

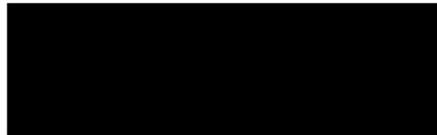
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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Office: CALIFORNIA SERVICE CENTER

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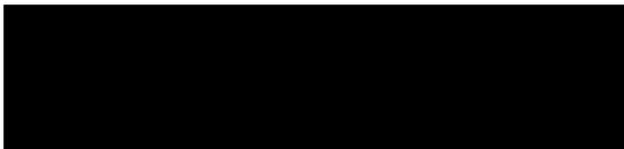
Petitioner:



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, denied the employment-based immigrant visa petition and it 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 an evangelism pastor. The director determined that, as the beneficiary worked in the United States in an unauthorized status, the petitioner had failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the petition.

Counsel asserts on appeal that the beneficiary “has indeed engaged in full-time employment in a religious occupation that should be deemed authorized by the immigration service during the requisite time period.” Counsel submits additional documentation in support of the appeal.

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 on appeal is whether the petitioner has established that the beneficiary worked continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the visa petition.

The 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 petition was filed on August 31, 2009. 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 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.

The record reflects that on August 16, 2006, the beneficiary self-petitioned to be classified as a special immigrant religious worker pursuant to section 203(b)(4) of the Act to perform services as an associate pastor with the [REDACTED]. The director denied the petition on May 15, 2007, finding that the beneficiary as the self-petitioner had not established that he worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the petition. The beneficiary/self-petitioner did not appeal the director's decision.

In her August 29, 2009 letter accompanying the instant petition, filed on August 31, 2009, counsel stated that the petitioner was submitting the application "in accordance with the *Ruiz-Diaz* litigation." Counsel refers to *Ruiz-Diaz v. U.S.*, (W.D. Wash., June 11, 2009) in which the court addressed the issue of the concurrent filing of 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. The court invalidated the USCIS regulation at 8 C.F.R. § 245.2(a)(2)(i)(B), which permits concurrent filing of the Form I-485 under certain provisions of the Act, including under section 203(b)(4), only after approval of the petition or application. On June 11, 2009, the court ordered:

Beneficiaries of petitions for special immigrant visas (Form I-360) whose Form I-485 and/or Form I-765 applications were rejected by [USCIS] pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B) and who reapply under paragraph (2) of this Order are entitled to a [sic] have their applications processed as if they had been submitted on their original submission date. Any employment authorization that is granted shall be retroactive to the original submission date.

For purposes of 8 U.S.C. § 1255(c) and § 1182(a)(9)(B), if a beneficiary of a petition for special immigrant visa (Form I-360) submits or has submitted an adjustment of status application (Form I-485) or employment authorization application (Form I-765) in accordance with the preceding paragraphs, no period of time from the earlier of (a) the date the I-360 petition was filed on behalf of the individual or (b) November 21, 2007, through the date on which [USCIS] issues a final administrative decision denying the application(s) shall be counted as a period of time in which the applicant failed to maintain continuous lawful status, accrued unlawful presence, or engaged in unauthorized employment.

The accrual of unlawful presence, unlawful status, and unauthorized employment time against the beneficiaries of pending petitions for special immigrant visas (Form I-360) shall be STAYED for 90 days from the date of this Order to allow the beneficiaries and their family members time in which to file adjustment of status petitions (Form I-485) and/or applications for employment authorization (Form I-765).

The petitioner indicated on the Form I-360 that the beneficiary had arrived in the United States on June 27, 2005. The petitioner provided a copy of the beneficiary's Form I-94, Departure Record, reflecting that he entered the United States on June 27, 2005 pursuant to a B-2 nonimmigrant visitor's visa with an authorized stay until December 26, 2005. A December 23, 2005 Form I-797 reflects that the beneficiary was approved for R-1, nonimmigrant religious worker status, from February 1, 2006 to February 1, 2008. With the petition, the petitioner submitted a copy of the beneficiary's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, for 2008 issued by the [REDACTED]

In a January 25, 2010 Notice of Intent to Deny (NOID) the petition, the director advised the petitioner that the beneficiary had not been in a lawful immigration status since December 2005, and that USCIS "can find no record of lawful immigration status to allow employment." In her February 23, 2010 letter, counsel stated that the beneficiary was authorized to work in the United States until February 1, 2008, and that:

With respect to the Beneficiary's employment between February 2, 2008 to the present, we herein assert that his employment should be deemed as authorized by the immigration service pursuant to [the] District Court's order in [REDACTED]. An I-360 Petitioner for Special Immigrant Religious Worker was filed on behalf of the Beneficiary on August 16, 2006. But for the Service's inappropriate interpretation of 8 C.F.R. § 245.2(a)(2)(i)(B) necessitating an approved I-360 Petition in order to file an I-485 Application for Adjustment of Status and I-765 Application for Employment Authorization Document, the Beneficiary would have been afforded authorization to work for [REDACTED] beyond February 1, 2008. Accordingly, in light of [REDACTED] the Beneficiary's accrual of unauthorized work from February 2, 2008 to August 31, 2009 should be tolled.

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, 2010. The requirements for tolling unlawful presence and unauthorized work is set forth in a memorandum from Donald Neufeld, Acting Associate Director of the USCIS Office of Domestic Operations, *Clarifying Guidance on*

the Implementation of the District Court's Order in Ruiz-Diaz v. United States, No. C07-1881RSL (W.D. Wash. June 11, 2009) (August 5, 2009):

1. For those who had previously submitted a concurrently filed Form I-360 with a Form I-485 or Form I-765 and whose applications were rejected pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B), and who refiles the Form I-360 and Form I-485, the period of unlawful presence and unauthorized work was tolled from either the filing date of the Form I-360 or November 21, 2007, whichever was earlier, until September 9, 2009.
2. For any alien who had an approved or pending Form I-360 with USCIS as of June 11, 2009 (the date of the district court's decision), the period of unlawful presence and unauthorized work was tolled from the date the Form I-360 was filed until September 9, 2009.
3. For any alien who filed a new Form I-360 on or after June 11, 2009, the period of unlawful presence and unauthorized work was tolled from the date the Form I-360 was filed to September 9, 2009.

The record does not reflect that the beneficiary had previously filed a Form I-485 or Form I-765 that was rejected pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B). The instant petition was filed on August 31, 2009. Accordingly, any unauthorized employment by the beneficiary was tolled only from the date the Form I-360 was filed (August 31, 2009) to September 9, 2009. Thus, any work performed by the beneficiary in the United States from February 2, 2008 to August 31, 2009 was in an unauthorized status. Any unauthorized work performed by the beneficiary in the United States interrupts the continuity of his work experience for the purpose of this visa petition.

As the beneficiary was engaged in unauthorized work in the United States, the petitioner has failed to establish that he worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the petition.

Beyond the decision of the director, the petitioner has not established how it intends to compensate the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(10) provides that the petitioner must submit:

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.

The petitioner submitted documentation indicating that the beneficiary had received compensation from the [REDACTED] in 2008, and on appeal submits a May 1, 2010 letter from the church certifying that the beneficiary served as associate pastor with the organization from July 2005 to the present. However, the petitioner submitted no documentation to establish a financial relationship with the [REDACTED] or to establish that the [REDACTED] will continue to be responsible for the beneficiary's compensation. The petitioner submitted none of the documentation outlined in the regulation above to establish how it intends to compensate the beneficiary.

Additionally, the petitioner has failed to establish that it is a bona fide nonprofit religious organization.

The regulation at 8 C.F.R. § 204.5(m)(5) provides, in pertinent part:

Tax-exempt organization means an organization that has received a determination letter from the IRS establishing that it, or a group that it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the IRC of 1986 or subsequent amendments or equivalent sections of prior enactments of the IRC.

Additionally, the regulation at 8 C.F.R. § 204.5(m)(8) provides:

Evidence relating to the petitioning organization. A petition shall include the following initial evidence relating to the petitioning organization:

- (i) A currently valid determination letter from the Internal Revenue Service (IRS) establishing that the organization is a tax-exempt organization; or
- (ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or
- (iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3) of the Internal Revenue Code [IRC] of 1986, or subsequent amendment or equivalent sections of prior enactments of the [IRC], as something other than a religious organization:
 - (A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;
 - (B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing

instrument of the organization that specifies the purposes of the organization;

(C) Organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization; and

(D) A religious denomination certification. The religious organization must complete, sign and date a religious denomination certification certifying that the petitioning organization is affiliated with the religious denomination. The certification is to be submitted by the petitioner along with the petition.

The petitioner submitted no documentation to establish its tax-exempt status, and therefore has not met the requirements of the above-cited regulation.

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.