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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

[Redacted]

C1

DATE: **AUG 29 2012** OFFICE: CALIFORNIA SERVICE CENTER [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:

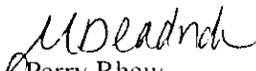
[Redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 a Catholic organization. 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 director and founding member while also serving as a Catholic nun. The director determined that the petitioner had failed to establish that the beneficiary possessed two years of continuous, lawful employment immediately prior to the filing of the petition, that it was operating in the capacity claimed at the time of filing, and that it had the ability to compensate the beneficiary, as it had not submitted evidence relating to the beneficiary's compensation during the two years immediately preceding the filing of the petition.

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 issues presented on appeal are whether the beneficiary possessed two years of continuous, lawful employment immediately prior to the filing of the petition, whether the petitioner's organization was operating in the capacity claimed at the time of filing, and whether the petitioner has established its ability to compensate the beneficiary.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m) provides that to be eligible for classification as a special immigrant religious worker, the alien 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.

Therefore, the petitioner must show that the beneficiary worked 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 petitioner filed the Form I-360 on January 31, 2011. Accordingly, the petitioner must establish that the beneficiary was continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

The regulation at 8 C.F.R. § 204.5(m)(11) provides:

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 [Internal Revenue Service] documentation that the alien received a salary, such as an IRS Form W-2 [Wage and Tax Statement] 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 the Form I-360 petition, the petitioner indicated that the beneficiary last arrived in the United States on July 1, 2008. Therefore, the beneficiary was in the United States throughout the entire two-year qualifying period. The record reflects that the beneficiary began working for the petitioner's organization in April of 2010. On the Form I-360, under "Current Nonimmigrant Status," the petitioner indicated "R-1" with an expiration date of March 31, 2010.

In her October 26, 2011 decision, the director found that the beneficiary had engaged in unauthorized employment following the expiration of her R-1 nonimmigrant status on March 31, 2010, which fell during the two-year qualifying period immediately preceding the petition's filing date. The director stated that the beneficiary had entered the United States on July 1, 2008 with an R-1 nonimmigrant visa allowing her to work [REDACTED] until March 31, 2010. The director noted that, when the petitioner submitted the petition, it informed USCIS that [REDACTED] was unable to renew the beneficiary's R-1 nonimmigrant visa beyond March 31, 2010, so the beneficiary decided to form the petitioner's organization so that she could continue to fulfill her vows by providing services to others in need.

The director stated that she had issued a Notice of Intent to Deny (NOID) to the petitioner on August 11, 2011, to which the petitioner responded on September 12, 2011. The director found that, in its NOID response, the petitioner failed to establish that the beneficiary was authorized by U.S. immigration law to engage in employment with its organization during the qualifying period. The director also noted that, within the petitioner's NOID response, it had asserted that the beneficiary continued her work as [REDACTED] in a soup kitchen and by engaging in a Eucharistic ministry after she ceased working for the [REDACTED]. The director concluded that the petitioner had failed to establish that the beneficiary was authorized to work between April 1, 2010 and January 31, 2011 and that the petitioner had thus not established that the beneficiary possessed two years of continuous, lawful employment immediately prior to the filing of the petition.

On appeal, counsel asserts that the beneficiary was engaged in continuous religious work as a Catholic nun throughout the qualifying period. Counsel highlights that the beneficiary possessed lawful employment status when she worked for [REDACTED] from July 1, 2008 through March 31, 2010. Counsel states that the beneficiary remained a member of [REDACTED] as a Catholic nun until the filing of the petition and beyond that date. However, counsel does not assert that the beneficiary actually possessed authorization to work for the petitioner's organization from April 1, 2010 onwards.

The regulation at 8 C.F.R. § 204.5(m)(4) prohibits USCIS from considering work that was not “in lawful immigration status” and any “unauthorized work in the United States.” The regulation at 8 C.F.R. § 204.5(m)(11) requires that “qualifying prior experience . . . must have been authorized under United States immigration law.” Therefore, the regulations, separately and together, require that USCIS must have affirmatively authorized the beneficiary to perform any claimed religious employment while in the United States. The petitioner has failed to establish the beneficiary’s lawful status after the expiration of her nonimmigrant status on March 31, 2010.

As it relates to whether such work was continuous, counsel’s arguments that the beneficiary was a volunteer and that she provided for her own support do not meet the requirements at 8 C.F.R. § 204.5(m)(4) and (11). In supplementary information published with the proposed rule in 2007, USCIS stated:

The revised requirements for immigrant petitions and nonimmigrant status require that the alien’s work be compensated by the employer because that provides an objective means of confirming the legitimacy of and commitment to the religious work, as opposed to lay work, and of the employment relationship. Unless the alien has taken a vow of poverty or similarly made a formal lifetime commitment to a religious way of life, this rule requires that the alien be compensated in the form of a salary or in the form of a stipend, room and board, or other support so long as it can be reflected in a W-2, wage transmittal statements, income tax returns, or other verifiable IRS documents. USCIS recognizes that legitimate religious work is sometimes performed on a voluntary basis, but allowing such work to be the basis for an R-1 nonimmigrant visa or special immigrant religious worker classification opens the door to an unacceptable amount of fraud and increased risk to the integrity of the program. In this rule, USCIS is proposing to implement bright lines that will ease the verification of petitioner’s claims in the instances where documentary evidence is required.

