

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



C1

DATE: **MAR 02 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 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 petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO subsequently remanded the petition to the director for a new decision based on revised regulations. The director again denied the petition and certified the decision to the AAO. The AAO affirmed the director's decision. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will grant the motion and affirm its prior decision.

The petitioner, according to its president, is "a non-profit Catholic ministry geared towards the media." 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 director of pastoral music. The director determined that the petitioner had not established that the position is, or has been, full-time. The director also found that the beneficiary has a secular side business.

The AAO, in its dismissal order, found that the beneficiary does not operate a secular business. The AAO affirmed, however, the director's finding that the beneficiary's position was part-time rather than a qualifying full-time occupation. The AAO also found that the petitioner had not submitted the required employer attestation.

On motion, the petitioner submits a brief from counsel, an employer attestation, payroll and tax documents and other supporting exhibits.

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 U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(7) states that an authorized official of the prospective employer of an alien seeking religious worker status must complete, sign and date an attestation prescribed by USCIS and submit it along with the petition. This regulation was not yet in effect when the petitioner filed the Form I-360 petition on November 13, 2006. While the petition was pending, USCIS published new regulations for special immigrant religious worker petitions. 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, 72285 (Nov. 26, 2008). The petition was still pending on November 26, 2008, and therefore the new regulations apply to the petition.

The AAO's January 31, 2011 dismissal order included a finding that the petitioner had not submitted the required employer attestation. The petitioner's motion includes a fully executed employer attestation. The director had not previously requested this required document. Instead, after the AAO remanded the petition for consideration under the new regulations, the director denied the petition without issuing a request for evidence under the new regulations. Therefore, the motion is the petitioner's first opportunity to submit the attestation. The petitioner has overcome this basis for denial of the petition.

There remains a second, final basis for denial. The USCIS regulation at 8 C.F.R. § 204.5(m)(11) requires the petitioner to document qualifying prior experience during the two years immediately preceding the petition. The USCIS regulation at 8 C.F.R. § 204.5(m)(2) requires that the beneficiary must be coming to the United States to work in a full time (average of at least 35 hours per week) compensated position in a qualifying religious occupation or vocation.

In a letter that accompanied the initial filing of the petition in 2006, [REDACTED] president of the petitioning entity, stated that the beneficiary "has been employed as a religious worker on a full-time basis for more than two years."

On December 11, 2006, the director instructed the petitioner to submit "evidence of the beneficiary's work history for the years 2004, 2005 and 2006," including evidence of compensation. In response, [REDACTED] stated that the beneficiary "has been working as a Director of Pastoral Music for [the petitioner] since March 21, 2003," where he "spends at least 40 hours per week performing his religious work duties." The petitioner submitted copies of Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements, showing that the petitioner paid the beneficiary \$15,137.00 in 2004 and 20,568.80 in 2006. The petitioner submitted no Form W-2 for 2005.

On May 9, 2007, the director instructed the petitioner to provide further details about the beneficiary's work history and compensation, as well as information about the beneficiary's work. The petitioner submitted a selection of original pay receipts from 2004 to 2007, showing biweekly payments to the beneficiary. Each pay receipt showed the number of hours worked. Of the six pay receipts dated within the qualifying period, only one (dated September 1, 2006) showed 80 hours worked during the two-week pay period. Another (dated November 26, 2004) showed 74 hours worked. The remaining four statements showed either 62 or 64 hours worked. The two most recent pay statements, dated July 6 and 20, 2007, likewise showed 64 hours each.

On November 5, 2007, the director denied the petition, noting that many of the beneficiary's pay stubs do not reflect the 40-hour work week claimed by the petitioner. On appeal, counsel and [REDACTED] disputed this finding but did not acknowledge or explain the pay receipts that contradict this claim. The petitioner submitted 68 photocopied pay receipts dated from May 28, 2004 to December 21, 2007, showing that the petitioner worked, on average, 33.7 hours per week. (A more thorough analysis of the pay receipts appears in the AAO's January 2011 dismissal notice.)

On May 16, 2009, the director denied the petition for a second time, again citing the pay stubs showing part time employment. In response to the certified denial, counsel attempted to show that the petitioner worked more than 35 hours per week on average, but this line of reasoning relied upon an arbitrary and untenable definition of the word "average." The AAO's January 2011 decision contains a fuller discussion of this issue. The AAO need not repeat the discussion here, because the petitioner does not pursue it on motion.

