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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

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DATE:

APR 25 2012

OFFICE: CALIFORNIA SERVICE CENTER

FILE:



IN RE:

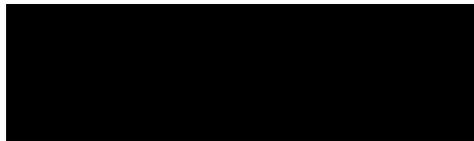
Petitioner:

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, (“the director”) denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner is a 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 religious education missionary. On November 20, 2008, the petitioner filed a Form I-360 petition. On July 15, 2010, the director denied the petition. The director denied this petition because she found that the beneficiary had been out of status during the two years immediately preceding the filing of the petition.

On appeal, the petitioner submits a brief and further documentation in order to overcome the director’s decision.

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 issue here is whether the beneficiary possesses two years of lawful work experience immediately prior to the filing of the form I-360 petition. 8 C.F.R. § 204.5(m) states:

Religious workers. This paragraph governs classification of an alien as a special immigrant religious worker as defined in section 101(a)(27)(C) of the Act and under section 203(b)(4) of

the Act. To be eligible for classification as a special immigrant religious worker, the alien (either abroad or in the United States) must:

* * *

(4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. A break in the continuity of the work during the preceding two years will not affect eligibility so long as:

- (i) The alien was still employed as a religious worker;
- (ii) The break did not exceed two years; and
- (iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.

Further, 8 C.F.R. § 204.5(m)(11) states:

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.
- (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.

On appeal, counsel argues that the director erred in her decision because the beneficiary had lawful immigration status for the two years immediately prior to the filing of the petition, from November 20, 2006 to November 20, 2008. The petitioner submitted approval notices that show that the beneficiary was in lawful status as an E-2 nonimmigrant from September 8, 2002 through February 15, 2012. The beneficiary would have been in a lawful status for the two years immediately prior to the filing of the petition, but he violated his status by working without authorization. His E-2 nonimmigrant status derived from the E-2 nonimmigrant status of his spouse. The regulation at 8 C.F.R. § 274a.12 states in pertinent part:

(b) *Aliens authorized for employment with a specific employer incident to status.* The following classes of nonimmigrant aliens are authorized to be employed in the United States by the specific employer and subject to the restrictions described in the section(s) of this chapter indicated as a condition of their admission in, or subsequent change to, such classification. An alien in one of these classes is not issued an employment authorization document by the Service:

* * *

(5) A nonimmigrant treaty trader (E-1) or treaty investor (E-2), pursuant to §214.2(e) of this chapter. An alien in this status may be employed only by the treaty-qualifying company through which the alien attained the status. Employment authorization does not extend to the dependents of the principal treaty trader or treaty investor (also designated “E-1” or “E-2”), other than those specified in paragraph (c)(2) of this section

Effective January 16, 2002, Public Law 107-124 amended section 214(e) of the Act by authorizing the employment of spouses of E nonimmigrants. To obtain employment authorization, the E nonimmigrant must file Form I-765, Application for Employment Authorization. USCIS records show that the beneficiary did file Form I-765 on August 17, 2009, but that he did not do so during the two-year period prior to the filing of the Form I-360, Immigrant Petition for Special Immigrant Religious Worker. The evidence submitted on appeal establishes that the beneficiary was not in a lawful status for the two years immediately prior to the filing of the petition, because the beneficiary was not “authorized under United States immigration law” to work for the petitioner. The petition may not, therefore, be approved.

Beyond the decision of the director, the USCIS regulation at 8 C.F.R. § 204.5(m)(10) requires that the petitioner show that it has the ability to compensate the beneficiary. Evidence of ability and intent to compensate can be established by documentary evidence that the proffered salary was paid to the beneficiary in the past or through budget set aside for salary, leases, etc. The petitioner submitted a job offer letter dated December 11, 2009 stating that:

██████████ offers ██████████ a permanent full time position as a Religious Education Missionary. Currently, our church provides a salary of \$18,000 per year for his services. From the past few years, ██████████ received \$1,500 per month for his salary. The reason why he received only \$1,500 per month was due to the fact that his wife had

income coming in from her business, (Attached Tax Returns of 2006-2008; [REDACTED]
In 2010, [REDACTED] will offer [REDACTED] an annual salary of \$31,200.

The petitioner has shown that it has paid the beneficiary \$18,000 per year from 2006 to 2008, but the petitioner has not shown that it has the prospective ability to compensate the additional \$13,200 in salary as required by the regulation at 8 C.F.R. § 204.5(m)(10). The AAO notes that the petitioner submitted copies of its business checking accounts from [REDACTED]. These are not sufficient to show the ability to compensate the beneficiary, since the checking account statements only refer to a specific snapshot in time, and do not reflect a sustained ability to compensate the beneficiary. For this additional reason, the petition cannot be approved.

The burden of proof in these proceedings rests solely 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.