

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: DEC 19 2012

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:
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,

Ron Rosenberg
Acting 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 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 an assistant pastor [REDACTED] California. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel, a document describing the history [REDACTED] a pamphlet from [REDACTED] and a printout about [REDACTED] from the website theophanychurch.com.

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 United States Citizenship and Immigration Service's (USCIS) regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or 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 petition on March 3, 2009. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work in lawful status throughout the two-year period immediately preceding that date.

The USCIS 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 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.

According to evidence accompanying the Form I-360 petition, the beneficiary was granted R-1 nonimmigrant status from June 17, 2005 to June 1, 2008, which authorized her employment with [REDACTED]. In a letter accompanying the petition, the petitioner stated the following regarding the beneficiary's work history:

From June 2005 through December 2008, [REDACTED] was a member of the [REDACTED] [REDACTED] where she served as a Missionary pursuant to R-1 status. In January 2009, our church filed a Form I-129 seeking to extend [REDACTED] R-1 status and to authorize a change of church. This petition is currently pending.

The letter did not indicate whether the beneficiary had been or was currently employed by the petitioning church. However, the petitioner submitted copies of two brochures from [REDACTED] [REDACTED] dated December 14, 2008 and February 15, 2009, both of which listed the beneficiary as an "Evangelist."

The petitioner submitted copies of the beneficiary's Forms W-2, Wage and Tax Statements, from 2007 and 2008, which indicated that the beneficiary earned \$24,036 and \$18,000 respectively during those years from [REDACTED]. The forms listed [REDACTED] employer identification number as [REDACTED]. The petitioner also submitted an uncertified copy of the beneficiary's 2007 Form 1040A, U.S. Individual Income Tax Return, which listed \$24,036 as the beneficiary's total reported income for that year. Additionally, the petitioner submitted copies of monthly pay statements from [REDACTED] to the beneficiary for the months of July to December 2007. The statements gave the organization's address as [REDACTED]. The petitioner also submitted pay statements from [REDACTED] for the months of February to September of 2009.

On November 22, 2011, USCIS issued a Notice of Intent to Deny the petition (NOID). The notice stated in part:

On June 18, 2005 the beneficiary was granted R-1 status with validity dates from June 17, 2005 to June 1, 2008 with the petitioner [REDACTED]. However the record shows that the beneficiary was employed by [REDACTED] in 2007 and 2008. The beneficiary was also employed by [REDACTED] between February 2008 and September 2008. USCIS records show no approved petitions for [REDACTED] on behalf of the beneficiary.

The regulations state that a different or additional organizational unit of the religious denomination seeking to employ or engage the services of a religious worker admitted under this section must file Form I-129 with the appropriate fee however; the alien cannot change employers or work for an additional employer until after the I-129 is approved. In the instant case, it appears the beneficiary participated in unlawful employment with two different or additional employers. A foreign worker can work for the petitioner, in the instant case Desert Bloom Ministries, but only as detailed in the petition and only for the period authorized.

In the NOID, USCIS also noted that a petition filed on behalf of the beneficiary by Abundant Life in Faith Ministries was withdrawn on December 29, 2008 after the petitioner failed a site visit.

In a letter responding to the NOID, counsel for the petitioner stated the following:

[REDACTED] was employed as a missionary at [REDACTED] from 2005 to 2007. After deciding that he wanted to do more world outreach, the church's pastor, [REDACTED] changed the name of his ministry to [REDACTED]. [REDACTED] continued working as a missionary under what [REDACTED] considered to be the same ministry.

Form I-129 to extend [REDACTED] R-1 visa status and to authorize her change of church to [REDACTED] was timely filed on May 29, 2008.

On or about December 8, 2008, after a USCIS investigator contacted her attorney's office regarding the on-site investigation related to that petition, it was discovered that Abundant Life in Faith church had been suspended as of October 1, 2008. [REDACTED] was completely unaware of the suspended corporate status of Abundant Life in Faith Ministries until her attorney informed her of this fact. The petition was subsequently withdrawn.

