

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

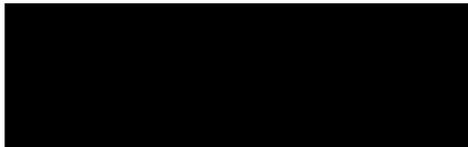
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

C<sub>1</sub>

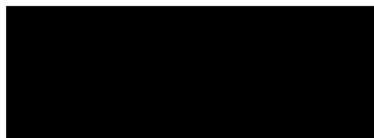


DATE: **MAY 17 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE:

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:



**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 beneficiary filed a motion to reopen and reconsider, which the director denied. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a Pentecostal Christian church of the Assemblies of God 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 an assistant pastor. The director determined that the petitioner had not established that the beneficiary had the required two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition. In addition, the director determined that the petitioner failed to submit an employer attestation.

The director's September 18, 2009 decision on the petitioner's motion consisted solely of a finding that the filing did not qualify as a motion to reopen. The petitioner's subsequent appeal, filed October 15, 2009, essentially duplicates much of the earlier motion; it includes no new arguments or exhibits. Therefore, while the AAO will give full consideration to the materials submitted on motion, a separate discussion of the appeal would serve no useful purpose here.

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 the AAO will consider concerns the employer attestation. The petitioner filed the Form I-360 petition on September 29, 2008. While the petition was pending, U.S. Citizenship and Immigration Services (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. 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).

The new regulation at 8 C.F.R. § 204.5(m)(7) states:

An authorized official of the prospective employer of an alien seeking religious worker status must complete, sign and date an attestation prescribed by USCIS and submit it along with the petition. If the alien is a self-petitioner and is also an authorized official of the prospective employer, the self-petitioner may sign the attestation. The prospective employer must specifically attest to all of the following:

- (i) That the prospective employer is a bona fide non-profit religious organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation;
- (ii) The number of members of the prospective employer's organization;
- (iii) The number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion;
- (iv) The number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years by the prospective employer's organization;
- (v) The number of special immigrant religious worker and nonimmigrant religious worker petitions and applications filed by or on behalf of any aliens for employment by the prospective employer in the past five years;
- (vi) The title of the position offered to the alien, the complete package of salaried or non-salaried compensation being offered, and a detailed description of the alien's proposed daily duties;

- (vii) That the alien will be employed at least 35 hours per week;
- (viii) The specific location(s) of the proposed employment;
- (ix) That the alien has worked as a religious worker for the two years immediately preceding the filing of the application and is otherwise qualified for the position offered;
- (x) That the alien has been a member of the denomination for at least two years immediately preceding the filing of the application;
- (xi) That the alien will not be engaged in secular employment, and any salaried or non-salaried compensation for the work will be paid to the alien by the attesting employer; and
- (xii) That the prospective employer has the ability and intention to compensate the alien at a level at which the alien and accompanying family members will not become public charges, and that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization.

In a notice dated January 28, 2009, the director instructed the petitioner to submit the newly required evidence. The petitioner's response included a February 15, 2009 letter signed by the petitioner's senior pastor, [REDACTED], addressing each of the points listed in the above regulation.

The director denied the petition on March 12, 2009, in part because the petitioner "did not submit the required attestation." On motion from that decision, counsel stated: "Petitioner submitted the required attestation as requested but not in the I-360 form but in an equally legally acceptable form." The petitioner's motion included a second version of the attestation, this time on Form I-360.

The director denied the motion on September 18, 2009, stating: "The motion to reopen does not state new facts and is not supported by affidavits or other documentary evidence." The AAO disagrees with this conclusion. The director had denied the petition, in part, because the petitioner supposedly had not submitted the required attestation. Counsel's assertion that the beneficiary had, in fact, submitted that attestation is directly relevant to the grounds for denial. Equally important, counsel's assertion was factually correct, and it was entirely appropriate for counsel to draw attention to this error.

The finding that the motion was substantive, however, does not mean the motion established the beneficiary's eligibility for the benefit sought. The next issue concerns the beneficiary's prior employment.

