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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 FILE: 

MAR 12 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)

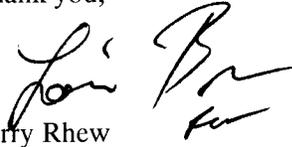
ON BEHALF OF PETITIONER:

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 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, (“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 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 musical director. The Form I-360 petition was filed on August 31, 2009.¹ On April 2, 2010, the director denied this petition because he found that the petitioner failed to establish that the beneficiary had two years of continuous lawful employment for the two year period immediately preceding the filing 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).

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

¹ Before the director, the petitioner was represented by [REDACTED] On appeal, however, the petitioner is representing itself.

(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.

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

(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.

The current Form I-360 petition was filed on August 31, 2009. According to the regulation above, the beneficiary must have been continuously working in lawful status for two years prior to the filing of the petition, from August 31, 2007 to August 31, 2009. The petitioner submitted a Form I-94 showing that the beneficiary entered the United States in R-1 nonimmigrant status on August 16, 2004. The record reflects that the beneficiary was approved for R-1 nonimmigrant status from March 9, 2005 to March 8, 2007. The record further reflects that the beneficiary is still in the United States.

The beneficiary has not satisfied the regulation at 8 C.F.R. § 204.5(m)(4) because she was not in lawful immigration status for the two years immediately preceding the filing of the petition. As stated above, the beneficiary's nonimmigrant status expired on March 8, 2007. The beneficiary did not leave the country after that. United States Citizenship and Immigration Services ("USCIS") records indicate that that the beneficiary filed an extension request to renew her R-1 status. However, USCIS records also show that the beneficiary submitted a request to withdraw her visa extension request on June 16, 2009, and that the visa extension request was withdrawn on June 17, 2009. From the period of June 17, 2009 to August 31, 2009, the beneficiary did not have status and was working without authorization. Because of this period, the beneficiary cannot be found to be in lawful immigration status for the two years immediately preceding the filing of the petition. Therefore, during the two year period immediately prior to the filing of the petition, the beneficiary was working when she was not in lawful immigration status.

Further, the regulation at 8 C.F.R. § 204.5(m)(11) states that the qualifying employment must have been authorized under immigration law. The AAO notes that the beneficiary did not leave the country when the extension request was withdrawn after her R-1 nonimmigrant status had expired. Instead, she stayed in the country and continued to work without authorization. Therefore, the beneficiary did not satisfy the regulations because she was working in the United States without employment authorization for the two years prior to the filing and at the time of the filing of the Form I-360 petition.

On appeal, the petitioner argued in the Form I-290B that:

The I-360 was denied in part because the Service states [REDACTED] was out of status since March 8, 2007. This is not true. Although [REDACTED] expired on March 8, 2007, she timely filed Form I-129 to extend her status, and said petition was received by USCIS on March 7, 2007. See attached. USCIS never adjudicated the extension application.

Since a nonimmigrant is considered to be in lawful status while a timely filed extension is pending, one [REDACTED] was never out of status, and two, since [REDACTED] was working in a religious occupation immediately preceding the filing of her I-360, she satisfies USCIS' "2 years of experience immediately preceding the I-360" requirement.

The beneficiary's former employer had timely filed a Form I-129 to extend her R-1 nonimmigrant status on March 13, 2007. As long as that extension was pending, up to 240 days, the beneficiary would be considered to be in an authorized status and working lawfully. 8 C.F.R. § 274a.12(b)(20). However, 240 days had expired on November 8, 2007 and the beneficiary's former employer withdrew the extension request on June 17, 2009. Thus, for the remainder of the time the beneficiary was living in the United States without status and working without authorization. Therefore, the beneficiary did not satisfy the requirements set forth in 8 C.F.R. § 204.5(m)(4) and 8 C.F.R. § 204.5(m)(11), which will result in the dismissal of this appeal.