Counsel argued that the beneficiary's employment at [REDACTED] Ministries International was not an unauthorized change of employers because she continued to work for Pastor [REDACTED] as she had at Desert Bloom Ministries. Counsel also asserted that, if the pending Form I-129 filed by the petitioning church on behalf of the beneficiary is approved, "[REDACTED] employment after June 1, 2008 would be authorized." Alternately, counsel argued that the beneficiary is protected from the accrual of unlawful status and unauthorized employment under the *Ruiz-Diaz* litigation, referring to *Ruiz-Diaz v. United States of America*, No. C07-1881RSL (W.D. Wash. June 11, 2009).

The petitioner submitted a letter from [REDACTED] asserting that he was the pastor at Desert Bloom Ministries, which employed the beneficiary from December 2005 to December 2007. He asserted that he subsequently changed the name of Desert Bloom Ministries to [REDACTED] Ministries International and changed the location to La Habra, California, where the beneficiary continued working for him. The petitioner submitted copies of paychecks from Desert Bloom Ministries to the beneficiary dated between August 2005 and December 2006. Additionally, the petitioner submitted a copy of the beneficiary's 2005 Form W-2 indicating that she received \$8,000 from Desert Bloom Ministries during that year.

[REDACTED] asserted in his letter that the beneficiary was employed by Desert Bloom Ministries throughout 2007, but no documentary evidence was submitted in support of this assertion and the previously submitted evidence indicated that the beneficiary was employed by [REDACTED] Ministries during 2007. No explanation was provided for this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, both counsel and [REDACTED] asserted that the name of the entity Desert Bloom Ministries was changed to [REDACTED] Ministries International. However, no documentary evidence was submitted in support of the purported name change, nor was an explanation provided as to why the two ministries possess different employer identification numbers if they are in fact the same entity and merely renamed. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Regarding counsel's argument concerning *Ruiz-Diaz*, counsel refers to a case in which the district court invalidated the USCIS regulation at 8 C.F.R. § 245.2(a)(2)(i)(B), which barred religious workers from concurrently filing the Form I-485, Application to Register Permanent Resident or Adjust Status, with the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. On June 11, 2009, the court ordered that the accrual of unlawful presence, unlawful status, and unauthorized employment time

against the beneficiaries of pending petitions for special immigrant visas be stayed for 90 days to allow time for beneficiaries and their families to file adjustment of status applications and/or applications for employment authorization. The court specified that unlawful presence and unauthorized work would be tolled “[f]or purposes of 8 U.S.C. § 1255(c) and § 1182(a)(9)(B).” The former statutory passage relates to adjustment of status and the latter relates to unlawful presence in the context of inadmissibility.

The AAO notes that on August 20, 2010, the Ninth Circuit of Appeals reversed and remanded the district court’s decision. *Ruiz-Diaz v. U.S.*, 618 F.3d 1055 (9th Cir. 2010). Nonetheless, in accordance with the district court’s decision, USCIS implemented a policy tolling the accrual of unlawful status and unauthorized employment until September 9, 2009. Like the district court’s ruling, the USCIS policy waives the accrual of unlawful presence in relation to adjustment applications. It does not waive or nullify the regulations at 8 C.F.R.(m)(4) and (11), which require an alien’s qualifying experience in the United States to have been authorized under United States immigration law.

On February 22, 2012, the director denied the petition, finding the petitioner’s evidence insufficient to establish that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition.

On appeal, counsel asserts that the letter from [REDACTED] corroborates counsel’s assertion that [REDACTED] and [REDACTED] International is the same ministry.” The petitioner submits a [REDACTED] brochure and a document describing the history of [REDACTED], both of which identify [REDACTED] as the founder and leader of the organization. The petitioner also submits a printout from the website of [REDACTED] current organization, [REDACTED] providing information about “Apostle [REDACTED].” The printout states in part: “In 2006, God instructed [REDACTED] to close the doors of [REDACTED] and to take his ministry world wide. This birthed forth [REDACTED] Ministries.”

