with their rental payments. The petitioner submitted a June 30, 2009 letter from [REDACTED] the pastor of the Immanuel Lutheran Church, who confirmed that the petitioner's congregation "had worshipped here until November 30, 2008." The AAO notes that the address on the letterhead on the letter from the beneficiary is [REDACTED]. However, the petitioner provided no information about the new address or the effective date of the new address.

In revoking the approval of the petition, the director stated:

The letter [from the beneficiary] does not address the fact no one has seen anyone since May of 2007. And no one could account for any Services at the location,

The petitioner failed to provide a reason for the lack of Services at the location. The petitioner submitted tax returns indicating his apartment as the business address of the church. The petitioner failed to establish the church had ongoing full time Services. The petitioner failed to establish the church had a congregation to support the beneficiary as a full time minister.

On appeal, counsel states that [REDACTED] "verifies that the petitioner's congregation continued to worship in their facilities from May 2007 until November 30, 2008." However, the letter from [REDACTED] does not state when the petitioner's congregation began leasing from the Immanuel Evangelical Lutheran Church. The petitioner provided no documentation, such as church bulletins, programs, or other documentation to establish the activities of the petitioner's church at that location.

The petitioner has failed to establish that the church at which the beneficiary is to work operates as claimed in the petition and that the job offered to the beneficiary is full time and permanent employment.

The director also determined that the petitioner had not established how it would compensate the beneficiary. The director erroneously cited to the regulation that became effective on November 26, 2008. The pertinent regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner indicated in a letter dated January 19, 2006 that the beneficiary would continue to receive \$20,000 per year to be paid "by this church." It is not clear whether the beneficiary would receive compensation from the petitioning organization or the church for which he is to work. The petitioner submitted a copy of its audited financial statement for the year ended December 31, 2003. It submitted no similar documentation for 2005 or 2005, the years immediately preceding the filing of the petition. In addition to the beneficiary's tax returns for 2003 and 2004, the petitioner also provided an uncertified copy of the beneficiary's 2005 IRS Form 1040 on which he reported self-employment income of \$19,200. The petitioner did not provide a copy of an IRS Form 1099-MISC or any other evidence to establish the source of the beneficiary's self-employment income. The document indicates that it was prepared by the tax preparer on July 20, 2006.

The documentation submitted by the petitioner reflects its financial status as of 2003, almost three years before the petition was filed; it submitted no documentation of its ability to

compensate the beneficiary subsequent to 2003. It provided no documentation of any compensation that it made to the beneficiary.

The petitioner has therefore failed to establish its ability to pay the beneficiary the proffered wage.

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

The applicable regulation at 8 C.F.R. § 204.5(m)(3) stated, in pertinent part, that each petition for a religious worker must be accompanied by:

(ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:

(A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

The petition was filed on February 17, 2006. Therefore, the petitioner must establish that the beneficiary was continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

As previously discussed, the petitioner provided uncertified copies of the beneficiary's IRS Forms 1040, each of which was prepared after April 15 of the effective year. The petitioner submitted no documentation to establish that the returns were ever filed with the IRS. Furthermore, like a delayed birth certificate, the late filing of tax returns two years after the claimed transaction raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings).

Additionally, the IO reported that the beneficiary stated that he had worked as an elder care worker on a part-time basis since 2003. Although the beneficiary denied that he had worked and been paid as an eldercare worker, his subsequent statement alone is insufficient to resolve the inconsistency with his earlier statement. He alleges that he was "not sure where the information came from." However, the record reflects that he was the source of the information. The record does not establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing date of 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 (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 petition will be denied 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.