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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

PUBLIC COPY

[Redacted]

C,

Date: **MAY 27 2011** Office: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the employment-based immigrant visa petition. On further review, the Director, California Service Center, (director) determined that the petitioner was not eligible for the visa preference classification. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke (NOIR) approval of the petition and her reasons for doing so, and subsequently exercised her discretion to revoke approval of the petition on September 24, 2009. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 a minister. The director determined that the petitioner had not established that the beneficiary seeks to enter the United States to work solely as a minister. The director also raised the issue of whether the petitioner had established its ability to pay the beneficiary.

On appeal, counsel asserts that the beneficiary had never had the intention of engaging in secular employment. Counsel submits a brief and additional documentation in support of the appeal.

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department 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 Estime, . . . 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 un rebutted, 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 Estime*, 19 I&N 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.*

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).

On November 26, 2008, the U.S. Citizenship and Immigration Services (USCIS) issued 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).

We note that the director's decision was based in part on the November 2008 regulation. However, as the instant petition was not pending on November 26, 2008, it is not subject to the evidentiary requirements of the new regulation. Accordingly, the petition must be adjudicated based on the regulations in effect at the time the petition was filed. Nonetheless, as the AAO conducts appellate review on a *de novo* basis, all of the evidence of record will be considered.

The issue presented is whether the petitioner has established that the beneficiary seeks to enter the United States for the sole purpose of working as a minister.

The regulation in effect at the time the petition was filed provided at 8 C.F.R. § 204.5(m)(1) required that, if the alien sought entry into the United States as a minister, the alien must be seeking entry solely for the purpose carrying on the vocation of a minister. This language echoes

section 101(a)(27)(C)(ii)(I) of the Act, 8 U.S.C. § 101(a)(27)(C)(ii)(I), which required that the alien seeks to enter the United States solely for the purpose of carrying on the vocation of a minister.¹

In its June 17, 2002 letter submitted in support of the petition, the petitioner stated that the position offered to the beneficiary was that of minister in its congregational development department. The petitioner further stated that the beneficiary would live within the temple under a vow of poverty and would receive no salary; however, he would be paid “a small stipend for personal maintenance items.”

In her June 4, 2009 NOIR, the director notified the petitioner that:

A public record search has revealed that as of August of 2006, the employment between the petitioner, and the beneficiary ended. The beneficiary is no longer a religious worker for the petitioner. Also, [a] public record search of the beneficiary shows employment other than that of the petitioner.

On January 23rd the beneficiary filed and opened a business [REDACTED] Moundsville, West Virginia. Employment other than that of the specified religious work is in direct violation of the R-1 visa.

In its June 29, 2009 response, the petitioner stated that after the beneficiary married a U.S. citizen:

[A]s he had a child and wished to visit his parents in India, in September 2005 his wife filed a family based I-130/I-485 application for him. On his wife's inspiration and I-864 affidavit [of] support of her parents his attorney submitted the applications . . .

Immediately after the submission of his application he received the work permit and travel documents. Thereafter, he received the interview date. After the interview the Pittsburgh USCIS administration told them that ‘everything is ok and we are waiting for the R1 file for Vermont center. On the basis of the work permit obtained through his marriage, his was [sic] listed him as a partner in the business she started with the financial assistance of her parents. Thus together as partners [the beneficiary] and his wife registered the company [REDACTED] in 2006.

Unfortunately, the business never performed well. This is primarily due to the fact that [the beneficiary] continued to perform his religious work for our temple full time, i.e. minimum of 35 hours per week. With their business producing poor results, their marriage relationship also suffered, they separated and ultimately

¹ This requirement remains unchanged in the 2008 regulation. See 8 C.F.R. § 204.5(m)(2)(i).

divorced in 2007. Throughout this difficult period [the beneficiary] found solace only in his religious duties which he continued to performed uninterruptedly. Subsequently, his ex-wife withdrew the I-130 petition she had filed on his behalf. Then he closed down the business [REDACTED] in April/May of 2007.

The petitioner further stated:

We believe the concern you express that, "A public records search has revealed that as of August of 2006, the employment between the petitioner and the beneficiary ended. The beneficiary is no longer a religious worker for the petitioner," is based upon our payroll records which indicated that the stipend we were giving to the beneficiary ended in September 2006. However, [he beneficiary] did not stop his religious service. He began to receive monetary compensation due to his marriage. When his marriage ended and he no longer required such maintenance he went back to living under the religious vows that characterized his original employment relationship with our organization when he first came to us in 2002, i.e. no monetary compensation.

Due to child support obligations it became impractical for [the beneficiary] to not receive monetary compensation and so in April of 2008 we began paying him \$850.00 per month.

The petitioner submitted copies of processed checks reflecting that, from January 2006 to June 2009, it paid the beneficiary various amounts ranging from \$101.18 on August 7, 2008 to \$1,000 in June, July, August, and September of 2006. While documentation indicates that payments were made every month, there does not appear to have been a regular schedule for payments. In some months, the beneficiary received only one payment. In others, he received as many as three. The petitioner also submitted a copy of an Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, that it issued to the beneficiary in 2008, indicating that it paid him wages of \$4,692.31 in 2008.

