



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **JAN 30 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 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 in accordance with the instructions on 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,


Ron Rosenberg
Acting 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 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 pastor in charge of its Brazilian congregation. The director determined that the petitioner had not established how it intends to compensate the beneficiary. The director additionally found that the petitioner had not established that the beneficiary had the requisite two years of continuous, 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a brief from counsel, a letter from the petitioner, a copy of the petitioner's 2011 financial statement, a copy of an unpublished AAO decision, and a copy of the decision in *Shia Association of Bay Area v. United States*, No. 11-1369 SC (N.D. Cal. Feb. 1, 2012).

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 to be discussed is whether the petitioner has established how it intends to compensate the beneficiary. The United States Citizenship and Immigration Service (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 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. Among other information, the prospective employer must specifically attest to the following:

(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;

The petitioner filed the Form I-360 petition on February 21, 2012. In the Employer Attestation portion of the petition, the petitioner stated that the beneficiary "will receive \$28,800 per year." In a letter accompanying the petition, the petitioner described the beneficiary's proffered compensation package as follows:

[REDACTED] will receive a starting annual salary of \$28,800 paid to him bi-weekly from the [REDACTED]. This salary will increase as the Brazilian congregation grows along with the growth of [REDACTED] duties and responsibilities.

In an additional letter submitted with the petition, the petitioner stated: "Our gross revenue for year 2010 is \$373,954. Our annual income will support the proffered position." The petitioner submitted a copy of its financial statement for the year 2010. Additionally, the petitioner submitted copies of processed checks from the petitioner to the beneficiary issued between August 3, 2010 and January 4, 2012. The submitted checks showed total payments of \$7,400 in 2010 and \$11,700 in 2011.

In a Request for Evidence issued on March 2, 2012, USCIS instructed the petitioner to submit additional evidence regarding how it intends to compensate the beneficiary in accordance with the regulation at 8 C.F.R. § 204.5(m)(10).

In response, the petitioner resubmitted a copy of its 2010 financial statement and indicated that its 2011 financial statement was not yet completed. The petitioner submitted uncertified copies of the beneficiary's Form 1040 tax returns for the years 2009 through 2011. The Schedule C forms for those years listed the following amounts as gross income without identifying the source(s) of the income: \$20,400 in 2009, \$15,000 in 2010, and \$13,259 in 2011. The petitioner also submitted a copy of the beneficiary's Form 1099-MISC for 2011 which indicated that he earned \$13,259.49 from the petitioner during that year. Additionally, the petitioner provided a copy of the beneficiary's earnings record from the Social Security Administration (SSA) covering the years 2009 and 2010. The SSA record listed income of \$2,559 in 2009 reported as self-employment, and income of \$3,929 in 2010, including \$2,909 reported as self-employment and \$1,020 from [REDACTED]

The AAO notes that the amount of earnings listed on the beneficiary's SSA record for the years 2009 and 2010 are not consistent with the earnings listed on his Form 1040 tax returns. 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 June 7, 2012, the director denied the petition based in part on a finding that the petitioner failed to establish how it intends to compensate the beneficiary. The director noted that, because the petitioner had paid the beneficiary less than the proffered amount, the evidence of past wages did not establish the petitioner's ability to provide the full proffered salary. The director additionally found that the 2010 financial statement did not demonstrate that the petitioner had the additional funds necessary to pay the proffered wage. The director stated:

The 2010 financial statement (Statement of Cash Receipts and Disbursements) show Total cash receipts of \$373,954; total cash disbursements of \$311,748; Debt servicing of \$52,931 and excess cash receipts over cash disbursements of only \$9,275.

The Schedule of Assets, Liabilities and Fund Balance sheet shows total current assets of \$28,942 and total current liabilities of \$24,173 indicating net current assets of only \$4,769. Total property and equipment for the petitioner is \$2,616,704 however, it seems highly unlikely that these would be converted into cash in order [to] pay the beneficiary's wages.

In a letter submitted on appeal, the petitioner states the following:

When we began this process we stated that [REDACTED] would be receiving an annual salary of \$28,000.00. Due to unforeseen circumstances we have not been able to fulfill this commitment. Therefore we would like to rescind the statement of being able to pay [REDACTED] \$28,000.00 annually. At

the same time we would like to change his annual pay to \$15,000, with his already given consent.

