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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

PUBLIC COPY

C,

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

JAN 31 2011

IN RE:

Petitioner:

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:

SELF-REPRESENTED

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,

2 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 is a school operated by the Seventh-day Adventist (SDA) denomination. 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 spiritual counselor. The director determined that the petitioner had not established that the beneficiary's intended position qualifies as a religious occupation relating to a traditional religious function.

On appeal, the petitioner submits an expanded job description and a letter from a regional SDA official.

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 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 September 29, 2008. In a letter accompanying the initial filing of the petition, [REDACTED] executive director of the petitioning school, stated:

[The beneficiary] has been continuously employed [by the petitioner] as a Spiritual Counselor and has been working for us under an R-1 visa since January 2004. . . .

As a *Spiritual Counselor*, [the beneficiary] is responsible for providing spiritual mentoring and guidance to the students, and was required to assist in all areas that would aid in the student's spiritual development. More specifically, these areas are the physical, social, mental, and spiritual domains. The *Spiritual Counselor* ensures the planning and implementation of activities, which enhance the spiritual development of students.

The breakdown of the duties and responsibilities in an average week entails:

- Personal Devotion: As a Spiritual Counselor, it is imperative that you prepare personally for the spiritual challenges of the day. Spiritual Counselors meet every morning and evening to discuss pray [*sic*], have staff worship, discuss the schedule, make goals and review goals.
- Student Worship: Spiritual Counselors engage in morning and evening worship with the students on a daily basis (including the weekends when you are working). Sometimes you will lead out but at the very least, you will play a significant role in guiding the discussion with other spiritual counselors.
- Spiritual Counseling: Every day, formal and informal counseling will take place between you and the students at MMS on an individual basis. This may be one of the most important aspects of your ministry at MMS. As students become acquainted with you, they discuss personal issues and questions regarding spiritual matters and seek guidance and counsel from you.
- Group Spiritual Counseling: Spiritual counseling is also done on a group basis. These groups of select students (all students are assigned to a group) meet once a

week for 1-4 hours and you will be expected to attend and contribute although you may not be expected to lead out.

- Mid-day Prayer Time: Students gather in the chapel every day after lunch for a prayer time. Spiritual counselors are expected to assist students in leading out or sometimes lead out themselves.
- Weekly Church Service: Spiritual counselors attend church with students and participate in leading out to the Sabbath School and main church service on a weekly basis.

On February 5, 2009, the director issued a request for evidence (RFE), instructing the petitioner to submit a variety of documents and statements, including an explanation of how the beneficiary's duties relate to a traditional religious function. In response, [REDACTED] listed the petitioner's "specific responsibilities":

- Lead out in worship in the Girls' dormitory
- Plan and implement worship services in the chapel
- Create a positive spiritual influence in every day interaction with students
- General supervision and spiritual guidance of [the petitioner's] students
- Participate in staff meetings
- Communicate with parents and provide regular written reports on each student
- Communicate with and provide spiritual counseling with students daily
- Observe and report all inappropriate student behavior for discipline and correction
- Enforce the student schedule
- Assist in planning and providing methods to motivate students to learn a better lifestyle
- Role model positive behavior and attitudes

An excerpt from the SDA *Church Manual* reads:

The primary focus of youth ministry is the salvation of youth through Jesus Christ. We understand youth ministry to be that work of the church that is conducted for, with, and by young people. Our task is to:

1. Lead youth to understand their individual worth and to discover and develop their spiritual gifts and abilities.
2. Equip and empower youth for a life of service with God's church and the community.
3. Ensure the integration of youth into all aspects of church life and leadership in order that they might be full participants in the mission of the church.

The director issued a second RFE dated April 28, 2009, but this notice did not directly relate to the nature of the beneficiary's work for the petitioner.

On July 17, 2009, the director issued a third RFE, requesting more details about the beneficiary's duties. In response, the petitioner submitted the same list of duties submitted previously, and repeated the above quotation from the *Church Manual*.

