

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
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[Redacted]

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Date: **JUN 15 2012** Office: CALIFORNIA SERVICE CENTER [Redacted]

IN RE: [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 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,

U. Deanna
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO remanded the matter to the California Service Center for consideration under new regulations. The director again denied the petition and, following the AAO's instructions, certified the decision to the AAO for review. The AAO will affirm the director's certified decision.

The petitioner is a church. It seeks classification for 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 associate pastor. The director determined that the petitioner had failed to demonstrate its ability to compensate the beneficiary and that the petitioner had failed a compliance review after a site check revealed that the petitioner's church did not appear to be functioning as indicated on the petition.

The petitioner submits a statement and additional evidence on certification.

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 are whether the petitioner has established that it has ability to compensate the beneficiary and that its church is functioning as indicated on the petition.

The regulation at 8 C.F.R. § 204.5(m)(10) states the following:

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.

At filing, the petitioner submitted a letter dated April 24, 2006 stating that it would pay the beneficiary \$1,800 per month (21,600.00 per year). This claim was reiterated in a January 27, 2007 letter indicating that the petitioner had paid the beneficiary the claimed salary. In support of the claims, the petitioner provided the beneficiary's uncertified Internal Revenue Service (IRS) Forms 1040 for 2004, 2005, and 2006 in response to the director's December 11, 2006 Request for Evidence (RFE). The petitioner additionally submitted an unaudited profit and loss statement from 2006. The profit and loss statement indicated a payment of \$21,600.00 in payroll expenses, the beneficiary's proffered salary; however, the statement did not reflect for whom the church may have budgeted that money for that year, and the record does not indicate that the beneficiary as assistant pastor is the petitioner's only employee.

Within her June 5, 2009 certification decision, the director noted that the petitioner had failed to submit its certified IRS Forms W-2 for work performed by the beneficiary and instead submitted uncertified IRS Forms W-2 as well as an unaudited financial statement. The regulation at 8 C.F.R. § 204.5(m)(10) requires that all available IRS documentation must be provided in order to establish past compensation or that the petitioner must provide an explanation for its absence. The director concluded that the petitioner had accordingly failed to establish its ability to compensate the beneficiary.

In his June 30, 2009 response to the director's certified decision, counsel asserts that the petitioner's church is a financially stable organization with gross revenue of over \$5,000,000.00 in 2007. Counsel claims that the petitioner has paid the beneficiary the proffered wage for the past five years and that it plans to pay the beneficiary an additional pension plan including medical insurance, transportation, and vacation if and when he gains lawful permanent residence status in the United States. 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).

Counsel submitted IRS Forms W-2 from the petitioner to the beneficiary from 2004 to 2008 in the respective amounts of \$18,000.00, \$21,600.00, and \$21,600.00, \$21,600.00, and \$21,600.00. Counsel also submitted IRS transcripts of the beneficiary's Forms 1040 for 2004 to 2007 as well as Social Security records, all of which are consistent with the information on the IRS Forms W-2.

On January 30, 2012, the petitioner submitted consolidated financial statements from its parent organization, the [REDACTED], from 2006 and 2007. The AAO notes that the petitioner has continuously indicated that it is responsible for paying the beneficiary's salary. Accordingly, these financial statements reflecting this parent organization's finances have no bearing upon the petitioner's claimed ability to compensate the beneficiary. Also on January 30, 2012, the petitioner submitted copies of its October through December of 2008 bank account statements. 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).

With regard to prior compensation, the director erroneously faulted the petitioner for failing to submit certified IRS Forms W-2. This is not a requirement under 8 C.F.R. § 204.5(m)(10). As the petitioner has submitted evidence in the form of IRS Forms W-2 for 2004 to 2006 demonstrating its prior payment of the proffered salary to the beneficiary, the AAO finds that the petitioner has sufficiently demonstrated its ability to compensate the beneficiary.

Regarding the director's remaining ground for denial, the regulation at 8 C.F.R. § 204.5(m)(12) states:

Inspections, evaluations, verifications, and compliance reviews. The supporting evidence submitted may be verified by [U.S. Citizenship and Immigration Services] USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

The director sent the petitioner an RFE on December 17, 2007, asking for the petitioner to submit evidence explaining why no one was on site during any of the three USCIS site visits and why no one had responded to several phone messages that USCIS had left for the petitioner. Reverend Castillo of the petitioner's church submitted a letter dated February 11, 2008 in response. He apologizes that his staff had consisted mostly of infrequent volunteers and was therefore not able to answer the USCIS calls that the director had mentioned in the RFE. Furthermore, he states that he had recently switched to a new voicemail system and therefore did not receive the messages from USCIS. He states that the beneficiary attends two to three conferences a year and had some difficult family matters come up recently, so he has often not been present at the church. Accordingly, the beneficiary missed USCIS site visits and calls.

Within her original May 20, 2008 decision denying the petition, the director had specifically noted that USCIS had visited the petitioner's church on September 27, 2007, October 11, 2007, and November 9, 2007. The director stated that USCIS officers found that no one affiliated with the organization was on site during any of the three visits. Additionally, USCIS called the petitioner several times at the number displayed at the petitioner's location. No one ever answered these calls or returned the voicemails left for the petitioner. The director found that the petitioner's church did not appear to be functioning as indicated on the petition. The director came to the same conclusion within her June 5, 2009 certification decision.

In his June 30, 2009 response to the director's certified decision, counsel asserts that the petitioner's church mostly depends on volunteer work, so it does not have a receptionist to handle all of its clerical duties. The AAO does not find this argument to be persuasive evidence that the church has been running as normal but for the lack of a receptionist, as no one affiliated with the church was ever present during any of the three USCIS site visits.

Counsel explained that [REDACTED] the church's senior pastor, has his own plumbing company, which keeps him busy and which has necessitated the church's need for the beneficiary to work there. Although the petitioner has submitted contracts regarding his outside business from 2007, the AAO finds that the petitioner has still failed to explain why no one such as the beneficiary was ever present to greet USCIS officers during their repeated visits or to take or respond to their repeated phone calls, especially since the beneficiary has purportedly been working there for 35 to 60 hours per week since February 15, 2004.

Counsel has submitted a certificate of formation from the Texas Secretary of State, church flyers, and photographs, all in an attempt to establish the legitimate existence of its church. Notwithstanding, the AAO finds that, due to the petitioner's failure regarding the USCIS compliance review based upon numerous attempts by USCIS to contact the petitioner's staff in person or by phone, the petitioner's church does not appear to be functioning as indicated on the petition. Additionally, the AAO does not find this argument to be persuasive, as it appears that the beneficiary may not be working at the church in a full-time capacity as previously claimed by the petitioner.

The AAO will affirm the certified denial for the above stated reasons. 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. The petitioner has not sustained that burden.

ORDER: The director's decision of June 5, 2009 is affirmed. The petition is denied.