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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



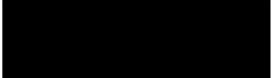
U.S. Citizenship
and Immigration
Services

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DATE: **MAY 31 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:

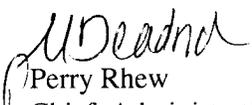


INSTRUCTIONS:

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 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 [REDACTED] congregation. 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 cantor. On August 31, 2009, the petitioner filed the Form I-360 petition. On March 22, 2010, the director issued a Notice of Intent to Deny (“NOID”), to which the petitioner timely responded. Based in part on a failed site visit, on May 13, 2010, the director denied the petition, finding that the petitioner did not qualify as a *bona fide* non-profit religious organization in the United States. The director also denied the petition because she found that the beneficiary had not been continuously working as a religious worker for at least the two-year period immediately preceding the filing of the petition. Finally, the director denied the petition because she found that the petitioner had not provided verifiable evidence of how it intends to compensate the beneficiary.

On appeal, the petitioner submits a letter and further documentation.

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 petitioner qualifies as a *bona fide* non-profit religious organization in the United States. The regulation at 8 C.F.R. § 204.5(m)(1) states:

(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:

(1) For at least the two years immediately preceding the filing of the petition have been a member of a religious denomination that has a bona fide non-profit religious organization in the United States.

The regulation at 8 C.F.R. § 204.5(m)(5) further states:

Bona fide non-profit religious organization in the United States means a religious organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the IRS confirming such exemption.

Bona fide organization which is affiliated with the religious denomination means an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code and possessing a currently valid determination letter from the IRS confirming such exemption.

The director denied the petition because she found that the petitioner had not submitted all of requested evidence from the NOID to establish that it qualified as a *bona fide* religious organization. However, in the documents submitted both with the Form I-360 petition and on appeal, the petitioner submitted an IRS 501(c)(3) letter dated June 29, 2006 showing that that the petitioner qualifies as a *bona fide* non-profit religious organization in the United States. The AAO finds that the submission of this valid determination letter from the IRS confirming this exemption satisfies the above regulations. As a result, the AAO will withdraw this part of the director's decision.

The second issue is whether the beneficiary possesses two years of qualifying, continuous work experience during the two years immediately prior to the filing of the Form I-360 petition. The regulation at 8 C.F.R. § 204.5(m)(4) requires that the alien:

(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, 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.

The petitioner filed the Form I-360 petition on August 31, 2009. According to the regulation above, the beneficiary must have been continuously working for the two year period immediately prior to the filing of the petition, from August 31, 2007 to August 31, 2009. On appeal, the petitioner stated:

We previously provided and attach again as Exhibit 4 the beneficiary's W-2's and 1099's for 2007, 2008 and 2009. In addition, we attach the Beneficiary's Individual Federal Tax Return and 2009 Extension Application. Note that [REDACTED] was paid in part with W-2 and in part with 1099, though at all times he was considered our employee and clergy member. We were informed by our CPA that this was a permissible manner of paying his salary and would lessen the tax burden on him and on us.

The AAO is not persuaded by these claims. As stated above, the regulations require that the beneficiary work continuously during the two years immediately preceding the filing of the petition. In the attestation clause of the Form I-360 petition, the petitioner stated that,

As an employee of the synagogue, [REDACTED] will continued [sic] to be paid a salary for his services by the synagogue and will not be required to perform any fundraising activities.

In response to the director's request in the NOID for verifiable evidence to establish the beneficiary's continuous employment with the petitioner during the two year period immediately preceding the filing of the petition, the petitioner merely stated:

Attached please find the beneficiary's 1099's and W-2's for 2007-2009. Please note that he is paid a combination of payroll and 1099 to save the synagogue money. He is still subject to the control of [REDACTED] as his employer.

The petitioner submitted three IRS Forms W-2 and one IRS Form 1099-MISC for the two-year period immediately preceding the filing of the petition:

- In 2007, an IRS Form W-2 shows that the petitioner paid the beneficiary \$17,500.
- In 2008, an IRS Form W-2 shows that the petitioner paid the beneficiary \$5,000.
- In 2008, an IRS Form 1099-MISC shows that the petitioner paid the beneficiary \$25,000.
- In 2009, an IRS Form W-2 shows that the petitioner paid the beneficiary \$15,000.

