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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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**U.S. Citizenship
and Immigration
Services**



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DATE: **MAY 19 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 matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is an Antiochan Orthodox 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 subdeacon. The director determined that a failed compliance review had called into question the petitioner's ability and intention to compensate the beneficiary at the rate claimed. The director also found that the beneficiary lacked lawful immigration status during part of the two-year qualifying period immediately preceding the petition's filing date.

On appeal, the petitioner submits a brief from counsel, a letter from a church official, and copies of various financial 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)(10) states:

Evidence relating to compensation. Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. If IRS [Internal Revenue Service] documentation, such as IRS Form W-2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

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

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 Form I-360 petition on August 31, 2009. On that form, asked to state the beneficiary's "Current Nonimmigrant Status," the petitioner indicated "R1." The beneficiary's R-1 nonimmigrant religious worker status, however, had expired on December 21, 2005.

In the employer attestation that accompanied the petition, the petitioner indicated that it would pay the beneficiary \$15,000 per year. The petitioner submitted bank records, showing a balance of \$115,632. The petitioner's initial submission also included IRS transcripts of the beneficiary's income tax returns and corresponding Form W-2 Wage and Tax Statements, showing the following earnings:

Year	Employer	Amount
2005	The petitioner	10,500
2006	Batshon Brothers	12,800
	The petitioner	4,500
2007	Batshon Brothers	31,291
	The petitioner	9,000
2008	Batshon Brothers	35,127
	The petitioner	15,000

Of the four years documented above, only in 2008 did the petitioner pay the beneficiary the stated salary of \$15,000 per year. The petitioner's payments to the beneficiary in 2006 and 2007 combined add up to less than a year's pay.

The present petition is the third that the petitioner has filed on the beneficiary's behalf. The others date from 2003 and 2005, respectively. As part of the compliance review process for the second petition, a USCIS officer visited the petitioning church on August 1, 2007 and interviewed the beneficiary and [REDACTED] pastor of the petitioning church. During that interview, the beneficiary stated that he was working 25-30 hours per week as a cashier at a gas station. This is consistent with the designation of the beneficiary as a "cashier" on his 2006, 2007 and 2008 income tax returns. The officer determined that the petitioner had failed the compliance review.

The director denied the petition on November 16, 2009, stating that the evidence of record, including the beneficiary's secular employment, calls into question the petitioner's intention and/or ability to compensate the beneficiary. The director also cited the regulation at 8 C.F.R. § 204.5(m)(4), which requires the beneficiary to have been performing qualifying religious work, either abroad or in lawful immigration status in the United States, for at least the two-year period immediately preceding the filing of the petition. The director claimed that the beneficiary had no authorization to work for any employer other than the petitioner during that two-year period.

On appeal, counsel notes that USCIS had approved the petitioner's 2005 petition on the beneficiary's behalf. At that time, the beneficiary filed a Form I-485 adjustment application and applied for employment authorization on Form I-765. USCIS approved the application for employment authorization, at which time the beneficiary could lawfully work for United States employers other than the petitioner.

Counsel's observations are correct insofar as the beneficiary's employment with Batshon Brothers was lawful, but they do not address the underlying question of why this outside employment was necessary at all. It is here that the compensation issue comes into play.

The USCIS regulations at 8 C.F.R. §§ 204.5(m)(7)(xi) and (xii) require the petitioner to attest that the alien will not be engaged in secular employment, and 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.

As noted previously, USCIS approved the petitioner's 2005 petition, but on June 24, 2009, the director issued a notice of intent to revoke that approval. The petitioner's response to that notice is relevant here. In a letter dated July 22, 2009, counsel stated:

Beneficiary works for [the petitioner] on a full-time basis, this is his primary employment, however, in order to supplement his income and be able to financially survive he was compelled to supplement income via other means. [The petitioner]

hopes to be able to increase Beneficiary's income in the forthcoming future as donations and programmes generate more income.

Thus, in correspondence dated a month before the present petition's filing date, the petitioner's attorney of record acknowledged that the petitioner was not able to pay the beneficiary enough that he could get by without a second job. Indeed, far from being supplemental employment, the beneficiary's work with [REDACTED] was his primary source of income in 2006-2008, providing upwards of 70% of his earnings in each of those years.

The appeal includes a December 10, 2009 letter from [REDACTED], vice chairman of the petitioning church, stating: "Starting November 2009, [the beneficiary's] salary will be \$30,000 (\$2,500 a month)." Counsel states that this salary increase eliminates the need for the beneficiary to work for a second employer. The petitioner submitted no verifiable documentary evidence to show a significant increase in the petitioner's income between July 2009, when counsel said that the petitioner could not pay the beneficiary enough to allow him to leave his second job, and November 2009, when the petitioner claimed to have doubled the beneficiary's salary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)).

A profit and loss statement for the first eleven months of 2009 shows no distinct upward trend in the petitioner's income. In January, the church took in \$38,997.81. A church festival in August pulled in \$27,175.00, resulting in a sharp upward spike in that month's income, but in the preceding month, the church took in only \$24,774.34. By November, the petitioner's gross monthly income was \$36,808.05, more than \$2,000 less than the January figure. The petitioner reported negative net income in five of the eleven listed months (January, March, May, July and September).

The "Office Payroll" line item on the profit and loss statement shows that the petitioner started the year paying its employees (other than the pastor) \$4,600 per month, a figure that later dropped to \$2,200 in most months. In November 2009, the month that the beneficiary's salary supposedly increased to \$2,500 per month, the "Office Payroll" figure was \$2,200.