The regulation at 8 C.F.R. § 214.2(r)(3)(ii)(E), as was in effect in 2005 when the beneficiary was approved as an R-1 nonimmigrant, required an authorized official of the organization to provide the “name and location of the **specific organizational unit** of the religious organization” for which the alien would work (emphasis added). The regulation at 8 C.F.R. § 214.2(r)(6) stated:

Change of employers. A different or additional organizational unit of the religious denomination seeking to employ or engage the services of a religious worker admitted under this section shall file Form I-129 with the appropriate fee Any unauthorized change to a new religious organizational unit will constitute a failure to maintain status...”

Further, the regulation at 8 C.F.R. § 214.1(e) provides that a nonimmigrant may engage only in such employment as has been authorized. Any unlawful employment by a nonimmigrant constitutes a failure to maintain status.

In this instance, the beneficiary’s R-1 status only authorized her employment with the named employer, [REDACTED]. The AAO disagrees with counsel’s

assertion that the petitioner submitted sufficient documentary evidence to show that [REDACTED] was in fact the same employer with a new name. Further, the statement in the website printout submitted on appeal that [REDACTED] “closed the doors of [REDACTED]” contradicts the assertion that he changed the name of an existing entity. Regardless of any relationship or common leadership between [REDACTED] and [REDACTED] the beneficiary was not authorized to engage in employment with any affiliated organization or organizational unit without first obtaining authorization through the filing of a separate Form I-129 petition. Accordingly, the beneficiary’s employment with [REDACTED] beginning in 2007 constituted unauthorized employment and a failure to maintain lawful status. Additionally, the beneficiary’s work for [REDACTED] was unauthorized.

On appeal, counsel also argues that, if the pending Form I-129 filed by the instant petitioner on behalf of the beneficiary is approved, the beneficiary’s employment after June 1, 2008 would be authorized.

The AAO disagrees with this argument. While the regulation at 8 C.F.R. § 274a.12(b)(20) states that aliens whose status has expired but who have filed a timely application for an extension of stay “are authorized to continue employment **with the same employer** for a period not to exceed 240 days beginning on the date of expiration of the authorized period of stay” (emphasis added), there is no provision for a nonimmigrant religious worker to begin working for a different or additional employer without receiving prior approval as required under 8 C.F.R. § 214.2(r)(13). Therefore, the beneficiary lacked authorization to work for the petitioner or any organization other than her named R-1 employer, Desert Bloom Ministries, prior to receiving R-1 approval.

Additionally, the AAO notes that the petitioner has not submitted sufficient documentary evidence to establish the beneficiary’s continuous employment during the qualifying period. The regulation at 8 C.F.R. § 204.5(m)(11) requires compensated employment. The petitioner must submit evidence of prior compensation in the form of IRS documentation, or evidence of qualifying self-support. Permissible circumstances for self-support, outlined in the USCIS regulations at 8 C.F.R. § 214.2(r)(11)(ii), involve the beneficiary’s participation in an established program for temporary, uncompensated missionary work. The petitioner has not shown or claimed that the beneficiary participated in such a program, and has offered no evidence that the beneficiary provided for his own support. The petitioner has not submitted any evidence to demonstrate that the beneficiary was engaged in compensated employment after September 2008. Further, the only documentary evidence suggesting the beneficiary’s continuing religious work after September 2008 consists of two brochures listing the beneficiary as an [REDACTED]

Finally, counsel argues on appeal that “the director failed to consider the recently decided district court decision which held that the regulatory amendments at 8 C.F.R. § 204.5(m)(4), (11) are ultra vires to the Immigration and Nationality Act,” referring to *Shia Association of Bay Area v. United States*, No. 11-1369 SC (N.D. Cal. Feb. 1, 2012). However, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

For the reasons discussed above, the AAO agrees with the director's determination that the petitioner has not established that the beneficiary has the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition.

As an additional matter, the AAO finds that the petitioner has not established its ability to compensate the beneficiary. The AAO may deny an application or petition that fails to comply with the technical requirements of the law 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 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 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.

According to the Form I-360 petition, the beneficiary's prospective salary is \$2,000 per month. The only evidence submitted relating to the petitioner's ability to pay the beneficiary was a copy of the petitioner's 2006 financial statements. An accompanying letter from the accountants who compiled the statements indicates that they have not been audited or reviewed. No IRS documentation was submitted, nor was an explanation for its absence provided along with comparable, verifiable documentation.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.