

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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

[REDACTED]

C1

DATE: **DEC 28 2011** OFFICE: CALIFORNIA SERVICE CENTER [REDACTED]

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.

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
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 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 a council/trustee. The director determined that the petitioner had not established that the beneficiary's intended position qualifies as a religious occupation. Based on a site-visit to the petitioning organization, the director also determined that the petitioner failed to demonstrate that it was operating in the capacity claimed at the time of filing.

On appeal, counsel provides a general history of the petitioner's organization and offers a brief statement regarding the beneficiary's position. Although counsel claimed he would submit a brief, no further submissions are contained in the record. Therefore, the record is considered complete as it now stands. The AAO will affirm the director's decision.

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 primary question at issue is whether the petitioner seeks to employ the beneficiary in a qualifying religious occupation. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(5) defines “religious occupation” as an occupation that meets all of the following requirements:

- (A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination.
- (B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.
- (C) The duties do not include positions that are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible.
- (D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

The petitioner filed the Form I-360 petition on July 6, 2009. On the petition, the petitioner indicated it was offering the beneficiary the position of council/trustee and listed the beneficiary’s duties as follows:

- Supervision over general administration;
- Daily management of property and finances;
- Consideration, review, and approval of annual budget;
- Keeping the cash books and all relevant vouchers;
- Preparation of a financial report for each council meeting;
- Preparation of proposals for new property purchases or major repairs;
- Organization of the publishing of brochures, books, and magazines;
- Organization and overview of Brotherhood, Sisterhood, and youth groups.

The director denied the petition on January 28, 2010, finding that the record lacks documentation establishing that the position is a recognized religious occupation related to a traditional function within this denomination. The director noted that the petitioner had not submitted bylaws, letters from authorized officials of the religious organization in the United States, or other documentary evidence indicating that the duties of this position are directly related to the religious creed of this denomination. The director concluded that the record of proceeding does not demonstrate that the proposed duties of the position are sufficiently specialized in a theological doctrine in order to constitute a religious occupation.

On appeal, counsel asserts that the position is for a religious counselor rather than for a council/trustee as the petitioner had indicated on the Form I-360 petition. Counsel states that, within

the petitioner's denomination, clergy members do not have sufficient time to provide counseling to all of their congregants, so lay persons such as the beneficiary may provide counseling and guidance. Counsel explains that the beneficiary's advice consists of the relaying of religious precepts and serves a religious function. Though counsel asserts that the beneficiary's duties are primarily spiritual in nature, the petitioner has not provided any letters from authorized officials of the religious organization in the United States to this effect. The assertions of counsel do not constitute evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes that the petitioner submitted a letter dated June 10, 2009 with the Form I-360 petition, which describes the beneficiary's duties. These duties include helping Belarusian victims of the Chernobyl catastrophe, organizing missions, engaging in revival work, running the entity's public events, and gathering financial assets for the church's religious work. This letter does not mention that the beneficiary has been engaged in any religious counseling, but rather that she has performed administrative functions.

In its December 2, 2009 response to the director's October 21, 2009 Request for Evidence (RFE), the petitioner submitted a summary of the beneficiary's duties that were entirely different from what it had originally listed on the petition. Within the RFE response, the petitioner did not list her travel, public relations, or financial management duties. Furthermore, for the first time, the petitioner stated that the beneficiary spends three hours a day five days a week engaged in faith based counseling.

The petitioner, in its January 12, 2010 response to the director's December 16, 2009 Notice of Intent to Deny (NOID), submitted a copy of the beneficiary's weekly schedule. The schedule does state that the beneficiary is engaged in worship and in faith based counseling on a regular basis, but the schedule also reflects that she frequently is involved in planning meetings, correspondence, administrative duties, telephone calls, sewing classes, choir practice, cooking, field trips, etc. Even though the beneficiary appears to be actively engaged in the daily operations of her denomination, the AAO finds that the beneficiary's duties overall do not appear to be primarily spiritual in nature.

The petitioner additionally submitted a letter from its secretary dated November 30, 2009 stating that the beneficiary has provided religious and faith-based advice and has taught Sunday school, camp programs, and other counselors for many years. The petitioner fails to reconcile why it did not originally list the beneficiary's purported religious counseling and teaching duties on the petition.