At the time the petitioner filed the petition, the USCIS regulations at 8 C.F.R. §§ 204.5(m)(1) and (3)(ii)(A) required the petitioner to establish that the beneficiary continuously engaged in qualifying religious work throughout the two years immediately preceding the petition's filing date.

On Form I-360, the petitioner indicated that the beneficiary had arrived in the United States on December 15, 2006 as a B-1/B-2 nonimmigrant visitor. The petitioner acknowledged that the beneficiary's nonimmigrant status had expired on June 14, 2007, but noted that it had filed Form I-129 on March 23, 2007 to change the beneficiary's status to that of an R-1 nonimmigrant religious worker. At the time the petitioner filed Form I-360 on September 29, 2008, the Form I-129 was still pending. The petitioner claimed that the beneficiary had never worked in the United States without authorization.

In a letter accompanying the petition, [REDACTED] stated:

The Beneficiary . . . is a candidate for licentiate as a pastor currently pursuing a religious vocation and studying theology at Berean Global University in preparation for credentialing with the Assembly of God. . . .

Prior to his coming to the United States, [the beneficiary] has been Music and Recruitment Pastor of the Cathedral of Praise in Davao City, Philippines.

[REDACTED] described the beneficiary's intended future duties, but did not state whether the beneficiary had already begun those functions. [REDACTED], executive secretary of the [REDACTED] stated that the beneficiary "is currently the Music Pastor for the [petitioner] and is currently pursuing studies for credentialing with [REDACTED] pending determination of legal status as an R1 applicant."

A November 23, 2006 letter from [REDACTED], stated that the beneficiary "is currently undergoing his training as an Intern Pastor since May 17, 2005 at our church." [REDACTED] did not state whether the beneficiary had ever been an employee (as opposed to a trainee) at the church. Accompanying documentation identified an intern pastor as "a person under training . . . [for] the full time ministry."

As noted previously, USCIS revised its religious worker regulations on November 26, 2008. 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) 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 [Internal Revenue Service] 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 the January 28, 2009 notice mentioned previously, the director quoted the regulations at 8 C.F.R. §§ 204.5(m)(4) and (11). The director acknowledged the December 2008 approval of the petitioner's application to change the beneficiary's nonimmigrant status from B-1/B-2 to R-1, but stated that this approval did not show that the beneficiary held lawful status and employment authorization throughout the two-year qualifying period from September 2006 to September 2008.

In response, the petitioner did not submit any IRS documentation of past employment in the United States or any specific evidence of lawful status. Instead, counsel stated:

The beneficiary has been "employed" or qualified as a religious worker for at least two years [prior] to the filing of the petition on 09/25/08 and this issue has been adjudicated by this Service when it approved the I-129 petition by this same petitioner . . . and classified the beneficiary as an R1 non-immigrant.

. . . The I-129 petition required the same qualification of two years work as a special nonimmigrant "religious worker" for its approval. . . .

On December 9, 2008 the Service approved the I-129 petition and Change of Status [for] the beneficiary . . . to a non-immigrant religious worker (R1) category. . . . The approval of the Change of Status (COS) is conclusive determination by the Service that the beneficiary was a qualified special religious worker in the two years preceding the filing of the I-129 petition on 03/23/07.

Counsel's assertion is incorrect. Unlike the special immigrant religious worker classification, the R-1 nonimmigrant classification does not require past employment experience. The regulation at 8 C.F.R. § 214.2(r)(1) requires two years of membership in the petitioner's religious denomination, but there is no comparable requirement for past employment. Therefore, the approval of the nonimmigrant petition does not imply that USCIS has ever stipulated to the beneficiary's prior employment.

Furthermore, even if the nonimmigrant petition had included a past experience requirement, the awarding of nonimmigrant status is not a "conclusive determination" of eligibility that is binding in future proceedings. Prior approvals may have been erroneous, and USCIS must consider each petition and application on its own merits. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Commr. 1988); *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications).

Regarding the beneficiary's past experience, counsel stated: "The beneficiary has been working as a qualified religious worker [for] two years prior to this filing on 09/28/08 or since 09/29/06. He was a religious worker in the Philippines from June 2002 until December 15, 2006 when he arrived in the United States." The petitioner submitted a copy of a February 12, 2007 letter from [REDACTED], indicating that the beneficiary "has been involved [REDACTED] . . . since June, 2002 until he resigned last December 14, 2006." Photocopied pay receipts and bank documents indicated that the church in the Philippines paid the beneficiary weekly 1,500 peso "lovegifts" in September and October 2006.