In both instances, the petitioner did not state the beneficiary's actual salary. Based upon the information provided by the petitioner, the AAO cannot determine whether the IRS forms show that the beneficiary worked continuously for the petitioner for the two year period immediately preceding the filing of the petition. However, the record contains an approved Form I-140 petition that the petitioner filed on behalf of the beneficiary. With that petition, the petitioner submitted a letter dated January 8, 2009, in which it stated that the beneficiary was working in a full time position, 40 hours per week, at the salary of \$16.52 per hour, which equals \$34,361 per year. The record also contains a Form ETA 9089 which was submitted in June of 2008 and corroborates the salary stated in the letter. Based upon the proffered wage set forth both in the letter from the petitioner dated January 8, 2009 and the Form ETA 9089, the petitioner has not established that it paid the beneficiary the proffered wage. The IRS Forms from 2007 to 2009 do not reflect that the petitioner had been

continuously working during the two years immediately preceding the filing of the petition, as required by the regulations above, since he did not receive a full year's salary during this time period as set forth by the proffered wage. Therefore, based on the information above, the director's decision will be upheld.

The third issue is whether the petitioner has established its ability to compensate the beneficiary for his employment in the United States. 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.

At filing, the petitioner did not submit any documents showing that it had the ability to compensate the beneficiary. On March 22, 2010, the director issued a NOID to the petitioner, in which she requested that the petitioner:

Submit evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried and non-salaried compensation. This evidence must also 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 comparable evidence. Submit IRS documentation such as IRS Forms W-2 or certified tax returns.

In response to the NOID, the petitioner submitted IRS Forms W-2 and 1099 from 2007 to 2009. However, it did not submit the documentation that was requested in the NOID. As a result, the director found:

On 3/22/2010, the petitioner was advised to submit evidence of how the petitioner intends to compensate the beneficiary. More specifically, the petitioner was asked to submit budgets showing monies set aside for salaries, leases, etc.; or to submit verifiable documentation that room and board would be provided if such were to be the case. The petitioner did not address this issue in its response to USCIS's Request for Evidence, and the petitioner did not explain the failure to submit financial documentation to prove the petitioner's claims. Hence, the petitioner has failed to establish that the beneficiary's income will be a real certainty.

On appeal, the petitioner stated:

Aside from the evidence submitted that the Beneficiary has and continues to be paid a salary, which is sufficient evidence that the petitioner has the "ability to pay" the salary, we also provide here in as Exhibit 3 bank statements for the Petitioner for the past year. In addition, we attach as Exhibit 9 phone bills and utility bills as evidence that the petitioner still operates a synagogue at the address [REDACTED] Petitioner has paid its obligations including salary, expenses, rent, etc. and continues to do so.

The AAO is not persuaded that the petitioner has the ability to compensate the beneficiary. The petitioner has not shown that it has the ability to compensate the beneficiary through past compensation. As explained above, the IRS Forms W-2 and 1099 from 2007 to 2009 do not meet this proffered wage set forth in the Form ETA 9089 and the petitioner's letter. Therefore, the petitioner has not established through past compensation to the beneficiary that it has the ability to compensate the beneficiary.

As the petitioner is unable to show its ability to compensate through past compensation, the AAO will next look at the financial documentation submitted by the petitioner to determine whether the petitioner has the ability to compensate the beneficiary. The petitioner submitted Chase bank statements for the petitioner for part of 2009 and part of 2010. The petitioner's reliance on the balances in the bank account is misplaced. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to compensate the beneficiary. Moreover, the 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). The petitioner also submitted phone bills and utility bills. However, these documents not demonstrate that the petitioner has the ability to compensate the beneficiary. Further, the AAO notes that the petitioner still has not submitted the documents that the director requested in the NOID. Therefore, the AAO finds that the petitioner has not shown that it has the ability to compensate the beneficiary.

The evidence submitted does not establish that the beneficiary was working continuously during the two year period immediately preceding the filing of the petition and that the petitioner has the ability to compensate the beneficiary. Therefore, the appeal will be dismissed.

As an additional matter, the AAO also finds that petitioner failed to establish that the beneficiary would be working full-time for the petitioner. 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 regulation at 8 C.F.R. § 204.5(m)(2) requires that the beneficiary come to the United States to work in a full time (average of at least 35 hours per week) compensated position. The record does not contain a schedule for the beneficiary or any other evidence showing that he would be working in a full-time position. Therefore, the AAO finds that the petitioner has not shown that the beneficiary will be coming to the United States to work in a full time compensated position.

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