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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. 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 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 the beneficiary had violated his nonimmigrant status by working for a secular employer.

On appeal, the petitioner submits a brief from counsel and supporting exhibits.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In Matter of Esteime, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Esteime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 589.

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 petitioner filed the Form I-360 petition on July 1, 2005. The director approved the petition on December 12, 2005. In revoking that approval on August 12, 2009, the director cited only one ground for revocation. Noting Internal Revenue Service (IRS) documentation showing that the beneficiary worked for ██████████ in 2006-2008, the director stated: "the beneficiary is not eligible for classification as a special immigrant religious worker in the United States because he has engaged in unauthorized employment and is therefore not in compliance with 8 C.F.R. 214.1(e)." Under that regulation, unauthorized employment is a violation of nonimmigrant status.

The director also stated that the petitioner had referred to the beneficiary by two different job titles ("subdeacon" and "coordinator of Arabic religious and cultural programs"), but did not specify that this was a basis for the revocation.

On appeal, counsel notes that, upon the approval of the petition in 2005, the beneficiary filed a Form I-485 adjustment application. That application, in turn, entitled the beneficiary to apply for employment authorization on Form I-765. See 8 C.F.R. § 274a.12(c)(9). When the beneficiary worked for ██████████ in 2006-2008, he did so with a valid employment authorization document derived from his then-pending adjustment application. Therefore, counsel correctly observes, this employment did not violate the beneficiary's R-1 nonimmigrant status (which had expired in December 2005).

Furthermore, even if the beneficiary had violated his status by working for [REDACTED], this would not be a basis for revoking the approval of the petition. The current regulation at 8 C.F.R. § 204.5(m)(4) requires the beneficiary to maintain lawful immigration status during the two years immediately preceding the filing of the petition, but the petitioner filed the petition in 2005, before the beneficiary started working for [REDACTED]. Equally important, the regulation containing the lawful status requirement was not yet in effect when the petitioner filed the petition or when the director approved it. U.S. Citizenship and Immigration Services (USCIS) published revised regulations for special immigrant religious worker petitions in 2008. 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." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). The petition was not pending on the rule's effective date, having been approved nearly three years before. Thus, the revised regulations do not apply to the petition.

With respect to the job title issue, counsel notes that the reference to the beneficiary as a coordinator of Arabic religious and cultural programs comes from a 2003 letter that accompanied an earlier (denied) petition that the petitioner had filed on the beneficiary's behalf. The earlier letter somehow became associated with the 2005 petition. By 2005, the beneficiary had been ordained as a deacon.

The AAO will withdraw the director's decision. Nevertheless, review of the record shows other issues of concern that preclude approval of the petition. The AAO may identify additional disqualifying grounds 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).

At the time of filing, the USCIS regulation at 8 C.F.R. § 204.5(m)(1) required that an alien seeking classification as a special immigrant religious worker must have been performing qualifying religious work 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)(3)(ii)(A) required the petitioner to submit a letter from an authorized official of the religious organization to establish that the beneficiary had the required two years of experience. The regulation at 8 C.F.R. § 204.5(g)(2) reads:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Because a special immigrant religious worker petition requires an offer of employment, the above regulation applied to such petitions until the regulation at 8 C.F.R. § 204.5(m)(10) superseded it in 2008.

In a June 5, 2005 cover letter accompanying filing of the petition, counsel cited the "Beneficiary's 2002 and 2001 tax returns and W-2 Wage Statements" and "January and June 2003 pay stubs" as evidence of the beneficiary's required two years of employment. Most of those documents, however, did not relate to employment during the two years immediately preceding the petition's filing date. The two-year qualifying period began in July 2003, and ended with the July 2005 filing of the Form I-360. Only the July 2003 pay receipt related to that period.

The petitioner did not state the beneficiary's intended salary, but the July 2003 pay receipt showed a monthly salary of \$1,200, which extrapolates to an annual salary of \$14,400. The petitioner submitted IRS documentation, including income tax return transcripts and Form W-2 Wage and Tax Statements, showing that the petitioner paid the beneficiary \$11,250 in 2001 and \$10,500 in 2002. The petitioner did not submit IRS documents from subsequent years, or explain their absence. The year-to-date total on the July 2003 pay receipt is \$5,900, less than five months' pay at the \$1,200 monthly salary.

