

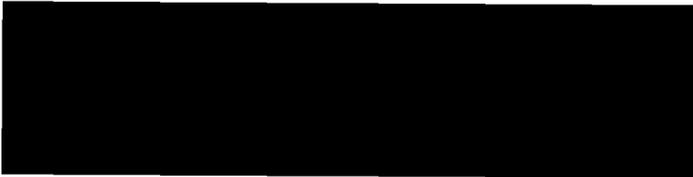
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



C1

Date: **JUN 23 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)

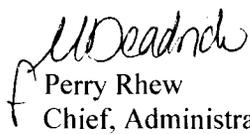
ON BEHALF OF PETITIONER:



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,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (VSC), denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) remanded the matter for consideration under new regulations. The Director, California Service Center (CSC), 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 its musical director. On certification, the director determined that the petitioner had not established that the beneficiary had worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the visa petition.

The petitioner provides no 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 issue presented on certification is whether the petitioner has established that the beneficiary worked continuously in a qualifying religious occupation or vocation for the two years immediately preceding the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working 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 April 5, 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.

In its March 22, 2006 letter submitted in support of the petition, the petitioner stated that the beneficiary had served as music director for Asante Presbytery from June 2001 to September 2003. The petitioner provided a copy of the beneficiary's Form I-94, Departure Record, which revealed that he entered the United States on November 12, 2003 as a B-2 nonimmigrant visitor for pleasure with an authorized stay until May 11, 2004. The petitioner also submitted a copy of a June 28, 2005 Form I-797, Notice of Action, approving the beneficiary for R-1 nonimmigrant religious worker status from June 28, 2005 to February 27, 2008. The petitioner submitted no other documentation to establish the beneficiary's qualifying work experience.

In a July 3, 2006 request for evidence (RFE), the Director, Vermont Service Center, instructed the petitioner to:

Submit evidence that establishes that the beneficiary has the continuous two years full-time experience in the religious vocation, professional religious work, or other religious work for the period immediately prior to April 05, 2006. Such evidence may be statements which include all of the following information: detailed listing of the beneficiary's duties, the commencement and termination dates of employment, and the time spent per week by the beneficiary performing those students.

In its August 9, 2006 response, the petitioner stated:

When [the beneficiary] arrived in the United States from Ghana he initially depended on the hospitality of his host in the United States. He however generously gave us his services on a volunteer basis until we formally advertised the position of Music Director in January of 2004. Given his impeccable qualifications and long experience, coupled with the references from members of our congregation who have known him from Ghana, we formally hired him in early 2004. Subsequently we petitioned on his behalf for an R-1 visa, which petition was approved in June 2005. In sum, [the beneficiary] has the necessary two-year prior experience required by the Service.

The petitioner submitted a copy of an Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, on which it reported it paid the beneficiary \$4,400 in wages in 2005, and a copy of an IRS Form 1099-MISC, Miscellaneous Income, on which it reported that it also paid the beneficiary \$13,695 in nonemployee compensation in 2005. The petitioner provided a copy of a letter from the IRS to the beneficiary advising him of his remaining tax liability for the year 2005. The petitioner also submitted a copy of an August 5, 2006 unprocessed check made

payable to the beneficiary in the amount of \$200 and an earnings statement for the period July 5, 2006 to July 18, 2006, reflecting gross pay for the period of \$880 and year-to-date earnings of \$13,200. The statement indicated that the beneficiary worked 80 hours for the pay period at a rate of \$11.00 per hour.

In denying the petition, the Director, VSC, stated:

While the record indicates the beneficiary volunteered his services at an unspecified time and location[,] the record fails to document that service or how the alien supported himself. The petitioner states the organization formally advertised the position of Music Director in January of 2004 and formally hired him in early 2004.[] However this is contradicted by the Job Vacancy Notice for Music Director which clearly shows the position was posted March 22, 2004. Although the notice includes a salary range of \$15.00-\$25.00/hour, the 2005 payroll documentation shows the individual is compensated \$11.00 per hour which is \$4.00 an hour less that the stated minimum wage. The petition also does not include evidence of employment during 2004.

