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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: **JUN 14 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:

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,

U Deadnick
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) remanded the matter for consideration under new regulations. The director again denied the petition and, following the AAO's instructions, certified the decision to the AAO for review. The AAO will affirm the director's decision.

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 property manager and sexton. The director determined that the petitioner had not established that the position qualifies as that of a religious occupation and that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the visa petition.

The petitioner provides a letter and additional documentation on certification.

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 on appeal is whether the petitioner has established that the proffered position qualifies as that of a religious occupation.

In its January 22, 2008 letter submitted in support of the petition, the petitioner, through its chairman, [REDACTED], stated that the beneficiary had been employed as a property manager and as sexton of the church since May 2005. [REDACTED] further stated:

As a Sexton, [the beneficiary] is responsible for opening and locking the church before and after services. He is responsible for directing other workers in the cleaning and maintenance of the church buildings and furnishings. According to prescribe[d] rite, he prepares the altar for religious services including lighting the candles and he takes care of vestments and sacred vessels. When necessary, he fulfills the duty of usher during services and rings bells to announce services.

In an undated statement, also submitted with the petition, the petitioner's administrative assistant, [REDACTED] stated that the beneficiary "was hired as the Property Manager of this church in May of 2006 at a salary of \$31,930. His duties include the total maintenance of this facility, as well as overseeing the maintenance of two parsonages belonging to the church."

The U.S. Citizenship and Immigration (USCIS) regulation that was in effect at the time the petition was filed, provided at 8 C.F.R. § 204.5(m)(2):

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters.

The director determined that the primary duties of the proffered position were secular in nature and denied the petition.

On appeal, the petitioner stated that the beneficiary is a full time sacristan and was an essential worker for the operation and maintenance of the church. The petitioner stated on the Form I-290B, Notice of Appeal or Motion, that the beneficiary "has a number of responsibilities that we believe qualify under 8 C.F.R. § 204.5(m)(2)." The petitioner then stated that the beneficiary's responsibilities included:

1. LITURGICAL [sic] Worker – [The beneficiary] is our SACRISTAN and is responsible for ensuring that everything required for our Sunday worship and other worship services are fully operational including maintaining the altar area, the instruments for worship such as the communion vessels and elements, the church paraments and banners, the bibles and [worship] missals, the sound and heating system, and the general sanctuary. Liturgy could not be performed WITHOUT his essential liturgical work.
2. RELIGIOUS INSTRUCTOR – [The beneficiary] speaks fluent Spanish and assists the Sunday school teachers and our Vacation Bible School with the

children who do not have English as their first language. These studies would not receive appropriate religious education without [the beneficiary] acting as a Spanish speaking religious instructor.

3. RELIGIOUS TRANSLATORS – Besides functioning as a Spanish speaking religious instructor [the beneficiary] also functions as a religious translator for our Spanish speaking congregants. In addition, he acts as an essential translator for our mission teams travelling to other countries.

The petitioner also provided a list of list of responsibilities for the church sacristan which included unlocking the church on Sunday mornings, securing the church building every evening including conducting two building tours, setting up rooms for meetings and functions and taking them down upon completion of the event, sweeping, vacuuming and dusting, cleaning the front sidewalk and portico areas, snow and ice removal, watering plants and shrubs, clearing the parking lot of debris, and maintaining the “orderliness and cleanliness of apartment and garage.” The duties also include, when assigned by the pastor, acting as a translator and assisting teachers in religious education and in translating for church members on mission trips and being responsible for all liturgical instruments.

Pursuant to requirements under section 2(b)(1) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008), 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).

In keeping with this requirement, the AAO remanded the petition to the director on December 17, 2008, to give the petitioner an opportunity to meet the new requirements.

The new 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.

In response to a November 19, 2009 request for evidence (RFE), the petitioner again expanded on the duties of the position held by the beneficiary stating that the beneficiary's schedule included 2 hours per week serving as a co-lead in Sunday school Spanish and English bible study, 35 hours during the month of August serving as vacation bible school leader, 2 hours per week serving as "interfaith co-leader," 1 hour per week serving as Spanish trainer for mission trips, 4 hours per week as hospitality minister, 6 hours per week as a liaison to the Spanish speaking community, and 10 hours per week serving as the church sacristan, 4 hours per week as children-on-the green liaison, and 20 hours per week serving as church guardian.