The director denied the petition on December 3, 2009, stating that the petitioner failed to submit "documentation establishing that the beneficiary's day-to-day job duties are recognized as a religious occupation related to a traditional function in this denomination." The director concluded that "the duties performed by the beneficiary are generally performed by dedicated members of the congregation and do not relate to a religious occupation." It is not clear what "congregation" the director had in mind, because the petitioner is not a church. The director stated that the petitioner had not submitted "a letter from a Superior or Principal of the denomination." The director had not previously requested "a letter from a Superior or Principal of the denomination" attesting to the religious nature of the beneficiary's position. The director, therefore, based the denial on the petitioner's failure to submit materials that the regulations do not require, and that the director had never requested.

On appeal, the petitioner submits a letter from [REDACTED], president of the [REDACTED] [REDACTED] who states:

One of the main duties performed at [the petitioning] School is that of a spiritual counselor. It is a recognized job that can only be filled by SDA individuals who have experience in Bible based religious counseling, preferably with youth and has the ability to guide, teach and counsel youth in accordance with [REDACTED] [REDACTED] beliefs, teaching and manual.

This letter shows that a high-ranking official of the denomination has recognized that the beneficiary's position is a religious occupation within that denomination. The director, in the denial notice, had stated that such a letter would be strong evidence in the petitioner's favor.

The director, in the denial decision, cited no basis for the conclusion that the duties of a spiritual counselor are typically entrusted to "members of the congregation." The petitioner's consistent descriptions of the beneficiary's job duties indicate significant involvement, rather than occasional volunteer duties that "require only a modest time commitment" (another phrase from the decision). A more detailed job description indicates that spiritual counselors "provide spiritual guidance using Seventh-Day Adventist 28 fundamental beliefs . . . seeking to inculcate these beliefs as a guide to positive behavior."

The petitioner's submission on appeal suffices to overcome the director's stated grounds for denial. Therefore, the AAO will withdraw the director's decision.

Nevertheless, the AAO cannot approve the petition because a significant and potentially disqualifying issue remains. The AAO may identify additional grounds for denial beyond what the Service Center 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).

The 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 qualifying prior experience during the two years immediately preceding the petition, if acquired in the United States, must have been authorized under United States immigration law.

USCIS records indicate that the beneficiary was not in the United States when the petitioner filed the petition on September 29, 2008, or two years earlier when the qualifying period began. The beneficiary was, however, in the United States for most of the two-year period, apart from absences in October 2006, November 2007 and March 2008.

In the February 2009 RFE, the director requested evidence of the beneficiary's lawful nonimmigrant status. In response, [REDACTED] stated that the beneficiary "is on an R1 visa that [expires] in December 30, 2008; however I-94 extends to October 30, 2011." The petitioner submitted no documentation to support these claims.

In the April 2009 RFE, the director requested first-hand documentation of the beneficiary's nonimmigrant status and prior entries into the United States, including "copies of all Form I-797A, Notice of Action, approval notices granting the beneficiary any changes of status and/or extensions of stay in the United States" (emphasis in original). In response, the petitioner stated that the beneficiary did not have any documentation of any "approved change of status." Mr. Weber repeated the assertion that the beneficiary's "R1 visa expired in December 30, 2008 however I-94 extends to October 30, 2011."

The record shows that the beneficiary received her R-1 nonimmigrant visa on December 31, 2003, with an "Expiration Date" of December 30, 2008. The beneficiary used the R-1 visa to enter the United States on January 18, 2004; December 29, 2004; August 16, 2005; March 20, 2006; November 2, 2006; March 25, 2008; and most recently on October 30, 2008. A Form I-94 Departure Record from the most recent admission indicates that USCIS admitted the beneficiary as an R-1 nonimmigrant, with status valid through October 30, 2011.

The petitioner has not accounted for the beneficiary's activities during her several trips outside the United States. A still more serious issue arises from review of the beneficiary's visa documents.