Counsel acknowledged that the regulation at 8 C.F.R. § 204.5(m)(2) requires that the beneficiary must "[b]e coming to the United States to work in a full time (average of at least 35 hours per week) compensated position." Counsel asserted, however, that the regulations do not require the beneficiary's past work to have been full-time. The AAO, in considering this claim, stated:

This observation is correct, as far as it goes. When USCIS proposed revisions to the special immigrant religious worker regulations, USCIS included the requirement that the alien's past experience must have been full-time. *See* 72 Fed. Reg. 20442, 20447 and 20452 (April 25, 2007). This proposed requirement was not retained in the final rule.

In this instance, however, we must take into account that the petitioner does not seek to employ the beneficiary in a new position. Rather, the petitioner seeks to continue to employ the beneficiary in the same position that, the petitioner claims, the beneficiary has already held for several years. As will be discussed, the petitioner previously declared to USCIS under penalty of perjury that the beneficiary would be employed on a full-time basis at a salary of \$22,880.¹ If the beneficiary has, thus far,

¹ *See* Form I-129 [REDACTED] filed on November 7, 2005, incorporated into the alien's A-file record of proceeding. [Footnote reproduced from prior AAO decision.]

worked part-time for the petitioner, usually 32 hours per week, then the petitioner must explain how and why the same duties will suddenly occupy 35 or more hours per week upon approval of the petition.

On motion, counsel states:

we must point out that [the AAO's reasoning] is only applicable in *sudden* change in the number of hours worked by the beneficiary. In fact, the AAO used the word "*suddenly*" in its decision to describe such change. However, an increase of [a] mere 3 hours per week does not appear to imply a *sudden* change to us. . . . [W]e believe that a *sudden* change means a *significant increase* in the number of hours worked by the beneficiary in the existing position. . . . [A] 3 hours per week increase can not by any means be considered significant. . . . It is only a little more than half an hour per day on a regular 5 work day week. It is really hard to imagine that such change is *sudden*.

(Counsel's emphasis.) The above reasoning is misplaced for at least two reasons. First, counsel offers no justification for the arbitrary assertion that "a *sudden* change means a *significant increase* in the number of hours worked." Second, by focusing emphasis on the word "suddenly," counsel fails to address the documented fact that the beneficiary worked, on average, less than 35 hours per week, even though the petitioner had claimed that the petitioner would work 40 hours per week.

The AAO, in its January 2011 decision, stated:

The petitioner filed a Form I-129 nonimmigrant petition (with receipt number [REDACTED] [REDACTED] on the beneficiary's behalf on November 7, 2005. On that petition form, the petitioner claimed that the beneficiary would work full time for \$22,880 per year starting in 2006. The petitioner signed the Form I-129 at part 10 under penalty of perjury, certifying that "this petition and the evidence submitted with it is all true and correct." The petitioner's own IRS Forms W-2 show that the beneficiary's 2006 salary [\$20,568.80] fell short of that amount by more than ten percent. The beneficiary's reduced salary is consistent with the payroll documents that show, on average, less than 35 hours worked per week. In short, the petitioner has failed to employ the beneficiary on a full-time basis for the wage declared on the Form I-129 petition. 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). . . .

The petitioner also submits copies of later pay receipts from 2007-2009 in response to the latest decision. The receipts show 80-hour pay periods, but they represent only a sample, rather than a complete, continuous sequence. The petitioner submitted two pay receipts from 2007, eleven from 2008 and six from the first five months of 2009,

representing only 18 out of 63 biweekly pay periods. The petitioner does not explain why it omitted other pay receipts from this same period. Given well-documented fluctuations in the beneficiary's hours in earlier years, we cannot accept this incomplete record as evidence that the beneficiary has consistently worked full-time since 2007.

Also, some pay receipts show additional payments beyond the hourly wage. The pay receipt dated October 24, 2008 shows "other earn[ings]" of \$700, and the May 8, 2009 pay receipt shows a \$700 "commission." Therefore, we cannot infer the beneficiary's overall hours worked by dividing the year-to-date totals by the hourly pay rate, because the year-to-date totals include amounts beyond the hourly rate. The additional payments would, therefore, inflate the quotient above the number of hours worked. An \$700 commission, divided by \$18 per hour, would falsely imply nearly 39 hours worked.

