



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **DEC 06 2013** Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) remanded the matter to the director for consideration under new regulations. The director again denied the petition and certified the decision to the AAO for review. The AAO affirmed the denial of the petition and dismissed a subsequent motion to reopen. The matter is now again before the AAO on a motion to reconsider. The motion is granted. The petition remains denied.

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 minister. The director determined that the petitioner failed to establish that the beneficiary has the requisite two years of continuous, qualifying work experience immediately preceding the filing of the petition. The AAO, in its June 20, 2012 decision, agreed with the director's determination. On July 24, 2012, the petitioner filed a motion to reopen. On January 25, 2013, the AAO dismissed the motion as untimely filed. The petitioner filed the instant motion to reconsider on March 1, 2013.

In denying the petition on June 18, 2010, the director questioned the validity of the petitioner's assertions regarding the beneficiary's full time schedule of duties, in part based on a failed compliance review. On certification, counsel for the petitioner asserted that most of the beneficiary's duties take place outside of the actual church building. In affirming the denial of the petition on June 20, 2012, the AAO found counsel's assertion to be contrary to previous assertions made by the petitioner and counsel. The AAO stated that only the church address was listed on the employer attestation as the "address(es) or location(s) where the alien will be working" and that counsel previously stated that "all religious activities take place" at the church's address. 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 AAO also found that, apart from a letter from a hospital confirming that the beneficiary visits patients, the petitioner had not submitted documentary evidence to support its assertions regarding the beneficiary's purported duties outside of the church. Additionally, the AAO stated that the submitted copies of the beneficiary's Internal Revenue Service (IRS) Tax Return Transcripts for the years 2005 to 2007 did not indicate the source of his income. Accordingly, the transcripts failed to support the assertion that the beneficiary was engaged in qualifying, compensated employment with the petitioner during the two year qualifying period immediately preceding the filing of the petition. Finally, the AAO found that the petitioner failed to submit evidence to support its assertions that the beneficiary held R-1 nonimmigrant status during the qualifying period.

In support of the July 24, 2012 motion to reopen, the petitioner submitted evidence that the beneficiary entered the United States in R-1 nonimmigrant status on March 25, 2004, August 16, 2004 and March 4, 2007. Accordingly, the AAO withdraws its finding that the petitioner failed to establish that the beneficiary held lawful immigration status and employment authorization during the qualifying period.

In regard to the site visits discussed by the director in denying the petition, counsel argued that the site visits on June 18, 2008, July 13, 2008 and July 23, 2008 “never occurred,” stating: “How could there possibly have been site visits occurring three months before the regulations became effective?” The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(12) reads:

Inspections, evaluations, verifications, and compliance reviews. The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization’s facilities, an interview with the organization’s officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

While the above regulation is part of a 2008 revision to the regulations (*see* 73 Fed. Reg. 72276 (Nov. 26, 2008)), compliance review procedures were already in place before November 26, 2008. Therefore, the above regulation described an existing process, rather than created a new one. Additionally, in its June 20, 2012 decision, the AAO acknowledged that “according to the record, the 2008 site visits discussed by the director were conducted not at the petitioning church, but at [REDACTED] the church of the signatory, [REDACTED] and stated that “a compliance review was later conducted regarding the petitioning church.”

Regarding the beneficiary’s work schedule during the qualifying period, counsel argued:

Your decision points out an inconsistency in counsel’s prior statements in regards Pastor [REDACTED] work schedule. As stated by counsel **all religious activities** do take place in the church- whether its pastor is officiating services or leading women’s or men’s groups at nights. But additionally, the Pastor as the spiritual leader of a small group also conducts bible studies and prayer groups in individual member’s homes. The Pastor visits the sick in hospitals and the elderly at home and he has other duties outside of the Church. We provided a letter from [REDACTED] in which they certify that Pastor [REDACTED] has been visiting patients since 2004.

(Emphasis in original). Counsel also indicated that the beneficiary used his home as an office for church business. The petitioner submitted signed statements from the beneficiary and the petition’s signatory, [REDACTED]. Neither counsel’s brief nor the signed statements provide an

explanation as to why the church address was listed on the employer attestation as the only location where the beneficiary would work, and the petitioner again failed to submit documentary evidence to support counsel's assertions regarding the beneficiary's additional weekly activities outside of the church. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The petitioner submitted promotional materials and photographs relating to special church events, but this evidence does not identify the beneficiary or confirm his participation in these events. Further, the petitioner again failed to submit IRS evidence to show qualifying, compensated religious work during the qualifying period.

As an additional matter, in her brief supporting the July 24, 2012 motion, counsel stated that the beneficiary is no longer employed by [REDACTED] Florida. Counsel indicated that, as of January 2012, the beneficiary is working as a pastor of [REDACTED] a church within the petitioner's denomination, in [REDACTED] Florida, and that another pastor has taken over as pastor of [REDACTED]. Counsel argues that "a special immigrant petition remains valid even if minister is transferred or assigned to a different congregation within the same denomination." Counsel cites a May 13, 1994 letter from [REDACTED] of the former Immigration and Naturalization Service (INS). The cited letter discussed the validity of an approved special immigrant petition, rather than a pending or denied petition. Further, the letter interpreted regulations which are no longer in effect, as new regulations pertaining to special immigrant religious workers were published on November 26, 2008.

The current regulation at 8 C.F.R. § 204.5(m)(7) requires an authorized official of the prospective employer of an alien seeking religious worker status to complete, sign and date an attestation providing specific information about the employer, the alien, and the terms of proposed employment. The regulation at 8 C.F.R. § 204.5(m)(7) states that the prospective employer must specifically attest to 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 [United States Citizenship and Immigration Services] 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 submitted Form I-360 and employer attestation relate to the beneficiary's proposed employment for [REDACTED] Florida. The specific information in the attestation about the prospective employer, such as the number of members, number of employees, number of aliens holding special immigrant or nonimmigrant religious worker status, and number of petitions filed, no longer applies to the beneficiary's proposed employer and therefore fails to satisfy the regulations. Similarly, the petitioner has not established how it intends to compensate the beneficiary. The attestation and regulations require specific information regarding how the beneficiary will be compensated. With the change in employment, the petitioner's claims and documentary evidence about compensation are no longer applicable. The USCIS regulation at 8 C.F.R. § 204.5(m)(10) states:

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.

The petitioner submitted evidence of past compensation of the beneficiary by [REDACTED] Florida. The petitioner has not demonstrated how and by whom the beneficiary will be compensated while serving as pastor of [REDACTED]

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 reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The AAO reaffirms its decision dated June 20, 2012. The petition remains denied.