The R-1 visa's December 30, 2008 expiration date does not mean that the beneficiary held valid R-1 nonimmigrant status through December 30, 2008. The "Glossary of Visa Terms" on the web site of the U.S. Department of State includes this definition:

Visa Expiration Date: The visa expiration date is shown on the visa. This means the visa is valid, or can be used from the date it is issued until the date it expires, for travel for the same purpose, when the visa is issued for multiple entries. This time period from the visa issuance date to visa expiration date as shown on the visa, is called visa validity. . . . The visa validity is the length of time you are permitted to travel to a port-of-entry in the U.S. to request permission of the U.S. immigration inspector to permit you to enter the U.S. The visa does not guarantee entry to the U.S. The Expiration Date for the visa should not be confused with the authorized length of your stay in the U.S., given to you by the U.S. immigration inspector at port-of-entry, on the Arrival-Departure Record, Form I-94, or I-94W for the Visa Waiver Program. The visa expiration date has nothing to do with the authorized length of your stay in the U.S. for any given visit.¹

The USCIS regulation at 8 C.F.R. § 214.2(r)(4) in effect before November 26, 2008,² limited the initial admission of an R-1 nonimmigrant to three years. The earlier version of the regulation at 8 C.F.R. § 214.2(r)(5) permitted an extension of up to two years. The current USCIS regulation at 8 C.F.R. § 214.2(r)(4) permits an initial admission of 30 months, while the regulation at 8 C.F.R. § 214.2(r)(5) provides for a single extension, also of 30 months. The regulations have never permitted a single five-year admission as an R-1 nonimmigrant.

Because the beneficiary first arrived in the United States as an R-1 nonimmigrant on January 18, 2004, her initial period of admission would have expired on January 17, 2007. The record contains no evidence that the petitioner applied to extend the beneficiary's stay as an R-1 nonimmigrant past that date, and the petitioner does not claim to have sought any such extension for the beneficiary.

Regarding the October 30, 2008 Form I-94 that indicates the beneficiary's R-1 status is valid through October 30, 2011, we repeat that the regulations in effect at the time only permitted a three-year initial admission for R-1 nonimmigrants. Therefore, USCIS can only legitimately have admitted the beneficiary for three years in October 2008 if she had spent the preceding year outside the United States, and then received a new R-1 visa. *See* the former 8 C.F.R. § 214.2(r)(7), superseded on November 26, 2008 by 8 C.F.R. § 214.2(r)(6). In this instance, the beneficiary was not outside the United States for a year or more immediately before her October 2008 entry.

Therefore, the inspecting and admitting officer had no authority to admit the beneficiary for three years as an R-1 nonimmigrant in October 2008. The expiration and replacement of the beneficiary's passport in 2007 may have meant that the officer saw no evidence of the beneficiary's past entries. Regardless of how it happened, the beneficiary's three-year admission in October 2008 was contrary to the applicable regulations.

¹ Source: http://travel.state.gov/visa/frvi/glossary/glossary_1363.html (printout added to the record January 25, 2011).

² *See* 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

Also, the beneficiary received multiple three-year admissions from a single R-1 nonimmigrant visa, but nothing in the statute or regulations entitled her to those admissions. Therefore, we conclude that any three-year admission after the first admission was in error, as was any admission after January 2007. Because the beneficiary's initial three-year admission expired in early 2007, and there is no evidence that the petitioner ever sought to extend the beneficiary's R-1 nonimmigrant stay, there is no indication that the beneficiary properly held current, valid nonimmigrant status for most of the two-year qualifying period.

Therefore, it does not appear that the petitioner has satisfied the regulatory requirements at 8 C.F.R. §§ 204.5(m)(4) and (11) that the beneficiary must have worked in lawful immigration status, authorized under United States immigration law, while employed in the United States during the two-year qualifying period. The director's new decision must take this information into account.

Therefore, the AAO will remand this matter 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.