

identifying data deleted to
prevent identity unwarranted
invasion of personal privacy

PUBLIC COPY

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**



C1

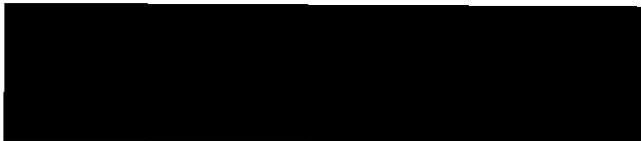
DATE **JUN 14 2012** OFFICE: CALIFORNIA SERVICE CENTER

FILE:

IN RE: 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 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 with the field office or service center that originally decided your case by filing a 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, (“the director”) denied the employment-based immigrant visa petition. The petitioner timely filed an appeal to the denied petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The AAO will dismiss the appeal.

The petitioner is a temple. 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 monk. On January 3, 2011, the petitioner filed the Form I-360 petition. On March 22, 2011, the director issued a Request For Evidence (“RFE”), to which the petitioner timely responded. On June 2, 2011, the director denied the petition, finding that the employer failed to provide all of the requested evidence in the RFE and therefore did not establish that it was a bona fide non-profit religious organization in the United States. The director also determined that the beneficiary had not been in lawful status for at least the two year period immediately preceding the filing of the petition.

On appeal, the petitioner submits a brief and further documentation.

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 first issue is whether the petitioner submitted sufficient evidence to respond to the director's RFE and thereby qualify as a bona fide non-profit religious organization in the United States. The regulation at 8 C.F.R. § 204.5(m)(1) states:

(m) Religious workers. This paragraph governs classification of an alien as a special immigrant religious worker as defined in section 101(a)(27)(C) of the Act and under section 203(b)(4) of the Act. To be eligible for classification as a special immigrant religious worker, the alien (either abroad or in the United States) must:

(1) For at least the two years immediately preceding the filing of the petition have been a member of a religious denomination that has a bona fide non-profit religious organization in the United States.

The regulation at 8 C.F.R. § 204.5(m)(5) further states:

Bona fide non-profit religious organization in the United States means a religious organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the IRS confirming such exemption.

Bona fide organization which is affiliated with the religious denomination means an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code and possessing a currently valid determination letter from the IRS confirming such exemption.

In the March 22, 2011 RFE, the director asked that the petitioner submit:

Tax Exempt Status Organization: Records show that the Internal Revenue Service (IRS) certification letter was issued on March 21, 2008. On February 22, 2010, the petitioner amended the organization's article of incorporation. Submitted evidence shows that the petitioner only notified the authority of Texas State; but, the petitioner has not notified the IRS. Submit evidence to clarify the petitioning organization, after the above mentioned amendment, is exempted from taxation in accordance with section 501(c)(3) of the Internal Revenue Code ("IRC") to establish that the petitioner is a bona fide nonprofit religious organization in the United States or that the petitioner is a bona fide organization which is affiliated with the religious denomination or religious organization which is affiliated with the religious denomination or religious organization, as appropriate. **If there is any name/address difference between the work location and the organization address on the IRS letter, submit evidence to explain the variance.**

Also, please explain why the petitioner has not notified the IRS about the change and attach supporting evidence for the explanation.

Submit article of incorporation and bylaws of the petitioner, before the amendment and now.

(Emphasis added).

On April 12, 2011, the petitioner responded to the RFE. Regarding the above request for information, prior counsel for the petitioner stated only:

There was an error in the paperwork and an Amendment was never made in February 2010 on the State or Federal level. The Article of Incorporation stands as submitted in July 2003.

Counsel provided no explanation for the error, nor did he attempt to reconcile his claim with the documents submitted in the record in which the petitioner's Board of Directors specifically indicated that such an amendment had been effected. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director did not find this explanation to be sufficient. The director stated:

The issue to be discussed is whether the petitioner has responded with all requested evidence. 8 C.F.R. § 103.2(b) states the following in regarding to failure to respond to RFE notice,

(13) Effect of failure to a request for evidence or appearance. If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

The director further stated:

First, the petitioner failed to provide requested evidence. The RFE requested,

If there is any name/address difference between the work location and the organization address on the IRS letter, submit evidence to explain the variance.

AND

Submit article of incorporation and bylaws of the petitioner, before the amendment and now.

The petitioner did not submit evidence to explain the variance in address on documents of the response. For example, the electric billing for January 2011, statement date 1/13/2011, shows the service address is at [REDACTED]. However, the telephone bill (Connexions Telecom) for January 2011, ill dated January 1, 2011 [sic] shows that the service address is at [REDACTED]. As another example, submitted banking statement of International Bank, dated February 28, 2011, shows another (different) address at [REDACTED]. And although there was no amendment, the RFE requested the article of incorporation and bylaws. But, the petitioner did not submit the present article of incorporation and bylaws of the petitioner. And the petitioner did not submit past evidence of compensation for similar positions and budgets, as requested. Thus, the response the response failed to provide all requested evidence.

On appeal, the petitioner submitted a letter explaining the variance of physical addresses that the director referred to in the denial decision. The petitioner through counsel also provided an explanation for the different town names that the director referred to in the denial decision. The AAO will accept this evidence on appeal. In the RFE, the director only generally requested an explanation of the variances of addresses. It was not until the denial decision that the director explained to which specific variances in addresses she was referring. The AAO cannot fault the petitioner for not responding to the director's request to submit evidence and explain the variance between the work location and the organization address on the IRS letter, because the director did not fully explain to what specifically she was referring. Therefore, the AAO will accept the petitioner's explanation and additional evidence on appeal addressing the director's findings.