In denying the petition on certification, the director determined that the petitioner had added additional responsibilities in order to qualify the position as a religious occupation and that pursuant to regulations, the petitioner must establish eligibility at the time of filing the petition.

On certification, the petitioner denied that any religious responsibilities had been added to the beneficiary's duties, asserting that all of his duties have been in existence since he became employed by the church. The petitioner then states that it believes that the director "did not give proper weight to the actual job duties . . . but instead denied the application because the job performed by the applicant was not a fulltime religious vocation." The petitioner then cites to several cases that predated the governing regulations that became effective in November 2008.

The petitioner's argument is not persuasive. In two different letters submitted with the petition, the petitioner outlined the duties of the proffered position. With the possible exception of the ritual lighting of candles and caring for vestments and sacred vessels, neither indicated any religious duties required in the position. Eligibility must be established at the time of filing. The petitioner may not change the beneficiary's duties after filing in order to meet the eligibility requirements. 8 C.F.R. § 103.2(b)(1), (12); A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 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. 1998).

Considering that the petitioner seeks to employ the beneficiary as a religious worker, the failure to include all religious-related duties in the initial submission is telling. On appeal, the petitioner asserts that the beneficiary is engaged in religious work and provides a list of 21 duties associated with the position. Only two, however, liturgical worker and translator, are arguably religious related. Furthermore, the translation duties appear to be more associated with the beneficiary as an individual than to the proffered position, and the sacristan duties comprise only

a minimum part (10 hours) of the duties. A review of the beneficiary's weekly schedule reveals that less than half of his work is arguably religious related and the schedule does not distinguish between the requirements of the position and the work performed by the beneficiary because of his unique qualifications.

The petitioner has submitted insufficient documentation to establish that the duties of the proffered position primarily relate to a traditional religious function, is recognized as a religious occupation within the denomination, and are primarily related to, and clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination. The regulation specifically excludes from the definition of religious worker those positions that are primarily support positions such as janitors and maintenance workers. The AAO notes that the beneficiary listed his occupation as "custodian" on his Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, for the years 2006 through 2008.

The petitioner has therefore submitted insufficient documentation to establish that the proffered position is a religious occupation within the meaning of the regulation at 8 C.F.R. § 204.5(m)(5).

The second issue on appeal is whether the petitioner has established that the beneficiary worked continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m) provides that to be eligible for classification as a special immigrant religious worker, the alien must:

(4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. A break in the continuity of the work during the preceding two years will not affect eligibility so long as:

- (i) The alien was still employed as a religious worker;
- (ii) The break did not exceed two years; and
- (iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.

Therefore, the petitioner must show that the beneficiary worked 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 petition was filed on February 4, 2008. Accordingly, the petitioner must establish that the

beneficiary was continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

As discussed above, the petitioner has failed to establish that the position of property manager and sexton, the positions in which the beneficiary worked during the qualifying period, qualify as religious occupations. Additionally, in documentation submitted with the petition, the petitioner stated that the beneficiary had been in its employ since 2005. In a statement submitted with the petition, the beneficiary stated, "From 1990-1992, I worked without authorization. In 1993, I obtained my employment authorization which I maintained until 1995. Since 1995, I was unable to renew my employment authorization card so I have been employed without authorization." USCIS records reflect that the beneficiary was granted advance parole into the United States on September 20, 1993 for a period of one year. A copy of an employment authorization card indicates that the beneficiary was authorized to work in the United States from May 5, 1993 to May 4, 1994.

On certification, the petitioner states that the beneficiary's "original application in 1993 for political asylum status is still pending adjudication by USCIS. Therefore, we believe [the beneficiary] was lawfully in this country, pending this review, at the time of our original I-360 application." [Emphasis omitted.] Nonetheless, the petitioner must establish not only that the beneficiary is present in the United States in a lawful immigration status but also that his immigration status authorizes him to work in the United States. By his own admission, and confirmed by USCIS records, the beneficiary was not authorized to work in the United States during the two years immediately preceding the filing of the visa petition.

Accordingly, the petitioner has failed to establish that the beneficiary worked continuously in the United States during the two years qualifying period in accordance with the regulation at 8 C.F.R. § 204.5(m)(4).

The AAO will affirm the certified denial 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 sustained that burden.

ORDER: The director's decision of January 21, 2010 is affirmed. The petition is denied.