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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**

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER

Date: **JAN 31 2011**

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  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO subsequently remanded the petition to the director for a new decision based on revised regulations. The director again denied the petition and certified the decision to the AAO. The AAO will affirm the director's decision.

The petitioner, according to its president, is "a non-profit Catholic ministry geared towards the media." 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 director of pastoral music. The director determined that the petitioner had not established that the position is, or has been, full-time. The director also found that the beneficiary has a secular side business.

In response to the certified decision, the petitioner submits a brief from counsel, a letter from an official, and several supporting exhibits.

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)(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:

*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.
- (iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.

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

The USCIS regulation at 8 C.F.R. § 204.5(m)(2) requires that the beneficiary must be coming to the United States to work in a full time (average of at least 35 hours per week) compensated position in a qualifying religious occupation or vocation.

The petitioner filed the Form I-360 petition on November 13, 2006. [REDACTED] president of the petitioning entity, stated that the beneficiary "has been employed as a religious worker on a full-time basis for more than two years." [REDACTED] noted that the beneficiary has worked for the petitioner as an R-1 nonimmigrant religious worker since 2003.

The petitioner's initial submission included copies of what appear to be pay receipts dated between 1998 and 2003 from an archdiocese in Mexico, but no first-hand evidence of employment during the 2004-2006 qualifying period.

On December 11, 2006, the director instructed the petitioner to submit “evidence of the beneficiary’s work history for the years 2004, 2005 and 2006,” including evidence of compensation. In response, [REDACTED]. [REDACTED] stated that the beneficiary “has been working as a Director of Pastoral Music for [the petitioner] since March 21, 2003,” where he “spends at least 40 hours per week performing his religious work duties.”

The petitioner submitted copies of IRS Form W-2 Wage and Tax Statements, showing that the petitioner paid the beneficiary \$15,137.00 in 2004 and 20,568.80 in 2006. The petitioner submitted no Form W-2 for 2005. On uncertified copies of his corresponding income tax returns, the beneficiary listed his occupation as “graphic artist.” The income claimed on the tax returns corresponds to the figures shown on the Forms W-2, indicating that the beneficiary claimed no other income.

On May 9, 2007, the director instructed the petitioner to provide further details about the beneficiary’s work history and compensation, as well as information about the beneficiary’s work. The petitioner’s response included a document written by the beneficiary, with the legend [REDACTED]

The petitioner submitted a selection of original pay receipts from 2004 to 2007, showing biweekly payments to the beneficiary. Each pay receipt showed the number of hours worked. Of the six pay receipts dated within the qualifying period, only one (dated September 1, 2006) showed 80 hours worked during the two-week pay period. Another (dated November 26, 2004) showed 74 hours worked. The remaining four statements showed either 62 or 64 hours worked. The two most recent pay statements, dated July 6 and 20, 2007, likewise showed 64 hours each.

The petitioner also submitted an undated DVD, published by the petitioner, of a concert performance by the beneficiary, along with compact discs of three albums of the beneficiary’s music. Each album shows the logo of [REDACTED] and the address of a [REDACTED]. The three albums show copyright dates before the two-year qualifying period (two from 1999 and one from 2003). A fifth disc is hand-labeled “Production video.”

On November 5, 2007, the director denied the petition, noting that many of the beneficiary’s pay stubs do not reflect the 40-hour work week claimed by the petitioner. The director also stated:

The evidence of the record indicates that the beneficiary has been employed in other positions. The beneficiary’s 2006, 2005, and 2004 tax returns indicate his occupation as a Graphic Artist. The beneficiary’s [REDACTED], indicates he is the founder of [REDACTED] copyright year 2006. The petitioner submitted the beneficiary’s secular CD that indicates he is the executive producer. . . . The petitioner appears to have not submitted an accurate and complete account of the beneficiary’s employment history.

On appeal, counsel claimed that the denial “was in error as [the beneficiary] has been a full time religious worker for” the petitioner. Counsel did not acknowledge or explain the pay receipts that

contradict this claim. ██████ asserted that the beneficiary “has continuously and without interruption served full time in our ministry since March 2003,” but, like counsel, did not explain why most of the beneficiary’s submitted pay receipts from the qualifying period show part-time employment. ██████ did not address the issue of ██████

The petitioner submitted 68 photocopied pay receipts dated from May 28, 2004 to December 21, 2007. The biweekly pay receipts break down as follows:

Hours worked	Number showing those hours
56	1
62	1
64	43
66	1
68	1
71	1
72	11
77	2
80	6
84	1
Average hours per pay receipt	67.4
Average hours per week	33.7

The petitioner submitted original (not copied) amended tax returns, indicating that the beneficiary’s “occupation is not graphic artist his real occupation is director of pastoral music.” Like a delayed birth certificate, the provision of tax returns that were amended several years after the fact, and only after the director voiced concerns regarding conflicting information, 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).

