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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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CI

DATE: **MAY 24 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 matter was before the Administrative Appeals Office (“AAO”) on appeal. The AAO remanded the case to the director. The director denied the petition a second time, and certified the matter to the AAO. The AAO will uphold the director’s decision.

The alien seeks classification 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 reverend/assistant pastor at [REDACTED]. On December 31, 2009, the alien filed the Form I-360 petition. On May 7, 2010, the director denied the Form I-360 petition. The self-petitioner’s employer filed an appeal to the AAO. On February 14, 2012, the AAO remanded the matter to the director. On March 14, 2012, the director again denied the petition. The director determined that the self-petitioner had not been lawfully employed as a religious worker for at least the two year period immediately preceding the filing of the petition. The director also determined that the self-petitioner has not provided verifiable evidence of how the religious organization intends to compensate the self-petitioner. The director also found that the self-petitioner had not submitted an attestation clause.

On certification, the self-petitioner through counsel submits a brief.

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 self-petitioner 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 Form I-360 petition was filed on December 31, 2009. According to the regulation above, the self-petitioner must have been working in lawful status for two years immediately prior to the filing of the petition, from December 31, 2007 to December 31, 2009. The record reflects that the self-petitioner entered the United States on October 25, 2006 as a B-2 nonimmigrant visitor, with authorization to remain until April 6, 2007. The USCIS regulation at 8 C.F.R. § 214.1(e) states that a B-2 nonimmigrant may not engage in any employment, and that any unauthorized employment by a nonimmigrant constitutes a failure to maintain status. The record does not contain any evidence that the self-petitioner extended his status or received another form of status, or departed the United States after the expiration of his authorized stay as a B-2 nonimmigrant. Rather, it appears that the self-petitioner was out of status for the entire two year period immediately preceding the filing of the Form I-360 petition. Therefore, any work performed by the self-petitioner during this period would not be qualifying.

On appeal, counsel states that:

█ notes that in adjudicating the previous appeal, the AAO has not addressed his argument regarding the requisite two years of experience immediately preceding the filing of this application¹. Specifically, the AAO did not discuss that

¹ The AAO previously remanded this case on February 14, 2012. The AAO did not reach the merits of the petition because the self-petitioner improperly filed the appeal. Initially, the self-petitioner signed the Form I-360 petition, but on appeal, the self-petitioner's employer signed the appeal. On that basis, the AAO would have rejected this appeal. However, the AAO remanded the matter to the director to reissue the decision because the director sent the decision to the self-petitioner's employer, and not to the self-petitioner himself.

██████████ volunteer work experience with the church is qualifying work experience.

The AAO's conclusion that ██████████ volunteer experience did not count because it was unauthorized work is incorrect. Qualifying work experience does not need to be gained as a paid employee. A religious worker can gain qualifying work experience on a volunteer basis if the worker "provided for his or her own support. See, 8 C.F.R. 204.5(m)(11)(iii). Thus, the two years of experience gained as a volunteer does qualify as qualifying experience. The letter written by ██████████ states that ██████████ "earns" \$200 per week and is given housing. An explanation already provided shows that these were charitable gifts. This money is a special donation for living expenses. This was explained in a letter dated 5/4/09. As such, ██████████ experience gained inside of the United States is considered qualifying work experience.

The AAO is not persuaded by counsel's arguments. The AAO initially notes that the regulation at 8 C.F.R. § 204.5(m)(11) above requires that the self-petitioner's two years of qualifying work experience be *authorized under immigration law*. In this case, the self-petitioner was out of status for the entire two year period. Therefore, the self-petitioner's work experience was not authorized under immigration law.

Further, the AAO disagrees with counsel's argument regarding "voluntary" employment. The regulation at 8 C.F.R. § 204.5(m)(4) requires the alien's previous religious work to have been compensated. The regulation at 8 C.F.R. 204.5(m)(11) requires the self-petitioner to submit evidence of compensation, either salaried or "in-kind," in the form of IRS documentation, or evidence of qualifying self-support. Permissible circumstances for self-support, outlined in the USCIS regulations at 8 C.F.R. § 214.2(r)(11)(ii), involve the alien's participation in an established program for temporary, uncompensated missionary work. The self-petitioner has not shown or claimed that he participated in such a program, and has offered no evidence that he provided for his own support.

In supplementary information published with the proposed rule in 2007, the United States Citizenship and Immigration Services ("USCIS") stated:

The revised requirements for immigrant petitions and nonimmigrant status require that the alien's work be compensated by the employer because that provides an objective means of confirming the legitimacy of and commitment to the religious work, as opposed to lay work, and of the employment relationship. Unless the alien has taken a vow of poverty or similarly made a formal lifetime commitment to a religious way of life, this rule requires that the alien be compensated in the form of a salary or in the form of a stipend, room and board, or other support so long as it can be reflected in a W-2, wage transmittal statements, income tax returns, or other verifiable IRS documents. USCIS recognizes that legitimate religious work is sometimes performed on a voluntary basis, but allowing such work to be the basis for

an R-1 nonimmigrant visa or special immigrant religious worker classification opens the door to an unacceptable amount of fraud and increased risk to the integrity of the program. In this rule, USCIS is proposing to implement bright lines that will ease the verification of petitioner's claims in the instances where documentary evidence is required.