Counsel asserted that the beneficiary worked as a volunteer for the petitioner before the approval of his change to R-1 nonimmigrant status. To show the beneficiary's work in the United States, the petitioner submitted a copy of a March 29, 2008 Certificate of Appreciation from [REDACTED] (of which [REDACTED] and his spouse are officials). The certificate acknowledged the beneficiary's "selfless dedication . . . in serving and working in the ministry . . . [of] Music Director" at the petitioning church.

The regulation at 8 C.F.R. § 204.5(m)(11), quoted in full elsewhere in this decision, requires the petitioner to submit IRS documentation of qualifying experience in the United States, or to provide financial documentation to establish the beneficiary's self-support. The petitioner cannot simply label the beneficiary a "volunteer" and leave it at that. The petitioner's response to the director's January 2009 notice did not contain acceptable evidence of the beneficiary's claimed experience in the United States.

Regarding the issue of the beneficiary's immigration status, counsel stated:

The beneficiary was in lawful immigration status from his arrival on 12/15/06 . . . until 06/14/07. Petitioner filed a timely I-129 application to classify him as an R1

special nonimmigrant worker on 03/23/07 which was approved on 12/09/08. . . . His lawful immigration status continued during the pendency of the processing of the I-129 petition.

Counsel cited a memorandum from [REDACTED] to *Certain Employment-Based Adjustment of Status Applications filed under Section 245(a) of the Immigration and Nationality Act* (July 14, 2008). In that memorandum, [REDACTED] stated: "In examining any period where an application for . . . change of status (COS) was ultimately approved, the period during which the . . . COS had been pending would be considered, in retrospect, a period in which the alien was in a lawful nonimmigrant status."

The director, in denying the petition, repeated the assertion that "There is a break [in the beneficiary's lawful status] from 06/15/07 to 12/02/08." On motion from that decision, counsel argued that the director failed to consider the July 14, 2008 memorandum, under which the beneficiary was retroactively in lawful nonimmigrant status while his application for change of status was pending. Counsel added that the beneficiary "pursued his religious vocation when he arrived in the U.S. . . . by attending religious studies required for ordination."

In a new letter dated April 4, 2009, [REDACTED] stated:

I actively recruited [the beneficiary] . . . in December 2006 to train as Pastor [at the petitioning church]. . . .

[The petitioner] sponsored the religious studies of [the beneficiary] in the Assembly of God School of Ministry so that he may be able to complete his studies in contemplation of eventual ordination as minister or pastor. The Church paid for his studies allowing him to complete his studies from 2007 to 2008 in the Assembly of God School of Ministry in New York.

During the pendency of the I-129 petition, [the beneficiary] was an uncompensated or non-salaried religious worker of our Church performing the duties of Music Pastor and Director.

The petitioner submitted copies of a transcript and certificate showing that the beneficiary completed a course in the "history, missions & governance" of the Assemblies of God Church on October 25, 2008.

If the beneficiary worked at the petitioning church, and the church, in return, paid for the beneficiary's education, then he received compensation for services rendered. The Board of Immigration Appeals ruled that an alien who "receives compensation in return for his efforts on behalf of the Church" is "employed" for immigration purposes, even if that compensation takes a form other than a cash wage. *See Matter of Hall*, 18 I&N Dec. 203, 205 (BIA 1982). The petitioner

has not shown, or even claimed, that the beneficiary held employment authorization at any time between his December 15, 2006 arrival in the United States, and his change to R-1 nonimmigrant status nearly two years later. The beneficiary's initial B-1/B-2 nonimmigrant status did not permit him to accept employment in the United States. *See* 8 C.F.R. § 214.1(e). Even if the beneficiary did, as claimed, hold lawful status throughout the two-year qualifying period, lawful status is not the same thing as employment authorization, and the petitioner must show that the beneficiary continuously had both.

