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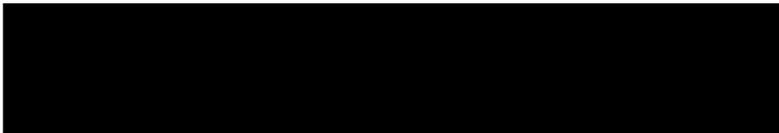
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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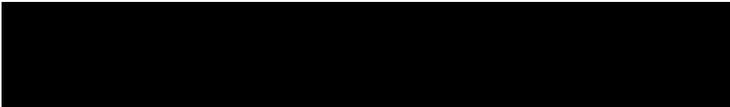
Office: CALIFORNIA SERVICE CENTER

Date: **MAR 16 2011**

IN RE:

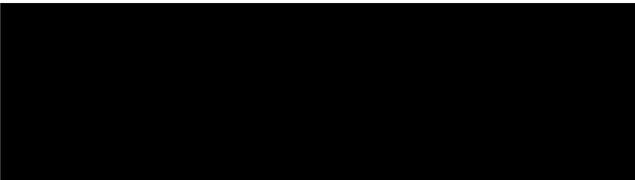
Petitioner:

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:



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,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reopen and reconsider, which the director dismissed. 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 [REDACTED]. 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 an associate pastor and music director. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous, qualifying work experience immediately preceding the filing date of the petition. The director based this finding on failed efforts to verify the petitioner's claims through compliance review and site inspection.

On appeal, the petitioner submits a brief from counsel, witness letters, and supporting documents.

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 regulation at 8 C.F.R. § 204.5(m)(11) requires the petitioner to submit Internal Revenue Service (IRS) documentation of past compensation, if available.

The USCIS regulation at 8 C.F.R. § 204.5(m)(12) reads:

Inspections, evaluations, verifications, and compliance reviews. The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

The petitioner filed the petition on May 18, 2006. In a letter dated May 15, 2006, [REDACTED], deacon and church secretary, stated that the beneficiary "was the Associate Pastor for the past six years (6) until June of 2005 when he took over as the Acting Senior Pastor due to the resignation of our Senior Pastor." The petitioner showed that the beneficiary had held R-1 nonimmigrant religious worker status for the preceding two years.

On December 11, 2006 and again on May 21, 2007, the director instructed the petitioner to submit additional evidence. The petitioner responded to both of these notices, submitting copies of IRS and payroll documents, certificates establishing the beneficiary's credentials as a minister, photographs of the petitioning church, and other materials.

The petitioner provided a work schedule for the beneficiary, including the following information:

Sun. 9:00am to 2:00pm (Sunday Worship Service)
Mon. OFF
Tues. 10:00am to 5:00pm (with one hour break)
Wed. 1:00pm to 10:00pm (including Bible Study)
Thu. 10:00am to 5:00pm (with one hour break)
Fri. 1:00pm to 10:00pm (including Choir Practice)
Sat. 6:00am to 7:00am (Men's Prayer)

Adding four hours per week for “visitation,” the petitioner indicated that the beneficiary works 40 hours per week.

On Friday, February 1, 2008, a USCIS officer arrived at the petitioning church at 10:25 a.m. in order to conduct a site inspection and compliance review. The church was empty at the time; its parking lot was locked, and no one answered the telephone. The beneficiary was not scheduled to work on Friday mornings. The officer returned on Wednesday, March 19, 2008, at 1:15 p.m. According to the above work schedule, the beneficiary should have been working at that time. Once again, the church was empty with a locked gate blocking access to its parking lot. On Tuesday, March 25, 2008, the officer called the church’s telephone number at 2:10 p.m. – once again, during the beneficiary’s stated work hours. Again, no one answered the telephone. The officer concluded that the petitioner had failed the compliance review, because “no one was ever found to be working at the church.”

On September 9, 2008, the director notified the petitioner of USCIS’s intent to deny the petition, based on USCIS’s inability to conduct compliance review through a site inspection or on the telephone. The director noted “numerous messages were left to contact USCIS,” but “the petitioner has failed to contact USCIS” in response to those messages. The director instructed the petitioner to “[l]ist the days and times the petitioner is open to the public,” and “the days and times the beneficiary is working at the [petitioner’s] address.” The director stated that the petitioner “must submit documented evidence (not sworn affidavits) to support all claims.”

In response to the notice, counsel claimed that a change of pastors and the “Beneficiary’s family situation” resulted in “momentary” changes to the church’s hours of operation, which happened to coincide with USCIS’s repeated efforts to visit or contact the church.

The petitioner submitted new schedules for the church, and for the beneficiary’s work hours:

| Day | Church hours | The beneficiary’s schedule |
|-----------|--------------------|--------------------------------|
| Monday | CLOSED | OFF |
| Tuesday | 10:00am to 4:00pm | 10:00am to 4:00pm |
| Wednesday | 10:00am to 10:00pm | 10:00am to 10:00pm |
| Thursday | 10:00am to 8:00pm | 10:00am to 4:00pm |
| Friday | 10:00am to 10:00pm | 10:00am to 10:00pm |
| Saturday | 12:00pm to 2:00pm | 6:00am to 7:00am (fortnightly) |
| Sunday | 9:00am to 3:00pm | 9:00am to 3:00pm |

Discussing personnel changes at the church, Deacon [REDACTED] stated that the petitioner’s “substantive pastor, Rev. [REDACTED] [resigned] in mid-2005. . . . [The beneficiary] was the acting Pastor followed by a period of interim ministry . . . while the Church searched for a new substantive Senior Pastor.” Deacon [REDACTED] stated that “the current Pastor (Rev. [REDACTED])” was “officially installed on November 18th, 2007.” The petitioner submitted a copy of the previous senior pastor’s resignation letter, and materials relating to Rev. [REDACTED] installation as senior pastor.