The petitioner submitted an unaudited profit and loss statement for January through May of 2005. A line item marked "Administrative / Deacon" shows expenses of only \$1,725, less than a month and half of salary, during that five-month period. It is not clear if that amount reflects wages paid or expenses incurred by the deacon(s). A separate line item for "Office Payroll / Gross Wages" showed \$6,100, with no explanation of how many employees shared that amount.

On August 1, 2007, a USCIS officer visited the petitioning church and interviewed the beneficiary and [REDACTED], pastor of the petitioning church. During that interview, the officer learned that the beneficiary was not working for the petitioner's large San Francisco congregation, but for a much smaller satellite congregation in Santa Rosa. The beneficiary stated that he was working 25-30 hours per week as a cashier at a gas station. The USCIS officer then contacted California's Employment Development Department, which indicated that there were records that the beneficiary worked for the petitioner in the first and fourth quarters of 2006, but not in the second or third quarters of that year, or the first quarter of 2007. Records showed that the beneficiary worked for the gas station throughout that entire period.

In the notice of intent to revoke, dated June 24, 2009, the director instructed the petitioner to submit detailed information about the terms of the beneficiary's employment with the petitioner, additional financial documentation, and records from the IRS and Social Security Administration (SSA) to show the beneficiary's past compensation.

In response, 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.

Beneficiary has always worked full-time for the Petitioner, as is evidenced by his income tax returns and W2 forms . . . [and] a sealed Form SSA-7050-F4 from the Social Security Office showing the employers the beneficiary has worked for.

vice chairman of the petitioning church, stated: "In 2008, [the beneficiary's] salary was \$15,000 and we anticipate his salary to remain the same in 2009."

The beneficiary's IRS and SSA documents show the following compensation:

Year	Employer	Amount
1999		\$2,079.08
2000		9,734.97
		5,089.46
2001		18,358.41
		11,250.00
2002		19,428.87
		10,500.00
2003		11,504.93
		9,600.00
		6,668.22
2004		13,890.62
		6,900.00
		538.13
2005		10,500.00
2006		12,800.00
		4,500.00
2007		31,291.09
		9,000.00
2008		35,127.69
		15,000.00

It is clear that the beneficiary did not merely "supplement" his income working for other companies. Rather, secular employment was the beneficiary's primary source of income for nine of the ten years detailed above. The beneficiary's 2006-2008 income tax returns list his occupation as "Cashier." The very low sums the petitioner paid the beneficiary in 2006 and 2007 contradict counsel's claim that the "Beneficiary has always worked full-time for the Petitioner." The amounts are consistent with the USCIS officer's report that the beneficiary worked only intermittently for the petitioner in those years. It does not appear that the beneficiary's employment with the petitioner has ever been full-time.

The AAO notes that, unlike the beneficiary's 2006-2008 employment at [REDACTED], the beneficiary's secular employment from 2001 to 2005 appears to have violated his R-1 nonimmigrant status. The petitioner has not shown or even claimed that USCIS had authorized the beneficiary to work for any employer other than the petitioner during those years. Nevertheless, as noted previously, unlawful employment cannot form the basis for revocation of the approval of a special immigrant religious worker petition approved before November 26, 2008. The chief concern, at this point, lies not with the lack of authorization but with the petitioner's demonstrated need (or desire) to earn most of his income through secular employment for most of the time that he worked for the petitioner.

Counsel conceded that the petitioner "hopes to be able to increase Beneficiary's income" but could not yet do so, and that the beneficiary could not survive on what the petitioner was paying him. The petitioner has not met the regulatory requirement at 8 C.F.R. § 204.5(g)(2), under which the petitioner must be able to pay the beneficiary's salary from the petition's filing date until the date the beneficiary adjusts status. As of the petition's filing date in July 2003, the beneficiary's salary was \$1,200 per month, or \$14,400 per year, but the petitioner did not begin reliably paying the beneficiary at that rate until 2008. In 2006, the petitioner appears to have paid the beneficiary only three months' salary. Either the petitioner could not pay the beneficiary's full salary, which is a disqualifying consideration, or the petitioner could pay but chose not to, which raises other serious questions regarding the petitioner's intention to employ the beneficiary (just as the beneficiary's persistent pattern of outside employment casts doubt on his intention of working full-time for the petitioner).

The above issues require further action, but the director did not cite these issues as grounds for revocation of the approval of the petition. Therefore, the AAO will remand the petition to the director for appropriate action. 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.