

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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]

C1

DATE: **JAN 24 2012** 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
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 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 minister of religion. The director determined that that the beneficiary had engaged in unauthorized employment and that the petitioner had 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.

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 had engaged in unauthorized employment and 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 petitioner filed the Form I-360 on September 25, 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 [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 arrived in the United States on March 8, 2000. Therefore, the beneficiary was in the United States throughout the entire two-year qualifying period. On the Form I-360, under "Current Nonimmigrant Status," the petitioner wrote "R-1." The record shows that the beneficiary's R-1 nonimmigrant religious worker status began on January 8, 2001 and expired on December 2, 2005.

The petitioner claimed that the beneficiary started working for its church as a minister of religion volunteer in January of 2006 following the expiration of his R-1 status. As part of its Request for Evidence (RFE) response on February 16, 2010, the petitioner submitted a letter stating that the beneficiary had been volunteering for the two years prior to the filing of the petition. The petitioner claimed that the beneficiary received donations of groceries, clothing, housing, and cash from members of its congregation.

On appeal, counsel asserts that the beneficiary served as a volunteer for the petitioner in the two years predating the filing of the petition so his employment was authorized. Counsel additionally claims that the beneficiary's unauthorized work was actually a break for further training. Lastly, counsel asserts that a district court decision, *Ruiz-Diaz v. United States*, No. C07-1881RSL (W.D. Wash. June 11, 2009), permits the beneficiary's periods of unlawful presence to be waived.

The AAO finds that the petitioner's claims of voluntary employment and remuneration from the congregation are disqualifying. First, as it relates to the beneficiary's receipt of donations from individual members of the congregation, in supplementary information published with the proposed rule in 2007, U.S. Citizenship and Immigration Services (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 AAO quotes 8 C.F.R. § 204.5(m)(11)(iii) again here, along with its prefatory clause from 8 C.F.R. § 204.5(m)(11):

If the alien was employed in the United States during the two years immediately preceding the filing of the application and . . . [r]eceived 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.

The regulation clearly refers to employment rather than volunteer work. The self-support here 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.

As previously stated, the beneficiary has not been in lawful status since December 2, 2005. 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 functions while in the United States; it cannot suffice to claim that an alien entered the United States as an R-1 nonimmigrant, who, after his status expired, ended up volunteering for a religious organization. The record therefore reflects that the petitioner was not in an authorized immigration status during the two years immediately preceding the filing of the visa petition. Accordingly, any work that he may have performed in an unauthorized status would interrupt the continuity of the qualifying work experience.

Next, counsel argues that the beneficiary's unauthorized work was actually a break "for further" training. Specifically, counsel claims that after January of 2006 the beneficiary "served a one

year apprenticeship and met all of the requirements of [REDACTED] position of Lay Minister.” Counsel’s argument is not persuasive. First, she has not provided any documentary evidence to support her claims. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Second, counsel’s undocumented claim contradicts evidence in the record of proceeding. The beneficiary’s “Lay Minister Certification” certificate is dated August 29, 1999. However, the Minutes of the 71st International General Assembly state that the lay minister certification requires completion of a one-year apprenticeship. If the beneficiary was already certified in 1999, then he should have completed his apprenticeship before that date, not after January of 2006 as counsel claims.

Finally, counsel references district court decision, *Ruiz-Diaz*. Counsel notes that this case permits persons who had filed I-360 petitions and who had fallen out of status due to not being permitted to file concurrent I-485 applications to have periods of unlawful presence waived and to adjust status.

As counsel indicates, the decision referred to unlawful presence that aliens accrued while a Form I-360 was pending, affecting certain aliens’ ability to adjust status. At issue here, however, is unauthorized employment and a lack of status before the filing of the Form I-360. The *Ruiz-Diaz* decision did not uniformly waive unlawful presence or unauthorized employment prior to the filing of the petition. Significantly, when the district court issued the *Ruiz-Diaz* decision in June 2009, the regulations at 8 C.F.R. §§ 204.5(m)(4) and (11) were already in effect, but the court did not strike down, limit, or modify the application of those regulations. The decision applied strictly and solely to adjustment of status and did not require USCIS to approve petitions for aliens who failed to meet the lawful status and/or employment authorization requirements at the petition stage. The *Ruiz-Diaz* decision does not retroactively provide the beneficiary with lawful status, work authorization, or any other benefit. Moreover, the petitioner filed the Form I-360 after September 9, 2009, so the provisions of *Ruiz-Diaz* were not even applicable to the petition.

The petitioner has failed to submit sufficient documentation to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the petition.

Under 8 C.F.R. §§ 204.5(m)(4) and (11), the petition cannot be approved, because the beneficiary’s religious employment in the United States during the qualifying period was not authorized under United States immigration law.

Beyond the decision of the director, the AAO has additional questions regarding whether the beneficiary will be coming to the United States to work in a full-time position pursuant to 8 C.F.R. § 204.5(m)(2). Specifically, the petitioner has submitted contradictory information regarding the beneficiary’s weekly schedule as a minister of religion. With the petition, the petitioner included a schedule of approximately 15 hours of week of scheduled work with some additional non-scheduled

responsibilities. On February 16, 2010 in response to the director's January 13, 2010 RFE, the petitioner indicated that the beneficiary engaged in approximately 35 hours of religious activities each week. The petitioner later stated that the beneficiary was engaged in approximately four hours of weekly work on the boys' ministry, but the petitioner had previously stated that the beneficiary only worked on such efforts two times a month. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

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.

ORDER: The appeal is dismissed.