In revoking approval of the petition, the director stated that in an interview conducted on September 5, 2006, the beneficiary's ex-wife stated that she was pressured by her husband into signing for the loan and the lease used for the business. The director further stated:

It appears from the statements received in regards to opening and closing of his business, the beneficiary would have continued his secular employment of [REDACTED], had the business performed better. The starting of the business shows the intent to pursue other secular employment than that of a religious vocation.

On appeal, the petitioner disputes the statement of the beneficiary's wife and stated that she was the primary force in establishing the business and that the beneficiary was included as a partner only on the insistence of his mother, who provided financial assistance to start the business. The petitioner provided a letter from the beneficiary's mother attesting to her request that the

beneficiary be included in the business to protect her financial interests. The petitioner provided other documentation signed by the beneficiary and his wife relating to the business that contains the signatures of the beneficiary and his wife. The petitioner stated, however, that the beneficiary never ceased working for the petitioning organization.

The petitioner has provided a reasonable and satisfactory explanation for the beneficiary's name on the financial documentation for the business [REDACTED]. The record does not contain a statement from the beneficiary's wife or a transcript of the interview in which she allegedly stated that the beneficiary pressured her into business arrangement. Nothing in the record indicates that the beneficiary was engaged in the daily operations of the business. Accordingly, the AAO withdraws the director's determination that the beneficiary did not seek to enter the United States to work solely as a minister.

The director also questioned whether the petitioner had established its ability to pay the beneficiary.²

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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.

The petition was filed on June 29, 2002. Therefore, the petitioner must establish its continuing ability to pay the beneficiary as of that date.

In its June 17, 2002 letter submitted in support of the petition, the petitioner stated that the beneficiary would live within its temple facilities under a vow of poverty and would receive a small stipend for personal items. With the petition, the petitioner submitted a partial copy of its May 31, 2002 monthly checking account statement, which indicated that it had an ending balance of \$39,411.62. The petitioner submitted no other documentation of its ability to compensate the beneficiary and provided no documentation of its ability to provide the beneficiary with room and board.

In response to a December 4, 2002 request for evidence (RFE), the petitioner submitted an unaudited copy of its profit and loss statement dated January 2003, which reflected a loss of

² Although the director's decision cited to the 2008 regulation, the AAO finds it to be harmless error. The regulation in effect at the time of filing that the AAO will apply, while having substantially similar requirements, is less restrictive than the 2008 regulation.

\$1,559.56; an unaudited copy of its January 31, 2003 balance sheet; and partial copies of its monthly bank statements for the period June 2002 through January 2003.

In response to the NOIR, the petitioner submitted documentation indicating that it had paid the beneficiary varying amounts from January 2006 through June 2009. The petitioner also submitted copies of its monthly bank statements for April 2002. On appeal, the petitioner submitted unaudited copies of its profit and loss statements for January 1 through October 12, 2006, January through December 2007, January through December 2008 and January 1 through October 12, 2009. The petitioner also submitted a copy of a letter from its payroll service indicating that the service had filed the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the quarter ending September 30, 2009. The beneficiary's name is listed as an employee. The petitioner additionally submitted photographs that it stated are of the apartments provided to "devotees."

The petitioner submitted no documentation of any compensation that it provided to the beneficiary from 2002 through 2005 and failed to submit documentation as required by the regulation at 8 C.F.R. § 204.5(g)(2), such as copies of annual reports, federal tax returns, or audited financial statements. As the petitioner has submitted none of the documentation required by the regulation and submitted no documentation to establish that it had compensated the beneficiary from 2002 to 2005, it has therefore failed to establish its continuing ability to pay the beneficiary as of the date the petition was filed.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the visa petition.

The applicable regulation at 8 C.F.R. § 204.5(m)(3) stated, in pertinent part, that each petition for a religious worker must be accompanied by:

(ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:

(A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

As discussed above, the petition was filed on June 29, 2002. 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 June 2002 letter, the petitioner stated that the beneficiary had served as a minister in its religion since 1989 and "began his ministry with the [redacted] India, and since coming to the United States in November 2001, he has served the missionary activities of

██████████ in the San Francisco Bay Area, CA, Chicago, and here in West Virginia.” The petitioner submitted no documentation with the petition to establish that the beneficiary had worked at any time during the qualifying period.

In its February 10, 2003 response to the director’s RFE, the petitioner again stated that the beneficiary had been a minister in the ISKCON denomination since 1989 and that throughout the period he served as a minister, he worked at least 40 hours per week. The petitioner provided a schedule of the beneficiary’s daily activities, but provided no other documentation to establish that the beneficiary actually performed the work indicated. 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 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The record contains no documentation to establish that the beneficiary worked in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the visa petition.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial 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 petition will be denied 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.