For the reasons discussed above, we conclude that the petitioner has not submitted sufficient evidence to show that the beneficiary's employment will be full-time, or that it has been consistently full-time as the petitioner claimed in its earlier nonimmigrant petition on the beneficiary's behalf. We will therefore affirm the director's decision to deny the petition.

On motion, counsel states:

The petitioner hereby introduces . . . new evidence in the form of Forms W-2 for the beneficiary for 2009 and 2010, as well as pay stubs for the said periods. This evidence was not and could not have been available at the time of the decision. This should serve as . . . objective evidence that the petitioner has in fact intended to employ the beneficiary full time.

The newly submitted IRS Forms W-2 show that the petitioner paid the beneficiary \$41,156.00 in 2009 and \$37,221.50 in 2010. The pay receipts, dated between June 2009 and January 2011, show full-time employment, usually 40 hours per week, with occasional overtime. The receipts show the beneficiary typically receiving \$1,440 per pay period (\$18.00 per hour, 80 hours per pay period). The year to date figures include vacation and holiday pay.

In its previous decision, the AAO noted that the petitioner did not submit complete payroll records, instead selectively submitting incomplete materials. On motion, the petitioner once again selectively omits two pay receipts that would not show 40 hours of work per week.

The last pay receipt from 2009 (covering December 12 through December 25) is missing. The previous receipt, for November 28 through December 11, shows year to date earnings of \$40,256.00. Subtracting that amount from the \$41,156.00 shown on the IRS Form W-2 for 2009 shows that the petitioner paid the beneficiary only \$900.00 during the December 12-25 pay period. At the stated rate of \$18.00 per hour, that figure calculates to 50 hours work over two weeks.

The pay statement for April 3 to April 16, 2010 is also missing. The previous pay statement shows a year to date total of 560 hours worked and \$10,080.00 paid. At the stated rate of 80 hours/\$1,440.00 per pay period, the pay statement for April 17 through April 30 ought to show a year to date total of 720 hours/\$12,960.00. Instead, it shows 712 hours/\$12,816.00. Therefore, the petitioner worked only 72 hours during the missing pay period. This still qualifies as full time, but demonstrates the continuation of a disturbing pattern of omission of material evidence that disfavors or contradicts the petitioner's claims. A few payroll receipts that would show a full 80 hours are also missing from the record, but the AAO is not persuaded that the omission of the December 12-25 receipt is coincidental.

Furthermore, the submitted pay receipts cover only the period beginning May 30, 2009. By that time, the director had twice denied the petition based on concerns about the claimed full-time nature of the beneficiary's employment. The timing of this change in the beneficiary's work hours inevitably appears to be a reaction to the director's decision, rather than the implementation of a long-intended plan by the petitioner.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). At the time of filing, in 2006, the petitioner did not state that the beneficiary was a part-time employee whom the petitioner intended eventually to employ full-time. Rather, in its 2005 nonimmigrant petition, the petitioner stated that it would employ the beneficiary full-time at an annual salary of \$22,880.00. [REDACTED] claimed in November 2006 that the beneficiary "has been" – not "will be" – "employed as a religious worker on a full-time basis for more than two years." [REDACTED] then claimed, in March 2007, that the beneficiary "spends" – not "will spend" – "at least 40 hours per week performing his religious work duties." The petitioner's own evidence discredits these claims. Payroll and tax documents from 2009 and 2010 cannot retroactively show that [REDACTED] statements in 2006 and 2007 were true or correct.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon 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. *Id.* at 582, 591-92. Section 204(b) of the Act, 8 U.S.C. § 1154(b), provides for the approval of immigrant petitions only upon a determination that "the facts stated in the petition are true." False, contradictory, or unverifiable claims inherently prevent a finding that the petitioner's claims are true. *See Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988). The AAO cannot now find that the petitioner's claims about the beneficiary's future employment are more credible than its discredited past claims. In the face of the other evidence of record, the petitioner's

adjustment in the beneficiary's work schedule after the denial of the petition offers little assurance that this adjustment is permanent, rather than a short-term strategy intended to secure immigration benefits.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the AAO will affirm the dismissal of the appeal and, therefore, the denial of the petition.

ORDER: The AAO's decision of January 31, 2011 is affirmed. The petition remains denied.