Although requested the petitioner has submitted nothing to satisfactorily demonstrate that the beneficiary has been engaged in a full-time traditional religious occupation or vocation for the two-year period of time immediately preceding the filing of the Immigration petition from April 5, 2004 to April 5, 2006.

On appeal, counsel asserted that “the services rendered to the petitioner-church by the beneficiary immediately on his arrival in the United States were unquestionably voluntary. However, they cannot be ignored in deciding whether or not he has met the two-year requirement.” Counsel cited to *Soltane v. DOJ*, 381 F. 3d 143 (3rd Cir. 2004) in support of his argument.

However, subsequent to the *Soltane* decision, USCIS issued new regulations for special immigrant religious worker petitions that imposed new evidentiary requirements. 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, CSC. on December 15, 2008, to give the petitioner an opportunity to meet the new requirements.

The new USCIS regulation at 8 C.F.R. § 204.5(m)(11) provides:

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.

In response to the director's Notice of Intent to Deny (NOID) issued pursuant to the AAO's remand, the petitioner submitted brochures dated in 2008 and 2009 that list the beneficiary as the music director and organist. The petitioner, however, submitted none of the documentation outlined in the above-cited regulation to establish that the beneficiary worked in qualifying religious work throughout the statutory period. The petitioner submitted no additional documentation on certification to the AAO.

The petitioner provided copies of IRS documents to establish the beneficiary's compensation during the year 2005; however, the petitioner failed to document the beneficiary's work experience from April 5, 2004 to at least December 31, 2004. Further, the beneficiary was present in the United States as a B-2 nonimmigrant until approval of his R-1 petition on June 28, 2005. An alien who is present in the United States in a B-2 nonimmigrant status is not authorized to work in the United States. Section 101(a)(15)(B) of the Act, 8 U.S.C. § 1101(a)(15)(B); 8 C.F.R. § 214.1(e). Any work performed in the United States in an unauthorized status interrupts the continuous work experience required by the regulation. 8 C.F.R. § 204.5(m)(11).

Furthermore, volunteer work is not qualifying. Regarding volunteer work, in supplementary information published with the proposed rule in 2007, USCIS stated:

The revised requirements for immigrant petitions and nonimmigrant status require that the alien's work be compensated by the employer because that provides an objective means of confirming the legitimacy of and commitment to the religious work, as opposed to lay work, and of the employment relationship. Unless the alien has taken a vow of poverty or similarly made a formal lifetime commitment to a religious way of life, this rule requires that the alien be compensated in the form of a salary or in the form of a stipend, room and board, or other support so long as it can be reflected in a W-2, wage transmittal statements, income tax returns, or other verifiable IRS documents. USCIS recognizes that legitimate religious work is sometimes performed on a voluntary basis, but allowing such work to be the basis for an R-1 nonimmigrant visa or special immigrant religious worker classification opens the door to an unacceptable amount of fraud and increased risk to the integrity of the program. In this rule, USCIS is proposing to implement bright lines that will ease the verification of petitioner's claims in the instances where documentary evidence is required.

72 Fed. Reg. 20442, 20446 (April 25, 2007). When USCIS issued the final version of the regulation, the preamble to that final rule incorporated the above assertion by reference: "The rationale for the proposed rule and the reasoning provided in the preamble to the proposed rule remain valid and USCIS adopts the reasoning in the preamble of the proposed rule in support of the promulgation of this final rule." 73 Fed. Reg. 72275, 72277 (Nov. 26, 2008).

We quote 8 C.F.R. § 204.5(m)(11)(iii) again here, along with its prefatory clause from 8 C.F.R. § 204.5(m)(11):

If the alien was employed in the United States during the two years immediately preceding the filing of the application and . . . [r]eceived 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.

The regulation clearly refers to employment rather than volunteer work. The self-support here relates to nonimmigrant religious workers who are part of an established missionary program.

Accordingly, the petitioner has failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation and in a lawful immigration status for two full years immediately preceding the filing of the petition.

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 12, 2010 is affirmed. The petition is denied.