Nevertheless, we also acknowledge that, in *Bueno*, the Board of Immigration Appeals did not simply declare a delayed birth certificate to be wholly and invariably lacking in credibility. Rather, it ruled that such evidence “must be evaluated in light of the other evidence of record and the circumstances of the case.” *Id.* By properly applying this test, we see that the petitioner has submitted other credible and consistent evidence that the beneficiary’s reported income came from the petitioner, rather than from another unauthorized outside source. Furthermore, whatever other questions may arise from the beneficiary’s web site, the available evidence suggests that Alabarte Producciones specializes in music production rather than graphic arts.

Furthermore, we note that, on April 2, 2008, a USCIS officer visited the petitioning organization in order to verify that the petitioner is a *bona fide* religious organization. During that visit, the officer interviewed the beneficiary. The officer’s report identified the beneficiary as a “Music Teacher, Radio Personality & Graphic Designer.” This indicates that graphic design was one element of the

beneficiary's multifaceted job description. If graphic design was one of the beneficiary's responsibilities for the petitioner, and there is no affirmative evidence that the beneficiary worked elsewhere as a graphic artist, then we cannot conclude that the appearance of the phrase "graphic artist" on the beneficiary's tax returns is grounds for denial.

While the petitioner's appeal was pending, USCIS published 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." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). Therefore, on December 16, 2008, the AAO remanded the petition for a new decision based on the revised regulations.

On May 16, 2009, the director denied the petition for a second time, again citing the beneficiary's self-description as a "graphic artist" on his income tax returns; the beneficiary's work with [REDACTED] and the pay stubs showing part time employment. The director stated that these exhibits, taken together, suggest outside employment by the beneficiary and show that the beneficiary does not have a full-time position with the petitioner.

In response to the certified denial, counsel states: [REDACTED] has not been a commercial enterprise established by the beneficiary. The[re] is no record of it as [a] business entity." Counsel states that the beneficiary merely used [REDACTED] for copyright purposes, "to protect the religious music he composed and recorded for" the petitioner. Counsel further asserts that the beneficiary's web site "has never been a side commercial project," but rather was a way "for worshipers interested in [the beneficiary's] music to contact him." Counsel also disputes the director's assertion that the beneficiary recorded secular music.

The unsupported assertions of counsel do not constitute evidence. *See 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). Nevertheless, there is at least fragmentary evidence that supports counsel's arguments. The beneficiary's performance DVDs show the name of the petitioning religious organization, and *alabarte* is the Spanish word for "praise." The beneficiary's album *Atrevete* shows a biblical quotation on the back cover.

Also, none of the IRS documentation in the record shows that the beneficiary earned any income from any source other than the petitioner. There is no evidence that [REDACTED] has operated as a commercial, for-profit enterprise. The beneficiary's recording of religious music is well within the stated scope of his duties for the petitioner.

We therefore disagree with the director that the beneficiary's recordings and web site represent an impermissible secular, commercial enterprise by the beneficiary. There remain, however, issues of concern as to whether the job offer is truly full-time.

With respect to the beneficiary's hours worked, counsel acknowledges that the regulation at 8 C.F.R. § 204.5(m)(2) requires that the beneficiary must "[b]e coming to the United States to work in a full

time (average of at least 35 hours per week) compensated position.” Counsel notes, however, that the regulations do not require the beneficiary’s past work to have been full-time. This observation is correct, as far as it goes. When USCIS proposed revisions to the special immigrant religious worker regulations, USCIS included the requirement that the alien’s past experience must have been full-time. *See* 72 Fed. Reg. 20442, 20447 and 20452 (April 25, 2007). This proposed requirement was not retained in the final rule.

In this instance, however, we must take into account that the petitioner does not seek to employ the beneficiary in a new position. Rather, the petitioner seeks to continue to employ the beneficiary in the same position that, the petitioner claims, the beneficiary has already held for several years. As will be discussed, the petitioner previously declared to USCIS under penalty of perjury that the beneficiary would be employed on a full-time basis at a salary of \$22,880.<sup>1</sup> If the beneficiary has, thus far, worked part-time for the petitioner, usually 32 hours per week, then the petitioner must explain how and why the same duties will suddenly occupy 35 or more hours per week upon approval of the petition.

Counsel disputes whether the director, in considering the pay receipts, took into account that the regulations require an average of at least 35 hours per week – meaning that the beneficiary may work less than 35 on some weeks. Counsel relies on two definitions of “average”: “[a]n arithmetic mean” and “[a] usual or typical degree,” and claims that the director relied on an inadequate sample of the beneficiary’s pay receipts. Nevertheless, when we rely upon the 68 pay receipts submitted with the petitioner’s 2007 appeal, the beneficiary’s position is demonstrably not full-time under either of these definitions. In terms of counsel’s first definition, we have already noted that the arithmetic mean of the hours shown on the 68 pay receipts is less than 34 hours per week.