When we began this process, [REDACTED] salary was based upon a projected growth of church membership and income. Because this did not happen we fell short with our overall church and ministries budget for the year. This is evidenced between our 2010 income of \$373,954.00 and our 2011 income of \$338,290.00. Our budgeting process is somewhat different from other religious organizations. We formulate our annual budget without any financial assistance from our headquarters. According to our 2011 financial statement along with the salary adjustment, we believe that we can and will be able to pay [REDACTED] the \$15,000 annual salary.

Even though our fulltime pastors and ministers do not take a vow of poverty, they do willingly make sacrifices; including financial sacrifices to fulfill their ministerial duties.

In her brief, counsel argues that the previously submitted evidence of past compensation and the 2010 financial statement establish the petitioner's ability to provide the "amended" salary of \$15,000 per year. Additionally, counsel acknowledges that the beneficiary's position as a minister does not meet the definition of a religious vocation under 8 C.F.R. § 204.5(m)(5). However, counsel argues that ministerial positions and religious vocations share "a common theme of a lifetime commitment to a religious way of life,... regardless of the amount of compensation received for such." Counsel cites an unpublished decision of the AAO regarding a beneficiary who would be employed as a nun, and asserts that USCIS "took no issue" with proposed "non-salaried compensation in the form of room and board, medical insurance and a small stipend for personal use." Counsel argues that the new proposed salary should be considered acceptable compensation for a minister who is willing to live within modest means in order to fulfill his religious calling.

The AAO notes that while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. Accordingly, the AAO decision cited by counsel is not a binding precedent decision.

With regard to the petitioner's attempt to amend the amount of proposed compensation on appeal, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12). This revision of the beneficiary's proposed compensation constitutes an impermissible material change. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Counsel correctly notes that the regulations do not dictate the form and amount of compensation paid to religious workers, and allow for non-salaried compensation of such workers. However, the regulation at 8 C.F.R. § 204.5(m)(7)(vi) requires the petitioner to attest to the “complete package” of compensation being offered at the time of filing the petition and the regulation at 8 C.F.R. § 204.5(m)(10) requires the petitioner to provide, as initial evidence, verifiable evidence of how the petitioner intends to compensate the alien. Therefore, the petitioner must set forth the intended salaried or non-salaried compensation **at the time of filing** and provide evidence in support of its ability to provide such compensation.

In this instance, the petitioner indicated at the time of filing that it would provide the beneficiary with compensation in the amount of \$28,800 per year. Accordingly, the petitioner is required to submit verifiable evidence of its ability to provide that amount. The AAO agrees with the director that the petitioner has not established its ability to pay the proffered wage.

For the reasons discussed above, the AAO agrees with the director’s determination that the petitioner failed to establish how it intends to compensate the beneficiary.

The second issue to be discussed is whether the petitioner has established that the beneficiary has the requisite two years of continuous, lawful, qualifying work experience during the two years immediately preceding the filing of the petition.

The USCIS regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary 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. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work in lawful immigration status throughout the two-year period immediately preceding February 21, 2012.

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.

In a letter accompanying the Form I-360, counsel for the petitioner stated that the beneficiary "has been working as a minister in the United States since 2007." The petitioner submitted evidence that the beneficiary held R-1 nonimmigrant status authorizing his employment with the petitioning church from October 14, 2010 to July 30, 2012. As discussed above, the petitioner also submitted copies of processed checks from the petitioning church to the beneficiary dated between August 3, 2010 and January 4, 2012. The record does not indicate that the beneficiary held any employment authorization prior to October 14, 2010. Accordingly, any work performed for the petitioner prior to that date is not considered qualifying experience under 8 C.F.R. § 204.5(m)(11).

In the March 2, 2012 Request for Evidence, USCIS requested additional evidence regarding the beneficiary's work history during the two-year qualifying period immediately preceding the filing of the petition. The notice specifically instructed the petitioner to submit experience letters providing detailed information about the beneficiary's schedule and the work performed during the qualifying period. The petitioner was also instructed to submit evidence of compensation received and, if the experience was gained in the United States, evidence that the beneficiary was authorized to accept employment.

In a letter responding to the notice, the petitioner stated the following, in pertinent part:

Work History: [REDACTED] has been working fulltime here at the church since 2010. From February 2010 until August 2010, he worked fulltime as a volunteer. He has been a fulltime paid employee of the church since August 2010.