██████████, attendance clerk with ██████████ stated that the beneficiary's son attended kindergarten from 12:20 p.m. to 3:20 p.m., preceded by a pre-kindergarten program (hours not specified), during the 2007-2008 school year.

The petitioner submitted additional IRS and payroll documentation, showing that the petitioner has consistently paid the beneficiary's salary, before, during and after the two-year qualifying period. Copies of church bulletins from 2008 (and one from May 2005) identified the beneficiary as one of the church's pastors.

The director denied the petition on October 28, 2008, stating that the petitioner had failed to provide documentary evidence to explain why the church was repeatedly empty and unstaffed on occasions when the petitioner had stated that the church would be open, with the beneficiary on site.

On November 26, 2008, the petitioner filed a motion to reopen and reconsider the director's decision. On motion, the petitioner submitted an affidavit from Rev. ██████████ senior pastor of the petitioning church since November 2007. Rev. ██████████ stated that the beneficiary "was not scheduled to be at work at the time that the visits were conducted" on February 1 and March 19, 2008, because the beneficiary's "family obligations" required "a schedule adjustment." Rev. ██████████ also claimed "we were unaware of any telephone messages from your office," and speculated "our telephone answering system might have deleted them" or that the "messages may have been lost in [a] deluge of [telemarketing] messages and inadvertently deleted along with them."

With respect to the telephone messages, the record does not show how many, if any, messages the USCIS officer left on the petitioner's answering machine. The compliance review report states only that one attempted telephone call connected to the petitioner's answering machine; the officer did not say whether or not the officer actually left a message. The report does not mention subsequent calls.

The petitioner submitted a copy of a memorandum dated January 25, 2008, shortly before USCIS attempted its first site inspection, detailing the beneficiary's "temporary schedule adjustment" to permit the beneficiary to take his son to and from school:

| | |
|-----------|----------------------------|
| Monday | Off (Church Office closed) |
| Tuesday | 4.00pm – 10.00pm |
| Wednesday | 4.00pm – 10.00pm |
| Thursday | 4.00pm – 10.00pm |
| Friday | 4.00pm – 10.00pm |
| Saturday | 9.00am – 3.00pm |
| Sunday | 9:00am – 3:00pm |

The director dismissed the petitioner's motion on April 30, 2009, stating that it did not meet the regulatory requirements of a motion to reopen or a motion to reconsider. The director found the petitioner's claims on motion to be unsupported.

The petitioner appealed the director's latest decision on June 2, 2009. Because that decision did not rest on the merits of the petition, but rather on the sufficiency of the petitioner's previous motion, we must first consider whether that motion met the regulatory requirements.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The motion did not state reasons for reconsideration or allege any incorrect application of law or USCIS policy. The motion, therefore, does not meet the requirements of a motion to reconsider. The petitioner's motion did, however, include new claims of fact, supported by an affidavit and supporting evidence that the director had not specifically requested or mentioned prior to the denial.

In dismissing the motion, the director acknowledged the petitioner's submission of an affidavit, but found that the petitioner "did not submit supporting documents to support the statements on the affidavit. For example, the . . . petitioner did not submit a copy of the revised schedule posted on the church bulletin, or information informing the congregation of the revised schedule. The petitioner only showed a revised schedule on the affidavit." The director acknowledged the 2008 memorandum showing the schedule change, but found: "The memorandum is not signed by the pastor. Therefore, USCIS does not consider the memorandum valid." The director did not explain the logic behind this last finding. If the pastor's signature were a definitive guarantor of a document's authenticity or accuracy, then the director would not have discounted the pastor's signed and sworn affidavit.

We find that the petitioner's November 2008 filing qualifies as a motion to reopen. We turn now to the content and merits of the petitioner's 2009 appeal. Counsel argues that the petitioner has submitted thorough and credible evidence of the beneficiary's continuous employment for several years, and that the beneficiary's absence from the church on two occasions "was not sufficient for USCIS to conclude" otherwise. Counsel adds that the petitioner provided a "plausible explanation for the absences of the church representatives during the visit."

The petitioner submits still more payroll records, and copies of what appear to be every weekly church bulletin from 2008. Parishioners, in letters (some of them notarized), attest to the beneficiary's contributions to the church.

The AAO has carefully considered the evidence and arguments offered in this proceeding. On the one hand, compliance review and site inspections are important and necessary components of the adjudication process, and we cannot lightly disregard the beneficiary's repeated absences from the church during what the petitioner had claimed were his designated work hours. On the other hand, it is difficult to account for several years of credible tax and payroll documents without concluding that the petitioner has employed the beneficiary as claimed. At this point, the failed site inspections appear to be

the sole obstacle to approval of the petition. Even then, the site inspections confirmed that the church does exist, and keeps a church vehicle in its parking lot. There is only the question of why USCIS has never been able to observe the beneficiary at work, or to speak to church officials. This is the question that demands resolution.

The petitioner appears to have made good faith efforts to address and resolve the director's concerns, and the director erred by dismissing the petitioner's properly filed motion to reopen. We will therefore withdraw the director's decision and remand the petition for appropriate consideration and action.

Because the director may determine that another site inspection is necessary, we strongly encourage the petitioner to advise USCIS immediately of any further changes to the beneficiary's schedule (and not to delete any future telephone messages from identified USCIS personnel). If USCIS were to attempt yet another site inspection, only to find the building once again locked and vacant during the beneficiary's scheduled work hours, any further discretion or consideration in the petitioner's favor would then be extremely unlikely. In such an event, USCIS would likely take a dim view of after-the-fact excuses for the beneficiary's absence.

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.