With respect to “a usual or typical degree,” we turn to the arithmetic mode (the most commonly occurring number in a data set). Here, the mode - the most common - weekly total is 32 hours, which appears in 43 of the 68 pay receipts – roughly five-eighths of the total. Only 21 of the 68 pay receipts – less than one-fourth – reflect full-time employment of 35 hours or more per week, compared to 47 pay receipts that show part-time work. It is abundantly clear that the beneficiary’s “usual or typical” work week is 32 hours, with the arithmetic mean pushed slightly higher by the much less frequent occasions on which the beneficiary works longer hours.

The petitioner submits copies of the beneficiary’s IRS Forms W-2 for 2004, 2005 and 2006. The beneficiary earned \$15,137.00 in 2004. The pay receipts from that year show a wage rate of \$9.00 per hour. We can therefore calculate that the petitioner paid the beneficiary for less than 1,682 hours that year. Dividing that figure by 52 yields an average of 32.3 hours per week.

In 2005, the petitioner paid the beneficiary \$19,018.00. Pay receipts show that the beneficiary started the year earning \$11.00 per hour, increased to \$12.00 per hour for the last two pay periods of

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\_\_\_\_\_, filed on November 7, 2005, incorporated into the alien’s A-file record of proceeding.

the year. Year-to-date totals on the pay receipts show that the beneficiary earned \$18,722.00 during the first 24 pay periods. Using these figures, we can calculate that the beneficiary worked 1,702 hours over 48 weeks. The last two pay receipts from 2005 each show 64 hours worked, for a total of 1,766 hours over 52 weeks, or about 34 hours per week.

The petitioner paid the beneficiary \$20,568.80 in 2006. The petitioner changed payroll service companies mid-year, so the format of the pay receipts changed in September 2006. As of September 15, 2006, the beneficiary had earned \$15,744 at a rate of \$12.00 per hour, or 1,312 hours. Six of the seven remaining pay receipts for 2006 show 64 hours every two weeks, except for the receipt dated October 27, 2006, which shows 71 hours worked over two weeks. These figures add up to 1,767 hours over 52 weeks, or 34 hours per week.

The petitioner filed a Form I-129 nonimmigrant petition (with receipt number [REDACTED]) on the beneficiary's behalf on November 7, 2005. On that petition form, the petitioner claimed that the beneficiary would work full time for \$22,880 per year starting in 2006. The petitioner signed the Form I-129 at part 10 under penalty of perjury, certifying that "this petition and the evidence submitted with it is all true and correct." The petitioner's own IRS Forms W-2 show that the beneficiary's 2006 salary fell short of that amount by more than ten percent. The beneficiary's reduced salary is consistent with the payroll documents that show, on average, less than 35 hours worked per week. In short, the petitioner has failed to employ the beneficiary on a full-time basis for the wage declared on the Form I-129 petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

With respect to the year-to-date totals, none of the numbers are exact multiples of the beneficiary's hourly pay rate, meaning that they may reflect additional payments. Such payments would further reduce the beneficiary's hourly compensation and, by implication, his total hours worked.

The petitioner also submits copies of later pay receipts from 2007-2009 in response to the latest decision. The receipts show 80-hour pay periods, but they represent only a sample, rather than a complete, continuous sequence. The petitioner submitted two pay receipts from 2007, eleven from 2008 and six from the first five months of 2009, representing only 18 out of 63 biweekly pay periods. The petitioner does not explain why it omitted other pay receipts from this same period. Given well-documented fluctuations in the beneficiary's hours in earlier years, we cannot accept this incomplete record as evidence that the beneficiary has consistently worked full-time since 2007.

Also, some pay receipts show additional payments beyond the hourly wage. The pay receipt dated October 24, 2008 shows "other earn[ings]" of \$700, and the May 8, 2009 pay receipt shows a \$700 "commission." Therefore, we cannot infer the beneficiary's overall hours worked by dividing the year-to-date totals by the hourly pay rate, because the year-to-date totals include amounts beyond the hourly rate. The additional payments would, therefore, inflate the quotient above the number of hours worked. An \$700 commission, divided by \$18 per hour, would falsely imply nearly 39 hours worked.

For the reasons discussed above, we conclude that the petitioner has not submitted sufficient evidence to show that the beneficiary's employment will be full-time, or that it has been consistently full-time as the petitioner claimed in its earlier nonimmigrant petition on the beneficiary's behalf. We will therefore affirm the director's decision to deny the petition.

Review of the record reveals another deficiency that precludes approval of the petition. 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 (9<sup>th</sup> 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)(8) requires the petitioner to submit a detailed attestation regarding the beneficiary, the intending employer, and the job offer. The record does not contain this required attestation. For this additional reason, the petition may not be approved.

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 director's decision of May 16, 2009 is affirmed. The petition is denied.