On appeal, counsel asserts that the position is for a religious counselor rather than for a council/trustee as the petitioner had previously indicated on the Form I-360 petition and within its prior submissions. The AAO notes that the petitioner failed to state on the petition that the beneficiary's position and duties include any amount of religious counseling.

Eligibility must be established at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The AAO finds the petitioner failed to establish that the beneficiary's position primarily relates to a traditional religious function and is recognized as a religious occupation within the denomination. The record of proceeding also does not show that the duties of the beneficiary's position are primarily related to, and clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination. The AAO finds that the duties that the petitioner has delineated for the position of council/trustee on the petition do not appear to involve carrying out the religious creed or beliefs of the denomination. The position's primary objective appears to be administrative in nature.

The record does not sufficiently establish the religious significance of the beneficiary's duties as a council/trustee. Counsel has not effectively addressed the concerns that the director raised within her denial notice.

Also at issue on appeal is whether or not the petitioner was conducting its worship services and daily administration at the address of record as of July 6, 2009 when it filed the petition for the beneficiary. In its January 12, 2010 response to the director's December 16, 2009 NOID, the petitioner submitted information regarding the petitioner's August 3, 2009 purchase of the property in which it operates, photos showing the petitioner's signage and parking options for its constituents, and documentation showing that the petitioner maintained car insurance for a vehicle located at its address as of August 12, 2009.

The site-check occurred on December 5, 2006. At that time, no one answered the door, and there was no signage or indication of any affiliation to church activities at that location. The petitioner has asserted that USCIS should have provided prior notice of the intended visit, as no one would have been at the address of record unless it occurred during times when services or meetings are regularly held.

The petitioner underscored that it is a small organization with limited hours of operation in which it is open to the public. The petitioner also stated that its sign must not have been up during the time of the inspection because a car had damaged it, that it maintains legal parking for 10 vehicles and has access to parking for its constituents next door, and that it has a van for its constituents that is registered at the address of record.

The AAO notes that the petitioner claimed on the petition that the beneficiary was working at the address of record in a full-time capacity. The petitioner, though, subsequently stated in its NOID response that its organization is often closed when it is not holding worship services or meetings. According to the information listed on the petition, the beneficiary should have been working at the address of record when the site-check took place. The petitioner has failed to address this discrepancy within the record of proceeding. Thus, the AAO finds that the petitioner has failed to demonstrate sufficiently that, at the time of filing the petition, its organization was operating in the capacity claimed on the petition at that location.

Beyond the decision of the director, the AAO finds that the petitioner has not established the beneficiary's past and intended compensation and that the beneficiary worked continuously during the two-year period preceding the filing of the instant petition. The regulations at 8 C.F.R. §§ 204.5(m)(10) and (11) require a petitioner to submit evidence regarding how it will compensate the beneficiary and regarding the beneficiary's compensation and continuous employment during the two-year period prior to filing.

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 [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.

The regulation at 8 C.F.R. § 204.5(m)(11) reads:

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. . . .

If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

As evidence of the petitioner's past compensation of the beneficiary, the petitioner submitted only three paystubs covering a month and a half period in 2009. The AAO finds that this small amount of financial information is not sufficient to demonstrate the beneficiary's continuous past compensation for the two-year period preceding the petition's filing date as required by the above regulation. It is also insufficient to demonstrate the petitioner's future intent to compensate the beneficiary.

Regarding the beneficiary's qualifying prior experience, the petitioner indicated that the beneficiary was a visitor in the United States during the two-year time period preceding the petition's filing date, but that she was also working for the petitioner during that time. The USCIS regulation at 8 C.F.R. § 214.1(e) states that a B-2 nonimmigrant may not engage in any employment and that any unauthorized employment by a nonimmigrant constitutes a failure to maintain status. As cited above, the regulation at 8 C.F.R. § 204.5(m)(11) requires the beneficiary to have been working, 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. As the beneficiary was in the United States, in a nonimmigrant status that did not permit her to engage in qualifying employment, the petitioner has failed to demonstrate the beneficiary's requisite two years of qualifying experience.

The AAO additionally notes that the petitioner submitted the beneficiary and her husband's 2008 joint tax return. Schedule C reflects that her husband's principal business is in long distance trucking and that he operates it from the same address as the petitioner's church. This information calls into question the petitioner's claim that it is operating in the capacity claimed at the time of filing.

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.

ORDER: The appeal is dismissed.