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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: JUL 2 6 2012

Office: CALIFORNIA SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

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, initially approved the employment-based immigrant visa petition on May 10, 2000. On further review, the director determined that the beneficiary was not eligible for the visa preference classification. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the preference visa petition stating the reasons therefore and subsequently exercised her discretion to revoke the approval of the petition on May 31, 2011. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will reject the appeal and, in the alternative, 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 a sacred music accompanist. In the Notice of Intent to Revoke, issued on February 5, 2003, the director found that the petitioner had not established that the beneficiary had the requisite two years of qualifying work experience immediately preceding the filing of the petition and afforded the petitioner 30 days to offer evidence in support of the petition and in opposition to the proposed revocation. In the final decision, the director found that the petitioner had failed to respond to the Notice of Intent to Revoke.

On appeal, the petitioner submits a photocopy of a United States Postal Service Certified Mail Receipt, a letter from counsel dated February, 27, 2003, letters from the signatory of the petition and the petitioner's treasurer, dated February 19, 2003, a copy of a page from the Federal Register, Volume 56, No. 249, copies of two Employment Authorization Cards held by the beneficiary, copies of several Form I-797 Approval Notices, and an article published by the American Immigration Lawyers Association.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) states that, for purposes of appeals, certifications, and reopening or reconsideration, "affected party" (in addition to U.S. Citizenship and Immigration Services (USCIS)) means the person or entity with legal standing in a proceeding. The USCIS regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*) states that an appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, USCIS will not refund any filing fee it has accepted.

Here, the party that filed the appeal was who claims to represent the petitioner. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 292.4(a) as well as the instructions to the Form I-290B require that a "new [Form G-28, Notice of Appearance as Attorney or Representative] must be filed with an appeal filed with the Administrative Appeals Office." This regulation applies to all appeals filed on or after March 4, 2010. *See* 75 Fed. Reg. 5225 (Feb. 2, 2010). As the Form I-290B, Notice of Appeal, was not accompanied by a Form G-28, the AAO requested that counsel submit a properly completed Form G-28. In response, the AAO received a Form G-28 which was signed by counsel and the *beneficiary*. Although not required to do so, the AAO afforded counsel a second opportunity to submit a properly completed Form G-28. In response to the AAO's second request, the AAO received a Form G-28 which is not signed by Rather, the form contains the illegible signature of another individual who indicated that he or she was signing "on behalf" of

As the signature on the Form G-28 indicates the individual's attestation of eligibility to appear as an attorney, there is no provision in the regulations or on the form which allows someone other than counsel to sign the form. 8 C.F.R. § 292.4(a). Therefore, the record does not contain a new, valid, fully executed Form G-28, authorizing to represent the petitioner. As filed the appeal but failed to submit a properly signed and executed G-28, the AAO cannot find that the appeal was filed by an affected party with legal standing in the proceeding. Therefore, the AAO must reject the appeal as improperly filed.

Even if the appeal had been properly filed, the evidence submitted does not establish eligibility for the benefit sought. Therefore, in the alternative, the AAO will dismiss the appeal.

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.*

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).

At the time the petition was approved in 2000, the regulation at 8 C.F.R. § 204.5(m)(1) provided:

(m) *Religious workers.* (1) An alien, or any person in behalf of the alien, may file an I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States. The alien must be coming to the United States solely for the purpose of carrying on the vocation of a minister of that religious denomination, working for the organization at the organization's request in a professional capacity in a religious vocation or occupation for the organization or 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. All three types of religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition. Professional workers and other workers must obtain permanent resident status through immigration or adjustment of status on or before September 30, 1997, in order to immigrate under section 203(b)(4) of the Act as section 101(a)(27)(C) special immigrant religious workers.

The regulation at 8 C.F.R. § 204.5(m)(3) stated, in pertinent part, that each petition for a religious worker must be accompanied by:

(ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:

> (A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

The Form I-360 petition was filed on March 30, 1998. According to the petition and supporting materials, the beneficiary arrived in the United States on April 13, 1996. In a letter accompanying the petition, the signatory of the petition, stated that the beneficiary "has been a member of our congregation since 1996, and has been volunteering her services up to the present date." Later, in the letter, stated "Since her arrival in April of 1996, has been volunteering for the church." In a second letter, also submitted with the petition, stated that ' has been a certified member of the since April 1996 to the present, and has been voluntarily serving our church as a Sacred Music Accompanist."

In a January 21, 2000 response to USCIS, the petitioner's counsel at that time, stated that while the beneficiary "has been serving the church here in the United States she has been supported by her family in Korea." To support this claim, prior counsel submitted a sworn statement from the beneficiary's mother-in-law, affirming that she has been "supporting [her] son and his family for his living in the U.S. since April 1996 . . . . " Counsel additionally submitted a January 18, 2000 letter from again confirming the beneficiary's work as a volunteer and indicating that the church "will add" the beneficiary to the payroll.