Further, with regard to the beneficiary's continuous employment, the AAO notes that on August 31, 2009, the beneficiary submitted a Form I-485 Application to Register Permanent Residence or Adjust Status. With this application, she submitted a Form G-325A, Biographic Information. This form requires that the applicant list her employment over the last five years. The AAO notes that the beneficiary left this section blank. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on 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.

This omission raises questions as to whether the beneficiary was even employed, which is required by the regulation. The fact that the beneficiary left this question blank on the Form G-325A raises questions regarding the petitioner's claims that the beneficiary was continuously working during the requisite two year period. The petitioner states in a letter dated August 28, 2009 that the beneficiary had been working for the [REDACTED] since 2003. The petitioner, however, provides no proof of this employment, such as Forms W-2 or 1099. 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)). Thus, the lack of evidence that the beneficiary had previously been employed over the past two years and the fact that the beneficiary omitted evidence of her past work experience on her Form G-325 further show that the petitioner has not met its burden of showing that the beneficiary has two years of continuous employment prior to the filing of this petition.

The evidence submitted and counsel's arguments do not establish that the beneficiary was continuously employed and was authorized to work under United States immigration law during the

two years prior to the filing of the Form I-360 petition. For these reasons, the petition must be denied.

Beyond the director's decision, the AAO also finds that the petitioner failed to establish that the beneficiary was a member of the petitioner's religious denomination, that the petitioner did not have the ability to compensate the beneficiary, that the petitioner has not shown that this position is a religious occupation, and that the petitioner has not shown that the beneficiary has been working full time. 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 petitioner has not shown that the beneficiary has been a member of its religious denomination. The regulation at 8 C.F.R. § 204.5(m)(1) requires that the petitioner be a member of the petitioner's religious denomination. Although the petitioner states in its letter dated August 8, 2009 that the beneficiary has been a member of its religious denomination since the age of twelve, the petitioner has not provided any proof of this. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Further, the petitioner stated that the beneficiary worked for a different organization, but did not provide evidence showing that the organization for which the beneficiary worked and the petitioner's organization were of the same religious denomination.

The petitioner has also not shown that it has the ability to compensate the beneficiary. The regulation 8 C.F.R. § 204.5(m)(10) requires that the petitioner submit verifiable evidence of how the petitioner intends to compensate the alien. If the beneficiary was receiving a salary, then the regulation requires that the petitioner submit verifiable proof, such as an IRS Form W-2 or certified tax returns. In the Form I-360 petition, the petitioner states that the beneficiary will earn \$2,000 per month. The record contains the petitioner's tax return from 2007, which shows net assets of \$14,437, which would not be enough to cover the beneficiary's yearly salary of \$24,000. The petitioner has not submitted any other tax returns. The petitioner also submitted bank statements from October and November of 2008 showing activities of its checking account. These statements are a snapshot into the finances of the petitioner and do not represent that the petitioner has sufficient funds to compensate the beneficiary. The petitioner must also 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). Further, the petitioner submitted a Form 1099-MISC for a man named [REDACTED] but did not submit any evidence as to who this person is, his job function, and whether the beneficiary would be taking his place. Further, [REDACTED] salary was below that of what the beneficiary would receive. Therefore, the AAO finds that the evidence submitted by the petitioner is insufficient to show that it has the ability to compensate the beneficiary.

The petitioner has not shown that the beneficiary's position is a religious occupation. The regulation at 8 C.F.R. § 204.5(m)(2) requires that this position be a religious occupation. On the Form I-360 petition, the petitioner stated that the beneficiary would work as a "musical director." However, the petitioner has not provided evidence that the beneficiary's duties primarily relate to a traditional religious function and is recognized as a religious occupation within the denomination. Further, the petitioner has not shown that the beneficiary's duties are primarily related to, and clearly involve inculcating or carrying out the religious creed and beliefs of the denomination.

Finally, the petitioner has not shown that this position is "full time." The regulation at 8 C.F.R. § 204.5(m)(2) also requires that this position be full time. The petitioner failed to provide a schedule listing the beneficiary's hours. The petitioner has not met its burden of showing that this position is a full time religious occupation. For these additional reasons, the petition may not be approved.

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.