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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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DATE: OFFICE: CALIFORNIA SERVICE CENTER

JUN 19 2012

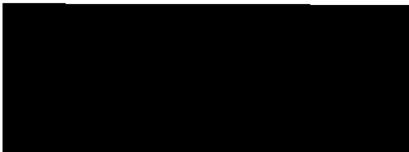


IN RE: Petitioner:  
Beneficiary:



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:

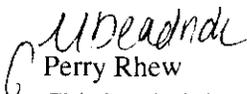


INSTRUCTIONS:

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, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will 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 community resource pastor. The director determined that the beneficiary had engaged in unauthorized employment during the two-year period immediately preceding the filing date of the 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).

At issue on appeal is whether or not the beneficiary had engaged in unauthorized employment during the two-year period immediately preceding the filing date of the petition.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or 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 petition on October 1, 2009. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work throughout the two years immediately prior to that date.

The USCIS regulation at 8 C.F.R. § 204.5(m)(11) reads:

(11) *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.

On the Form I-360 petition, the petitioner indicated that the beneficiary arrived in the United States on May 1, 2004. 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 entered the United States as a B-1 nonimmigrant visitor with authorization to remain until July 30, 2004. The beneficiary then converted to R-1 nonimmigrant status based upon a petition filed on his behalf by the [REDACTED]. The beneficiary possessed R-1 status and authorization to work for the [REDACTED] from February 8, 2005 to February 7, 2008. The beneficiary then obtained authorization to work for the petitioner from June 12, 2008 until February 7, 2010.

On the petition, the petitioner stated that it would be paying the beneficiary \$14,000.00 per year for his services as a community resources pastor. The director issued a Request for Evidence (RFE) to the petitioner on March 31, 2010, for which the petitioner submitted a response on May 12, 2010. Within

the RFE, the director asked for, among other things, specific information regarding the beneficiary's work history and relative compensation since October 1, 2007.

In response, the petitioner submitted Internal Revenue Service (IRS) Form W-2 transcripts, showing that the [REDACTED] paid the beneficiary \$13,432.00 in 2007 and \$9,760.00 in 2008. The beneficiary's IRS Form 1040 for 2007 reflects that the [REDACTED] paid the beneficiary for services that year. The petitioner additionally submitted an IRS Form W-2 wage and tax statement, indicating that it had paid the beneficiary \$8,000.00 in 2008. Thus, both employers paid him for services that year for a total amount of \$17,760.00.

The petitioner submitted an IRS Form W-2 showing that it paid the beneficiary \$18,000.00 in 2009. The beneficiary's IRS Form 1040 reflects that only the petitioner paid him that year. The petitioner had submitted a log of the checks that it had paid the beneficiary, which indicated that it instead paid the beneficiary \$22,000.00 for his services that year. The record of proceeding contains no information that would explain this \$4,000.00 discrepancy.

The director denied the petition on June 24, 2010, finding that the beneficiary had engaged in outside employment, which USCIS had not authorized, for the [REDACTED] in 2007 and 2008.

On appeal, counsel concedes that the beneficiary did engage in unauthorized work between July of 2007 and March of 2008 for the [REDACTED]. Counsel asserts that the beneficiary provided ministerial counseling, prayer, and Bible study services for that employer, but the record of proceeding contains no documentary evidence regarding the beneficiary's duties for [REDACTED]. 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). 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)). Counsel also contends that the beneficiary thought that his work for the [REDACTED] although compensated, was still a part of his activities for the petitioner's church. Regardless of the beneficiary's duties or intent, the AAO finds that the beneficiary violated the terms of his USCIS approved Form I-129 petition, which authorized him to engage in employment as a religious worker only for the [REDACTED] and for the petitioner's church.

The regulations at 8 C.F.R. § 214.2(r)(3)(ii)(E) as were in effect when the beneficiary was approved as an R-1 nonimmigrant, indicated that the beneficiary could only work for the specific organizational unit of the religious organization which would be employing and paying the beneficiary. Further, the regulation at 8 C.F.R. § 214.2(r)(6) indicated that "a different or additional organizational unit of the religious denomination seeking to employ or engage the services of a religious worker" shall file a new petition and that "any unauthorized change to a new religious organizational unit will constitute a failure to maintain status . . ."

Further, 8 C.F.R. § 274a.12(b) provides, in pertinent part:

*Aliens authorized for employment with a specific employer incident to status.* The following classes of non-immigrant aliens are authorized to be employed in the United States by the specific employer and subject to the restrictions described in the section(s) of this chapter indicated as a condition of their admission in, or subsequent change to, such classification...

(16) An alien having a religious occupation, pursuant to § 214.2(r) of this chapter. An alien in this status may be employed only by the religious organization through whom the status was obtained;

Finally, the regulation at 8 C.F.R. § 214.1(e) states, in pertinent part:

*Employment...* Any other nonimmigrant in the United States may not engage in an employment unless he has been accorded a nonimmigrant classification which authorizes employment or he has been granted permission to engage in employment in accordance with the provisions in this chapter. A nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a non-immigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

Again, although counsel concedes that the beneficiary has engaged in unauthorized employment, he asserts that, according to § 245(k) of the Act, the beneficiary's purported 128 days of unauthorized employment should not disqualify him from adjusting status or having his prior employment qualify under 8 C.F.R. § 204.5(m)(11).

Section 245(k) of the Act reads:

An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 203(b) (or, in the case of an alien who is an immigrant described in section 101(a)(27)(C), under section 203(b)(4)) may adjust status pursuant to subsection (a) and notwithstanding subsection (c)(2), (c)(7), and (c)(8), if –

(1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;

(2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days –

(A) failed to maintain, continuously, a lawful status;

(B) engaged in unauthorized employment; or

(C) otherwise violated the terms and conditions of the alien's admission.

Although section § 245(k) of the Act does enable a person who is adjusting status in an employment-based category to adjust even if he or she has been out of status or worked without authorization for less than 180 days, at issue for this proceeding is whether the beneficiary is eligible for approval of the special immigrant petition. Here, the beneficiary has no approved petition, is not eligible to receive an immigrant visa, and therefore is not eligible to adjust status. Any discussion of eligibility for adjustment of status is premature. At this time, the petitioner must establish that the beneficiary meets all of the requirements for 8 C.F.R. §204.5(m), which, as cited above, requires two years of lawful continuous employment.

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 religious functions while in the United States. Accordingly, any unauthorized work that he may have performed, such as for the [REDACTED], would interrupt the continuity of the qualifying work experience.

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.

As this finding renders the beneficiary facially ineligible for the benefit sought, the AAO makes no further finding regarding the beneficiary's eligibility; including whether the discrepancy noted in the beneficiary's 2009 compensation also precludes a finding that the petitioner has established the beneficiary's continuous employment during the qualifying period; whether the petitioner has established the beneficiary's qualifying membership; and whether the petitioner established that the beneficiary meets its ministerial requirements.

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.