

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



C1

Date: **NOV 15 2012** Office: CALIFORNIA SERVICE CENTER



IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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.

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 withdraw the director's decision. Because the record, as it now stands, does not support approval of the petition, the AAO will remand the petition for further action and consideration.

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 director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel, a letter from the petitioner, copies of Internal Revenue Service (IRS) transcripts, and copies of documents already in the record.

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 United States Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the alien 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 petition was filed on June 9, 2011. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work in lawful status throughout the two-year period immediately preceding that date.

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

*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.

According to the Form I-360 petition and accompanying materials, the beneficiary entered the United States on December 22, 2008 in R-1 nonimmigrant status authorizing her employment with the petitioner until December 22, 2011. In a letter submitted with the petition, the petitioner indicated that it has employed the beneficiary since December 22, 2008 and that she works 40 hours per week and is currently compensated at the rate of \$2,800 per month (\$33,600 per year).

The petitioner submitted a copy of the beneficiary's 2010 Form W-2 indicating that she received \$33,600 from the petitioner during that year. The petitioner also submitted an unsigned, uncertified copy of the beneficiary's 2010 Form 1040 tax return which listed a total income of \$33,600 for the year.

On September 14, 2011, USCIS issued a Request for Evidence, in part requesting additional evidence of the beneficiary's employment, including a detailed weekly work schedule and evidence of compensation received during the two-year qualifying period immediately preceding the filing of the petition. The notice specifically instructed the petitioner to submit IRS wage and income transcripts and federal tax return transcripts for the years 2009 and 2010.

In response to the notice, the petitioner submitted a weekly schedule for the beneficiary showing 40.5 hours of duties. The petitioner also resubmitted copies of the beneficiary's 2010 Form W-2 and Form 1040 tax return. In a December 6, 2011 letter responding to the notice, counsel for the petitioner stated: "The IRS transcripts that will establish the amount of salary are not yet available, although the Church has already made a request for the same." Counsel provided no explanation as to why, in December of 2011, the beneficiary's IRS transcripts for 2009 and 2010 would not be available. 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).

On February 14, 2012, the director denied the petition. The director found that the petitioner had only submitted non-verifiable documentation of compensation for the year 2010 and had failed to submit evidence of compensation during 2009. As the regulation at 8 C.F.R. § 204.5(m)(11) requires compensated employment, the director concluded that the petitioner failed to establish that the beneficiary had the requisite two years of qualifying work experience immediately preceding the filing of the petition.

On appeal, the petitioner submits the beneficiary's 2009 IRS Wage and Income Transcript which indicates that she earned \$28,000 from the petitioner, as well as her 2009 IRS Tax Return Transcript and Account Transcript reporting the same amount as total income for the year. The 2009 Account Transcript appears to indicate that amended tax returns were filed for that year. Counsel does not offer any explanation or description of what items were amended. Like a delayed birth certificate, the amended tax returns created several years after the fact raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). The petitioner also submits the beneficiary's 2010 IRS Wage and Income Transcript which indicates that she earned \$33,600 from the petitioner, as well as her 2010 IRS Tax Return Transcript reporting the same amount as total income for the year.

Although the petitioner has submitted evidence on appeal to indicate that the beneficiary's work for the petitioner was compensated during the qualifying period, without further explanation regarding the specific items amended on the beneficiary's 2009 tax return, the AAO cannot determine whether the beneficiary has the requisite two-years of continuous, qualifying work experience immediately preceding the filing of the petition. On remand, the petitioner should be given the opportunity to explain the 2009 amendments to the beneficiary's tax returns.

The record shows an additional obstacle to approval of the petition. The AAO may deny an application or petition that fails to comply with the technical requirements of the law 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 (9<sup>th</sup> 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 AAO finds that the petitioner has not established that the proffered position of musical director qualifies as a religious occupation.

The USCIS regulation at 8 C.F.R. § 204.5(m)(5) defines “religious occupation” as an occupation that meets all of the following requirements:

- (A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination.
- (B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.
- (C) The duties do not include positions that are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible.
- (D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

On the Form I-360 petition, the petitioner provided the following description of the beneficiary’s daily duties as musical director:

Composition of songs based on bible verses; selecting appropriate melodies for Sing-Read services; playing the piano for weekly services including the Lord’s Day Meeting, small group prayer meetings, church prayer meetings, college christians-on-campus meetings; selecting appropriate melodies for composing songs using a computer program; training additional pianists in the church; bible review in order to select appropriate music for services; practicing the piano with other church musicians in advance of services.

In response to the September 14, 2011 Request for Evidence, the petitioner provided further descriptions of the beneficiary’s duties as well as a detailed weekly schedule. The petitioner also submitted excerpts from its IRS Form 1023 Application for Recognition of Exemption Under

section 501(c)(3) of the Internal Revenue Code. The excerpts included multiple references to “singing” as part of the petitioner’s worship service.

On the Employer Attestation portion of the Form I-360 petition, the petitioner identified itself as affiliated with the denomination of “The Local Churches.” In its response to the Request for Evidence, the petitioner submitted printouts from the website of The Local Churches regarding its “Beliefs & Practices.” However, *none of the evidence submitted indicated that the position of minister of music is **recognized as a religious occupation within the denomination.*** Therefore, the petitioner has not established that the position qualifies as a religious occupation according to the definition at 8 C.F.R. § 204.5(m)(5).

The AAO does not find that a musical director position could never meet the eligibility requirements of a religious occupation, only that the petitioner has not yet demonstrated that the beneficiary’s position qualifies as a religious occupation.

For the reasons discussed above, the AAO will remand this matter for a new decision. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director’s decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.