72 Fed. Reg. 20442, 20446 (April 25, 2007). When USCIS issued the final version of the regulation, the preamble to that final rule incorporated the above assertion by reference: "The rationale for the proposed rule and the reasoning provided in the preamble to the proposed rule remain valid and USCIS adopts the reasoning in the preamble of the proposed rule in support of the promulgation of this final rule." 73 Fed. Reg. 72275, 72277 (Nov. 26, 2008).

Accordingly, the time the self-petitioner may have spent in the United States "working" as a volunteer is not considered as qualifying employment. Therefore, the AAO finds that the self-petitioner has not met his burden of showing that he was continuously working in lawful status for the two years immediately preceding the filing of the petition.

The AAO will next address whether the self-petitioner provided sufficient evidence to show his employer's ability to compensate him. The regulation at 8 C.F.R. § 204.5(m)(10) states that:

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.

Evidence of ability and intent to compensate can be established by documentary evidence that the proffered salary was paid to the self-petitioner in the past or through budget set aside for salary, leases, etc. According to the attestation submitted with the Form I-360 petition, the proposed salaried and/or non-salaried compensation was listed as "\$250." The employer does not indicate whether the \$250 is salaried or "in-kind" compensation or whether it is a weekly or monthly payment. For this reason, the director found that the self-petitioner's employer did not show that it had the ability to compensate the self-petitioner. In her decision, the director stated:

The self-petitioner has not submitted evidence such as: Past evidence of compensation for similar positions; copies of annual reports; federal tax returns, audited financial statements, IRS documentation, or verifiable documentation that

room and board will be provided. Therefore, the self-petitioner has not established that the religious organization can support the alien's proposed salary of \$12,000².

On appeal of the initial denial decision, counsel for the self-petitioner submitted a letter dated June 30, 2010 which states "as a financial support [sic], [REDACTED] earns the sum of \$200.00 a week plus a place where to live, since May of 2008." Counsel also submitted eight pay stubs from the self-petitioner's employer, some with photographs of the checks, showing that the self-petitioner's employer paid the self-petitioner \$200 per week. This evidence is insufficient to show that through past compensation, the self-petitioner's employer has the ability to compensate the self-petitioner. First, \$200 per week is discrepant from the Form I-360 petition's attestation clause, which simply states "\$250." Assuming that "\$250" means "\$250 per week," then the self-petitioner has not shown that his employer has paid him the wage set forth in the Form I-360 petition. Therefore, this evidence is insufficient to show that the self-petitioner's employer has the ability to compensate the self-petitioner.

Further, on appeal, counsel for the self-petitioner stated:

[REDACTED] has also demonstrated his employer's ability to pay the wages. USCIS has conceded that the Church has already been charitably giving approximately \$10,000 per year to [REDACTED] and his family as well as providing housing, which is easily valued at more than \$12,000 per year. Thus, [REDACTED] has demonstrated his employer's ability to pay the wage.

The AAO finds that the counsel's explanation does not overcome the lack of evidence submitted. Nowhere in the record or in either denial decision does it appear that the director conceded that the church has already been charitably giving approximately \$10,000 per year to the self-petitioner and his family as well as providing housing that is "easily valued at more than \$12,000 per year." Further, on appeal, the self-petitioner again provided no evidence of the employer's ability to compensate the proffered wage to the self-petitioner. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

² The AAO notes that it is not clear from the record where the self-petitioner's employer stated that it would provide the self-petitioner a salary of \$12,000 per year, although it appears the director believed the \$250 to be a weekly salary.

Therefore, the AAO concurs with the director's finding that the self-petitioner's employer has not shown that it has the ability to compensate the self-petitioner.

The director also denied the Form I-360 petition because the self-petitioner failed to submit an attestation clause signed by his employer. The regulation at 8 C.F.R. § 204.5(m)(7) states that:

Attestation. 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. If the alien is a self-petitioner and is also an authorized official of the prospective employer, the self-petitioner may sign the attestation. The prospective employer must specifically attest to all of the following:

- (i) That the prospective employer is a bona fide non-profit religious organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation;
- (ii) The number of members of the prospective employer's organization;
- (iii) The number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion;
- (iv) The number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years by the prospective employer's organization;
- (v) The number of special immigrant religious worker and nonimmigrant religious worker petitions and applications filed by or on behalf of any aliens for employment by the prospective employer in the past five years;
- (vi) The title of the position offered to the alien, the complete package of salaried or non-salaried compensation being offered, and a detailed description of the alien's proposed daily duties;
- (vii) That the alien will be employed at least 35 hours per week;
- (viii) The specific location(s) of the proposed employment;
- (ix) That the alien has worked as a religious worker for the two years immediately preceding the filing of the application and is otherwise qualified for the position offered;

(x) That the alien has been a member of the denomination for at least two years immediately preceding the filing of the application;

(xi) That the alien will not be engaged in secular employment, and any salaried or non-salaried compensation for the work will be paid to the alien by the attesting employer; and

(xii) That the prospective employer has the ability and intention to compensate the alien at a level at which the alien and accompanying family members will not become public charges, and that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization.

The director found that the self-petitioner has not submitted an attestation from the authorized official of the religious organization in the United States as required by the regulation above. A review of the record shows that an attestation clause was submitted, but it was signed by the self-petitioner, not by the employer of the self-petitioner. On appeal, counsel stated [redacted] is will [sic] also provide the attestation required under the regulations." However, neither counsel nor the self-petitioner submitted an attestation clause signed by the self-petitioner's employer. Therefore, the appeal will be dismissed on this basis as well.

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 director's decision is affirmed. The petition is denied.