The petition was approved on May 10, 2000. The beneficiary subsequently filed a Form I-485, Application to Adjust Status, on June 7, 2000. On the Form G-325A, Biographic Information, accompanying the Form I-485, the beneficiary indicated that from April 1996 to the present (she signed the form on May 24, 2000), she had held the occupation of "sacred music accompanist" for the petitioning church with "(volunteer basis)" typed under the petitioner's name.

On February 5, 2003, the director issued a Notice of Intent to Revoke the Petition, stating that, "[w]hile adjudicating the adjustment of status application, it was realized that the I-360 petition was approved in error as the alien does not qualify for the benefit sought." The director noted that, at the time of filing, the petitioner indicated that the beneficiary had worked as a volunteer since April 1996. The director cited the regulation at 8 C.F.R. 204.5(m) as it then existed, and stated that unpaid, volunteer experience is insufficient to fulfill the requirement of two years of qualifying work experience immediately preceding the filing of the petition. The director afforded the petitioner a period of 30 days "to offer evidence in support of the petition and in opposition to the proposed revocation."

The director revoked the petition on May 31, 2011. In the decision, the director stated:

> In the USCIS notice mentioned above, the appropriate regulation authorizing the intent of revocation was cited, along with the reason(s) for that intent (Notice of

> Intent to Revoke enclosed). A reasonable amount of time was afforded to offer evidence in support of the petition and in opposition to the proposed revocation.
>
> USICS records indicate that the notice of intent to revoke was issued, but the California Service Center has received no communication concerning this matter. Therefore, the petition is revoked as of the date of approval.

On appeal, counsel asserts that the petitioner did in fact respond to the Notice of Intent to Revoke. In support of this assertion, the petitioner submits a photocopy of a United States Postal Service Certified Mail Receipt, with a postmark stamp date of February 27, 2003. The receipt contains a notation with the beneficiary's name and contains the following address under "Sent To:"

> Laguna Niguel, CA 92067-0136

Counsel states that "the package can no longer be tracked because the record is 8 years old as of the date of this appeal." The petitioner additionally submits a letter from counsel and letters from the signatory of the petition and the petitioner's treasurer, purportedly included in the response to the Notice of Intent to Revoke, asserting that the beneficiary was compensated during the two years immediately preceding the filing of the petition.

The AAO notes that the zip code listed on the Certified Mail Receipt, does not match the one contained in the address provided on the Notice of Intent to Revoke, (emphasis added). The record does not indicate that the California Service Center received any communication from the petitioner concerning the Notice of Intent to Revoke. Although counsel asserts that the petitioner responded to the notice, the evidence offered does not establish that such a response was effectively submitted. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Regardless, the AAO finds the arguments and evidence purportedly submitted in response to the Notice of Intent to Revoke insufficient to overcome the grounds for revocation. Regarding the director's finding that the beneficiary was an unpaid volunteer, counsel asserted that the beneficiary did receive remuneration and stated that the beneficiary testified to cash payments during her adjustment interview. Counsel additionally submitted a letter dated February 19, 2003, in which stated, in pertinent part:

> received a stipend of $200.00 - $300.00 per month from April 1996 until July 2000 for her volunteer services as a full-time Sacred Music Accompanist. Further, advised our board she was in F-2 status at that time and did not wish to violate the terms of her immigration visa and therefore offered to serve on a volunteer basis. However, it is the policy of our church to pay some

> remuneration to our full-time staff. Therefore, it was resolved she would received [sic] a monthly stipend – this arrangement was made based upon the advice of our tax consultant at the time.

In a separate letter also dated February 19, 2003, the treasurer of the petitioning church asserted that "church records indicate that [redacted] was paid the sum of $ 200.00 - $ 300.00 per month from April 1996 until July 2000 for her full-time services as the Sacred Music Accompanist at our church." Copies of the referenced church records were not submitted and no further evidence was submitted to document any compensation purportedly paid to the beneficiary. Although the record contains copies of several checks from the petitioner to the beneficiary submitted in support of the Form I-485, none of the checks pertain to the qualifying two-year period. 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)).

Further, the claim that the beneficiary received compensation directly contradicts prior assertions by the petitioner at the time of filing and by the beneficiary on her Form G-325 that she worked as a volunteer. 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). In a letter dated February 27, 2003, counsel argued that the definition of "volunteer" is "to offer to enter into service of one's own free will," and that the petitioner's statements at the time of filing regarding the beneficiary's voluntary service referred to her "state of mind" rather than a lack of compensation. The AAO does not find this argument convincing.

Counsel alternately argued that the regulations at 8 C.F.R. § 204.5(m) as they then existed did not require an alien's experience during the two-year qualifying period to be compensated employment. Counsel stated:

> In interpreting 8 C.F.R. 204.5(m) the Service states that "the prior experience must have been full-time salaried employment" and "accordingly, volunteer activities do not constitute qualifying work experience." ...
>
> This interpretation constitutes impermissible rule-making on the part of the Service. The statute is silent and does not state that the employment must be "full-time, salaried" or that "volunteer activities" do not fall within the intent of the legislatures [sic] who drafted 8 C.F.R. 204.5(m).
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> Further, the drafters of 8 C.F.R. 204.5(m) did, in fact, contemplate religious workers who were uncompensated volunteers receiving wages or other remuneration.