As discussed above, the petitioner submitted uncertified copies of the beneficiary's tax returns for the years 2009 through 2011, as well as a copy of the beneficiary's SSA earnings record, which included \$1,020 earned from [REDACTED] in 2010.

In her decision denying the petition, the director found that the beneficiary's work for [REDACTED] as reflected on his SSA earnings record, constituted unauthorized employment and a failure to maintain his lawful R-1 nonimmigrant status.

On appeal, the petitioner does not contest that the beneficiary failed to maintain lawful immigration status throughout the two-year qualifying period immediately preceding the filing of the petition. Instead, counsel for the petitioner argues as follows:

Petitioner need not establish that the beneficiary has been working continuously in lawful immigration status because such requirement, as set forth in 8 C.F.R. 204.5(m)(4) and (11), is *ultra vires* to the Immigration and Nationality Act, specifically Section 245(k) of the Act.

In support of this argument, counsel cites the decision of the United States District Court for the Northern District of California in *Shia Association of Bay Area v. United States*, No. 11-1369 SC (N.D. Cal. Feb. 1, 2012). However, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Accordingly, the cited decision is not a relevant precedent decision.

Regarding counsel's argument that the requirements of 8 C.F.R. § 204.5(m)(4) and (11) conflict with section 245(k) of the Act, the AAO does not agree with counsel's argument. Section 245(k) applies at the adjustment stage and is applicable only to an alien "who is eligible to receive an immigrant visa." Unlike the regulations at 8 C.F.R. § 204.5(m)(4) and (11), section 245(k) does not address the eligibility requirements for receiving an immigrant visa, only for adjusting status once eligibility for the immigrant visa has been established.

The AAO agrees with the director's finding that the petitioner failed to establish that the beneficiary maintained lawful immigration status throughout the qualifying period.

The regulation at 8 C.F.R. § 274a.12(b)(16) states that "[a]n alien having a religious occupation, pursuant to § 214.2(r) of this chapter ... may be employed only by the religious organization through whom the status was obtained." The regulations at 8 C.F.R. §§ 214.2(r)(2) and (13) provide that "[a]n alien may work for more than one qualifying employer as long as each qualifying employer submits a petition plus all additional required documentation as prescribed by USCIS regulation" and that an R-1 nonimmigrant "may not be compensated for work for any religious organization other than the one for which a petition has been approved or the alien will be out of status."

Further, the regulation at 8 C.F.R. § 214.1(e) provides that a nonimmigrant may engage only in such employment as has been authorized. Any unlawful employment by a nonimmigrant constitutes a failure to maintain status.

The petitioner has not shown and the record does not indicate that the beneficiary held authorization to work for [REDACTED]. Accordingly, such employment constituted a failure to maintain his lawful R-1 status. Additionally, the beneficiary's tax return for the year 2010 lists gross income above the amount reflected on the 2010 paychecks submitted by the petitioner and the income from

The petitioner has not accounted for this additional income and therefore has not demonstrated that any additional employment was authorized under immigration law.

Regarding the petitioner's claim of the beneficiary's volunteer work within the United States from February 2010 to August 2010, such work is not considered to be qualifying experience. In the preamble to the proposed rule, USCIS recognized that although "legitimate religious work is sometimes performed on a voluntary basis . . . allowing such work to be the basis for . . . special immigrant religious worker classification opens the door to an unacceptable amount of fraud and increased risk to the integrity of the program." *See* 72 Fed. Reg. 20442, 20446 (April 25, 2007). The regulation at 8 C.F.R. § 204.5(m)(11) specifically requires that the alien's prior experience have been compensated either by salaried or non-salaried compensation (such as room and board), but can also include self-support under limited conditions. In elaborating on this issue in the final rule, USCIS determined that the sole instances where aliens may be uncompensated are those aliens "participating in an established, traditionally non-compensated, missionary program." *See* 73 Fed. Reg. at 72278. *See also* 8 C.F.R. § 214.2(r)(11)(ii). The petitioner has neither claimed nor established that the beneficiary was participating in such a program. Accordingly, any time the beneficiary may have spent in the United States "working" as a volunteer for the petitioner cannot be considered qualifying employment.

For the reasons discussed above, the AAO agrees with the director's determination 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 will dismiss the appeal 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.