The record shows that the petitioner employed the beneficiary for several years prior to the petition's filing date. During that time, the petitioner rarely paid the beneficiary his full salary. The claim that the petitioner is now both able and willing to consistently provide the full level of compensation (and even double it) lacks credibility.

With respect to the lawful status requirement at 8 C.F.R. § 204.5(m)(4), which the director raised in the denial notice, counsel correctly notes that the beneficiary held employment authorization through his pending Form I-485 adjustment application. The director, however, denied that adjustment application before the present petition's filing date. In the denial notice dated August 12, 2009, the director informed the beneficiary that "any . . . work authorization documents issued to you are now terminated as of the date of this notice."

The petitioner has not shown that the beneficiary held any lawful status or employment authorization between August 12, 2009, when the director issued the above notice, and August 31, 2009, when the petitioner filed the present petition. Counsel's arguments about the pending adjustment application do not address the denial of that application before the petition's filing date.

Counsel cites *Ruiz-Diaz v. United States*, No. C07-1881RSL (W.D. Wash. June 11, 2009), and states that, under that decision,

individuals whose [adjustment] applications are properly filed with appropriate fees and supporting documentation with USCIS by September 9, 2009 will have any period of unlawful presence or unauthorized employment tolled until USCIS issues a final administrative decision. This case can be used by analogy, in that, if USCIS finds that beneficiary undertook unauthorized employment, and there is strong evidence submitted that he did not, any unauthorized employment should be tolled. So in effect, there is no unauthorized employment.

Counsel's attempted analogy fails. The district court's *Ruiz-Diaz* order to grant an injunction tolled unlawful presence and unauthorized employment only in the limited context of aliens who attempted to file Form I-485 concurrently with a Form I-360, only to have USCIS reject the adjustment applications because the regulations made no provision for concurrent filing. The Ninth Circuit Court of Appeals subsequently reversed the district court's judgment and vacated the injunction. *Ruiz-Diaz v. USA*, No. 09-35734 (9th Cir. Aug. 20, 2010)

The district court's now vacated injunction waived the accrual of unlawful presence in relation to adjustment applications, but did not waive or nullify the regulations at 8 C.F.R. § 204.5(m)(4) and (11), which require an alien's qualifying experience in the United States to have been authorized under United States immigration law. Specifically, the district court held that:

For purposes of 8 U.S.C. § 1255(c) and § 1182(a)(9)(B), if a beneficiary of a petition for special immigrant visa (Form I-360) submits or has submitted an adjustment of status application (Form I-485) or employment authorization application (Form I-765) in accordance with the preceding paragraphs, no period of time from the earlier of (a) the date the I-360 petition was filed on behalf of the individual or (b) November 21, 2007, through the date on which the United States Citizenship and Immigration Services ("CIS") issues a final administrative decision denying the application(s) shall be counted as a period of time in which the applicant failed to maintain continuous lawful status, accrued unlawful presence, or engaged in unauthorized employment.

Id. at 2. The district court's order specifically referred to 8 U.S.C. § 1255(c) and § 1182(a)(9)(B). The former statutory passage relates to adjustment of status; the latter passage relates to unlawful presence in the context of inadmissibility. The district court's *Ruiz-Diaz* order did not require

USCIS to approve any petition under 8 U.S.C. § 1153(b)(4), or to overlook any beneficiary's unlawful employment in the context of such a petition. Rather, the order presupposed an already-approved immigrant petition, and dealt exclusively with adjustment of status, which is the next step in the immigration process. The beneficiary concurrently filed a Form I-485 application with the present petition, but USCIS will not adjudicate that application on the merits until and unless the underlying petition is approved. In this instance, USCIS has not approved the underlying immigrant petition. The now vacated injunction never required USCIS to disregard unauthorized employment or lack of lawful status at the petition stage.

Also, USCIS had previously approved a Form I-360 petition on the beneficiary's behalf, and the beneficiary's first Form I-485 application was pending when USCIS revoked that approval. The district court's *Ruiz-Diaz* order was intended to remedy a perceived inequity, in that some classes of intending immigrants could concurrently apply for adjustment while special immigrant religious workers could not. The order did not state that an alien could remain in the United States in perpetuity simply by filing new Forms I-360 and I-485 every time the previous round of filings is denied.

For the above reasons, the AAO agrees with the director's decision and will dismiss the appeal. In addition, review of the record shows another issue of concern, related to those that the director discussed. 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 (9th 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)(11) states, in pertinent part:

(11) *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.

As noted above, when the director denied the beneficiary's Form I-485 adjustment application on August 12, 2009, the director stated that the beneficiary's "work authorization documents are now terminated," leaving the beneficiary without employment authorization during the final weeks of the two-year qualifying period. Therefore, the petitioner has not shown that all of the beneficiary's employment during that two-year period was authorized under United States immigration law.

Furthermore, the IRS documentation in the record does not demonstrate two years of continuous employment immediately preceding the filing of the petition. The petitioner paid the beneficiary only \$9,000 in 2007, only three-fifths of his stated salary. The record indicates that the beneficiary's employment with the petitioner was intermittent in 2006 and 2007. The petitioner has not shown that the beneficiary continuously performed compensated work for the petitioner from August 31, 2007 through the end of that year. Also, given the interruptions in the beneficiary's work for the petitioner, the AAO notes that the petitioner has not submitted any documentary evidence of the beneficiary's work for the petitioner in 2009. Year-end IRS documentation for that year would not have been available as of the filing date, but payroll records and quarterly tax records should have been available.

The petitioner has not satisfactorily shown that it continuously employed the beneficiary throughout the two-year qualifying period from August 2007 to August 2009. This deficiency amounts to an additional basis for denial of the petition.

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.