On appeal, counsel states:

The varying service addresses are because the U.S. Postal Service has changed the address of the property in the years since the land was developed by the Petitioner. The issue of the name of the city as either Fate or Royse City is also a U.S. Post Office issue because they share the same zip code. The correct designation is Royse City. Please see attached statement by the Petitioner regarding the discrepancy and the correct physical address of [REDACTED]. The address is the same as the Beneficiary's work location.

In addition to counsel's explanation of the various town names on appeal, the petitioner also provided a letter from [REDACTED] which states that:

[REDACTED] was the original address when the petitioner bought the land back in 1995. We had not paid attention to changing them on the utilities. We just continued to pay when the bills came due.

[REDACTED] on the telephone bill is the Connections Telecom address. They are our neighbors and bill us for our service by our phone number 4 [REDACTED] - [REDACTED]

Our correct physical address for the 37.2 acres is [REDACTED]

The combination of counsel's explanation of the distinctions in the town names and the petitioner's explanations of the varying physical address is sufficient to respond to the director's concerns in the RFE and in the denial decision. Therefore, the AAO will overturn this part of the director's decision.

However, the AAO will uphold the director's ultimate determination because on appeal the petitioner still did not submit the articles of incorporation and the bylaws of the petitioner, which were specifically requested by the director in the RFE. The petitioner failed to submit these documents both in response to the RFE, and has failed to submit them again on appeal. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Because the petitioner did not submit the director's requested evidence in response to the RFE, the AAO will uphold the director's dismissal on this basis.

The second issue is whether the beneficiary possesses two years of lawful work experience in the United States immediately prior to the filing of the Form I-360 petition. The regulation at 8 C.F.R. § 204.5(m)(4) states that:

(m) *Religious workers.* This paragraph governs classification of an alien as a special immigrant religious worker as defined in section 101(a)(27)(C) of the Act and under section 203(b)(4) of the Act. To be eligible for classification as a special immigrant religious worker, the alien (either abroad or in the United States) 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.

(Emphasis added).

Further, the regulation at 8 C.F.R. § 204.5(m)(11) states that:

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.

(Emphasis added).

The current Form I-360 petition was filed on January 3, 2011. According to the regulation above, the beneficiary must have been working in lawful status for two years immediately prior to the filing of the petition, from January 3, 2009 to January 3, 2011. The record reflects that the beneficiary entered the United States in R-1 nonimmigrant status on July 5, 2007, which expired on July 4, 2010. Since that time, the beneficiary has been out of status. Therefore, from the period of July 5, 2010 to January 3, 2011, the beneficiary was working without lawful status in the United States.

On appeal, the petitioner through counsel argues that the beneficiary has two years of lawful experience. Counsel states:

The Beneficiary has been fully engaged in the vocation since his ordination at Wat Ongtue Mhavihan in Vientiane, Laos PDR in 1998. The information was presented with previous petitions and provided to the attorney filing this petition. Through no fault of the Petitioner and the Beneficiary, the documents were not submitted to USCIS at the time of filing. The Beneficiary has been carrying on the vocation of a Monk for at least two years as required in INA § 101(a)(27)(C). We submit herewith a letter from [REDACTED] confirming Beneficiary's experience with the Temple in R-1 status since July 5, 2007. It is this R-1 experience that qualifies the Beneficiary for the instant I-360 petition. We respectfully request that the documents be accepted now.

In addition, on appeal the petitioner submits a letter from [REDACTED] as well as [REDACTED] membership card.

The AAO is not persuaded by this argument. As the regulation at 8 C.F.R. § 204.5(m)(4) states, the beneficiary's two years of lawful experience must be *immediately preceding the filing of the petition*, the petitioner must show that the beneficiary had been working continuously in lawful status during the two year period from January 3, 2009 to January 3, 2011. It does not matter that the beneficiary worked at the temple since July 5, 2007, since the beneficiary was not in lawful R-1 status for the entire two year period immediately preceding the filing of the petition.

In the appeal brief, counsel further states:

The Petitioner and the Beneficiary relied on the advice of prior counsel regarding the effects of filing an I-360 on the nonimmigrant status of the Beneficiary. They are now in the process of working with current immigration counsel to file a nunc pro tunc petition to request an extension of R-1 status to correct this deficiency.

First, although counsel claims that the petitioner and the beneficiary relied on the advice of prior counsel regarding the effects of filing an I-360 on the nonimmigrant status of the Beneficiary, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based

upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

Regardless, the AAO is not persuaded by counsel's arguments. Counsel stated that the petitioner and the beneficiary are now in the process of working with current immigration counsel to correct the deficiency regarding the beneficiary's unlawful status. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Therefore, the AAO cannot find that the beneficiary worked in lawful status during the two year period immediately preceding the filing of the petition, and will dismiss the appeal.

As an additional matter, the AAO also finds that the petitioner failed to establish that the petitioner has the ability to compensate the beneficiary. 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 regulation at 8 C.F.R. § 204.5(m)(10) requires that the petitioner submit verifiable evidence of how the petitioner intends to compensate the alien. In the Form I-360 petition attestation clause, the petitioner stated that, "non-salaried compensation consists of room and board and all other necessities." The petitioner did not submit any evidence showing that it provided the room, board and all other necessities to the beneficiary. In response to the RFE, the petitioner stated that it submitted bank account statements to show that it had the ability to compensate the beneficiary. However, bank account statements are insufficient to show the ability to compensate because they show the amount in an account on a given date, and cannot show the sustainable ability to compensate. Further, bank statements are insufficient to show that the beneficiary actually received room, board and other necessities. The petition provides no actual evidence to show that the beneficiary received this non-salaried compensation. Further, in the notice of denial, the director stated that the petitioner did not submit past evidence of compensation for similar positions and budgets, as requested. Therefore, the AAO finds that the petitioner has failed to establish that the petitioner has the ability to compensate the beneficiary.

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