72 Fed. Reg. 20442, 20446 (April 25, 2007). When USCIS issued the final version of the regulation, the preamble to that final rule incorporated the above assertion by reference: “The rationale for the proposed rule and the reasoning provided in the preamble to the proposed rule remain valid and USCIS adopts the reasoning in the preamble of the proposed rule in support of the promulgation of this final rule.” 73 Fed. Reg. 72275, 72277 (Nov. 26, 2008).

The self-support referred to in 8 C.F.R. § 204.5(m)(11)(iii) relates to nonimmigrant religious workers who are part of an established missionary program. 8 C.F.R. § 214.2(r)(11)(ii). In this instance, the record does not establish that the beneficiary was in a missionary program. Accordingly, the petitioner’s voluntary work in the United States does not count toward the two-year continuous work requirement.

Counsel claims that any break in the continuity of the beneficiary’s work was insignificant and did not exceed two years. The AAO finds that counsel has failed to establish that the beneficiary’s

employment was continuous. Although some breaks in employment may not affect the alien's continuous employment, the petitioner has not demonstrated that the beneficiary meets the requirements of 8 C.F.R. § 204.5(m)(4).

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.

In her decision, the director stated that USCIS had conducted a site check at the petitioner's address listed on the petition. The director noted that a USCIS officer found the petitioner's address to be a home located in a residential neighborhood with no signage and found there to be no religious activities occurring there at that time. The director also stated that a USCIS officer interview with a current occupant of the home as well as neighbors had revealed that there were no ongoing religious activities occurring at that address.

The director noted that the petitioner's September 12, 2011 response to the August 11, 2011 NOID included an explanation from the petitioner stating that it had a second location called Helping Hands, which is a soup kitchen where the beneficiary was working on the day of the site visit and where she continues to work. The director also stated that the petitioner asserted that the Reverend Father who had responded to USCIS inquiry was not an occupant at the address listed on the petition, but rather an out-of-state visitor. Thus, the petitioner claimed that the Reverend Father was not in a position to respond to any USCIS inquiries. The director highlighted that the petitioner noted that its residence had been under renovation during the time of the site visit, that small signage with the name of its organization was there at the time of the visit, and that local zoning codes did not allow for larger signs to be posted in that neighborhood. The director concluded that the petitioner could not make a material change to the petition by stating that the beneficiary currently performs the majority of her work at the separate Helping Hands location.

On appeal, counsel asserts that the petitioner has provided evidence of its physical location at both the address of record and the Helping Hands location. Counsel contends that the petitioner should not be punished for listing its living quarters as the location on the petition, because it advances its religious work at both locations. The petitioner additionally resubmits photos, which it had

previously submitted in response to the director's NOID. Similar to the director, the AAO finds that these photos are unlabeled and that do not have corresponding documentation with them reflecting their significance.

The AAO finds that the petitioner made a material change to the petition when it changed the beneficiary's work location to being at Helping Hands. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. 8 C.F.R. § 103.2(b)(1) and (12); *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). The petitioner is required to attest to the specific location of the beneficiary's proposed employment. 8 C.F.R. § 204.5(m)(7)(viii). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Accordingly, the AAO concurs with the director and finds that the petitioner has failed to establish that it was operating in the capacity claimed at the time of filing.

The USCIS regulation at 8 C.F.R. § 204.5(m)(10) reads:

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 petitioner stated on the petition that it intended to provide the beneficiary with non-salaried compensation in the form of room and board. The AAO highlights the fact that future self-support as an immigrant is not qualifying. The petitioner has failed to establish its past compensation of the beneficiary, either salaried or non-salaried. The fact that the beneficiary has provided her own support does not lead to the conclusion that the petitioner will be able to compensate the beneficiary in the future.

In her decision, the director noted that the petitioner had failed to provide evidence that the beneficiary received compensation in exchange for the religious work that she performed in the two years immediately preceding the filing of the petition. The director stated that the petitioner had submitted a 2010 Internal Revenue Service (IRS) Form 990-EZ, but that it was not certified by the IRS or verifiable by USCIS.

The petitioner submitted the same uncertified 2010 IRS Form 990-EZ on appeal. The form states on Part IV that the petitioner did not compensate the beneficiary that year even though she purportedly

began working there in April. Further, the form shows no salaries, other compensation, or employee benefits. The petitioner also submitted an "Account Certification Letter" from Comerica Bank dated April 29, 2010 showing an account balance for the petitioner of \$12,731.21. The letter does not indicate whether this was an average balance and the record contains no further evidence regarding the balance and activity on this account on any date other than the one listed in the letter. The petitioner also submitted copies of the beneficiary's bank account statements for 2010 and 2011, but they do not reflect regular or occasional payments received from the petitioner for work performed. The petitioner claimed on the petition that it would pay the beneficiary's room and board, but it has failed to establish that it has done so in the past. Counsel asserts that the petitioner provided for her own support while she was working for the petitioner's organization. The petitioner's documentation does not include evidence that it has previously compensated the beneficiary or anyone in a similar position in the amount it states it will pay the beneficiary, has not provided a budget showing that it has set aside money to compensate the beneficiary, and has not provided any of the other documentation specified in the above-cited regulation.

The petition will be denied for the above stated reasons. 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.

ORDER: The appeal is dismissed.