Furthermore, the petitioner has not shown that the beneficiary continuously held lawful status throughout the two-year qualifying period. The petitioner and counsel have asserted that the beneficiary studied for the ministry at the New York District School of Ministry in 2007 and 2008. [REDACTED] initially stated, in 2006, that the beneficiary was "currently . . . studying theology at Berean Global University." The petitioner has also consistently acknowledged that the beneficiary entered as a B-1/B-2 nonimmigrant, with no change of status until December 2008 when he became an R-1 nonimmigrant.

The USCIS regulation at 8 C.F.R. § 214.2(b)(7) reads, in pertinent part:

*Enrollment in a course of study prohibited.* An alien who is admitted as . . . a B-1 or B-2 nonimmigrant . . . violates the conditions of his or her B-1 or B-2 status if the alien enrolls in a course of study. . . . The alien may not enroll in the course of study until the Service has admitted the alien as an F-1 or M-1 nonimmigrant or has . . . changed the alien's status to that of an F-1 or M-1 nonimmigrant.

Under the above regulation, the beneficiary violated his B-1/B-2 nonimmigrant status by enrolling in a course of studies at Berean Global University and the New York District School of Ministry.

A change of status may not be approved for an alien who failed to maintain the previously accorded status. 8 C.F.R. § 248.1(b). Under this regulation, the director could not properly approve the petitioner's application to change the beneficiary's status, because the beneficiary had already violated that status by enrolling in a course of study and by working for the petitioner. Therefore, the available evidence seems to indicate that the director approved that application in error. More importantly, the approval of the change of status does not negate the beneficiary's multiple violations of his B-1/B-2 nonimmigrant status.

For the reasons described above, the AAO agrees with the director's finding that the beneficiary did not maintain lawful status or employment authorization while in the United States during the two-year qualifying period. The AAO will dismiss the appeal for that reason.

Beyond the director's decision, review of the record reveals additional grounds of concern. 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).

As noted previously, the USCIS regulation at 8 C.F.R. § 204.5(m)(11) requires evidence of compensation or self-support during the two years immediately preceding the filing date. When the director requested this evidence, the petitioner responded by submitting documentation from the Philippines, but nothing to show the beneficiary's compensation or self-support while in the United States. On motion, the petitioner submitted bank documents indicating the beneficiary had U.S. \$19,261.74 on deposit in a bank in the Philippines as of October 31, 2006, with no accompanying evidence that the beneficiary had any access to those funds while in the United States. The petitioner did not explain why it failed to submit this evidence when first instructed to do so.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the director made the initial decision. The petitioner failed to submit the requested evidence and later submitted it on motion. The AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

The regulation at 8 C.F.R. § 204.5(m)(9) reads, in part:

*Evidence relating to the qualifications of a minister.* If the alien is a minister, the petitioner must submit the following:

- (i) A copy of the alien's certificate of ordination or similar documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination; and
- (ii) Documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination, as well as evidence that the alien has completed any course of prescribed theological education at an accredited theological institution normally required or recognized by that religious denomination, including transcripts, curriculum, and documentation that establishes that the theological institution is accredited by the denomination.

The petitioner has repeatedly indicated that the beneficiary intends to work as a minister, but there is no evidence of his ordination. Rather, the evidence consistently indicates that the beneficiary was still training for the ministry at the time of filing. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The petitioner has not shown that, as of the date of filing, the beneficiary was qualified for the ministerial position that he admittedly seeks.

Finally, the regulation at 8 C.F.R. § 204.5(m)(7)(vi) requires the petitioner to attest to the complete package of salaried or non-salaried compensation being offered to the beneficiary. In his initial letter, ██████████ stated that the beneficiary “will be receiving a monthly salary and a housing allowance in the amount of \$2,500.00 with medical insurance benefits.” \$2,500 per month is equal to \$30,000 per year. In the subsequent employer attestation, however, ██████████ stated that the beneficiary would receive “\$20,800 per year payable \$800 bi-weekly. He is entitled to \$1,500 a year continuing education allowance, \$300 book allowance and health insurance after three (3) months.” The petitioner did not explain or even acknowledge what appears to be a substantial drop in the amount of the beneficiary’s proffered compensation.

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 appeal is dismissed.