Volume 56, No. 249 of the Federal Register states in pertinent part:

> "Two commentators asked that the regulation specifically indicate that religious volunteers need not be compensated. The final rule has been revised to account more clearly for uncompensated volunteers, whose services are engaged [but] who are not technically employees. Any alien who receives remuneration for services is an employee." [56 Fed. Reg. 66965, 66966 (Dec. 27, 1991).]

The AAO notes that the cited passage from the Federal Register concerns a regulation that applied only to R-1 nonimmigrant religious workers, not to special immigrant religious workers. The final rule for special immigrant religious workers was promulgated separately, at 56 Fed. Reg. 60897 (Nov. 29, 1991) and contained no provision for uncompensated volunteers.[1]

The director's determination that volunteer work was not qualifying was based upon the legislative history of the religious worker provision of the Immigration Act of 1990 which states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." *See* H.R. Rep. No. 101-723, at 75 (1990).

Section 101(a)(27)(C)(iii) of the Act requires that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is not paid, the assumption is that he/she is engaged in other, secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who in accordance with their vocation live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and

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[1] Current regulations have retained this distinction. While certain R-1 nonimmigrants may rely on self-support, there is no such provision for immigrant religious workers. Specifically, as it relates to evidence of past employment, the current regulations at 8 C.F.R. § 204.5(m)(11) require evidence of either salaried or non-salaried employment. Although the regulation contemplates one "who received no salary but provided for his or her own support," the regulation is referring to those aliens who were R-1 nonimmigrants that were part of an established program for missionaries at 8 C.F.R. § 214.2(4)(11)(ii). See also 73 Fed. Reg. 72277, 72278 and 77282 (Nov. 26, 2008) which explains that uncompensated workers are restricted only to those R-1 nonimmigrants that are part of an established missionary program.

religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and generally salaried. To hold otherwise would be contrary to the intent of Congress.

The AAO therefore agrees with the director's finding in the Notice of Intent to Revoke that the petitioner has not demonstrated that the beneficiary had the required two years of qualifying experience immediately preceding the filing of the petition.

On the Form I-290B, Notice of Appeal, counsel additionally argues as follows:

> The USCIS revokes the petition on the basis that no communication was received by the California Servce [sic] Center concerning this matter. A review of the case history will show that the USCIS issued an EAD for 11 years on this case which constitutes 11 years of communication.

The AAO is not persuaded by counsel's argument. The revocation was based not on a lack of any communication with the petitioner, but on the petitioner's failure to submit evidence to overcome the grounds for revocation as described in the Notice of Intent to Revoke.

Counsel also asserts that USCIS "administratively closed the case in 2004" and, subsequently, "the case was re-opened and the revocation was sent." Counsel argues that the law does not permit for "the reopening of a case and then a revocation." The AAO disagrees with counsel's interpretation of the law. As cited above, Section 205 of the Act, 8 U.S.C. § 1155, explicitly states that the Secretary of the Department of Homeland Security "may, **at any time**, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204" (emphasis added).

Further, the regulation at 8 C.F.R. § 205.2(b) requires USCIS to give the petitioner the opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval. A decision to revoke approval of a visa petition can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations specified in the notice of intention to revoke. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988). In this instance, the petitioner was provided notice of the specific deficiencies found by the director and given an opportunity to respond.

Finally, on the Form I-290B, counsel argues that the case "must be considered under the new religious worker regulations as implemented in 2008, and not revoked under the regulations as they existed in 2003." Counsel refers to the regulations published on November 26, 2008, as required under section 2(b)(1) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008). Supplementary information published with the new rule specified:

> All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information.

73 Fed. Reg. 72276 (Nov. 26, 2008). The instant case was not "pending" on November 26, 2008, as it had been approved on May 10, 2000. Therefore, the director properly revoked the petition under the regulations as they existed at the time the case was initially approved.[2]

For the reasons discussed above, the AAO finds that the petitioner has not overcome the grounds for revocation as described in the February 5, 2003 Notice of Intent to Revoke. Accordingly, the AAO will affirm the director's decision and dismiss the appeal.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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, if the AAO did not reject the appeal, it would dismiss the appeal.

ORDER: The appeal is rejected or, in the alternative, dismissed.

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[2] The current regulations are more restrictive than the previous regulations in that they codify the case law and legislative history and clearly indicate that any prior work must have been compensated. The preamble to the 2008 regulations explains that allowing voluntary work "to be the basis for . . . special immigrant religious worker classification opens the door to an unacceptable amount of fraud and increased risk to the integrity of the program." See 72 Fed. Reg. 20442, 20446 (April 25, 2007). Therefore, application of the current regulations to the instant petition would presumably result in the same outcome.