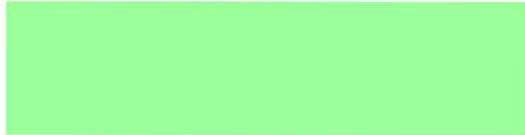




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 24 2013** 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:

SELF-REPRESENTED

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 Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will dismiss the motion to reconsider, grant the motion to reopen, and affirm the dismissal of the appeal.

The petitioner is a *gurdwara* (sometimes spelled *gurudwara*), or Sikh temple. 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). The petitioner claims that the beneficiary will perform services as a *kirtankar*, or devotional hymn singer and priest. The director determined that the petitioner had not established that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing date of the petition. In affirming that finding, the AAO cited an additional ground for denial relating to the beneficiary's compensation.

In this decision, the term "prior counsel" shall refer to [REDACTED], who represented the petitioner at the time the petitioner filed the petition. The petitioner filed the motion on its own behalf, and refers to "[p]revious counsel" on motion, indicating that [REDACTED] no longer represents the petitioner. There is no new Form G-28, Notice of Entry of Appearance as Attorney or Representative, or other indication that the petitioner has secured new counsel in this proceeding. The petitioner is, therefore, considered to be self-represented.

On motion, the petitioner submits statements, photographs, and supporting documents.

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, 2015, 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, 2015, 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 U.S. Citizenship and Immigration Services (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. The USCIS regulation at 8 C.F.R. § 204.5(m)(11) reads:

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 [Internal Revenue Service] 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 28, 2009. On the employer attestation that accompanied the petition, the petitioner stated that the beneficiary would receive an "annual salary [of] \$25000 plus free boarding & lodging."

An accompanying letter from [redacted] then president of the petitioning temple, included this passage: "[the beneficiary] has been employed by our religious organization as a Kirtankar in the United States since April 7, 2004 to the present time. [The beneficiary] receives an annual salary of

\$25,000 including free lodging and boarding valued at \$15,400.” These statements disagree as to whether the value of the beneficiary’s food and lodging is included in the \$25,000 sum, or in addition to it.

On October 27, 2009, the director issued a request for evidence, instructing the petitioner to submit certified copies of the beneficiary’s income tax returns and a copy of the beneficiary’s IRS Form W-2 Wage and Tax Statement for 2007, and to provide further details regarding the beneficiary’s experience and work schedule. The director also requested other evidence and information. Prior counsel stated that the petitioner’s response included a copy of its 2006 membership list and copies of the beneficiary’s IRS Forms W-2 for 2007 and 2008. Prior counsel asserted that the beneficiary “works 40 hours during the weekdays and then extra hours during the special weekend programs.”

The petitioner submitted uncertified copies of the beneficiary’s IRS Form 1040 Individual Income Tax Returns for 2007 and 2008, showing that the beneficiary earned \$10,400 in business income in 2007, and \$6,800 in salary in 2008. A copy of an IRS Form W-2 corroborated the figure for 2008, but the petitioner’s submission did not include an IRS Form W-2 or 1099 for 2007. The petitioner did not explain the absence of the Form W-2 that the director had specifically requested. The petitioner also did not explain why the beneficiary’s 2008 salary was less than the proffered salary.

The petitioner also submitted a letter from [REDACTED]. The original date printed on the letter was March 15, 2007; however, the date was obscured with correction fluid, and a handwritten date of December 2, 2009 was substituted. [REDACTED] stated that the beneficiary “works approximately 40 hours during the weekdays during which he works 4 hours each during the morning and evening services [on a] daily basis. In addition to that he works flexible hours during the special weekend services.”

The director denied the petition on January 12, 2010, stating that the submitted evidence does not consistently show continuous, full-time employment. The director noted that the petitioner paid the beneficiary significantly less than the stated salary in 2008, and did not submit any acceptable IRS documentation of the beneficiary’s 2007 compensation. The director also noted the absence of the beneficiary’s name from the 2006 member list, which was not consistent with the claim that the beneficiary was already working at the petitioning temple before 2006.

On appeal from that decision, [REDACTED] stated that the \$25,000 salary figure “includes free boarding and lodging valued at \$15,400,” leaving an “annual cash salary [of] approximately [\$]10,000 per annum.” He also stated: “our organization has fixed his salary at \$10,400 per annum from 2009 onwards. . . . Previously [the beneficiary] was receiving lesser salary but he has always been our full time employee since April 2003.”

The petitioner submitted new tax documentation. An uncertified copy of the beneficiary’s 2007 income tax return, prepared January 21, 2010, showed \$27,150 in business income. Under Part II, “Explanation of Changes,” the beneficiary stated: “part of income not reported earlier now reported.” An uncertified and undated copy of the beneficiary’s amended income tax return for 2008

added \$19,810 in business income to the previously reported \$6,800 in salary, for a total of \$26,610. The 2008 return showed his home address as [REDACTED] Richmond Hill, New York. The beneficiary left the "Explanation of Changes" blank on the amended 2008 return. An IRS Form W-2 for 2009 indicated that the petitioner paid the beneficiary \$10,400 in salary.

Regarding the beneficiary's schedule, [REDACTED] stated: "Morning service starts at the dawn around 4.30 am and concludes at 8.30 am. Evening service goes from 5 pm to 9 pm."

With respect to the membership list, [REDACTED] stated: "this membership list is only for the voting purpose[s] and normally salaried employees of our organization . . . do not participate in the election process. Hence their names are not on this list."

The AAO dismissed the petitioner's appeal on April 23, 2012, stating that the beneficiary's IRS Form W-2 for 2008 showed a salary "below the petitioner's new stated salary of \$10,000 per year," and that the petitioner had submitted inconsistent evidence regarding the beneficiary's 2007 compensation. The AAO stated that amended tax returns, filed after the director raised concerns about the beneficiary's compensation, have diminished evidentiary weight. The AAO also found that the petitioner had not provided verifiable documentation that it has provided, or will provide, room and board to the beneficiary (such as documentary evidence that it owns the property where the beneficiary resides).

In addition to upholding the director's stated basis for denial, the AAO added that, given the petitioner's underpayment of the beneficiary, the petitioner had not established how it intends to compensate the beneficiary as required by the USCIS regulation at 8 C.F.R. § 204.5(m)(10). In making that finding, the AAO noted that, on Form G-325A, Biographic Information, the beneficiary claimed to have resided at [REDACTED] Richmond Hill, New York, since August 2004. The AAO stated that the petitioner had not established its ownership or control of the property at that address.

On motion, [REDACTED], [REDACTED] successor as president of the petitioning temple, states: "Previous counsel provided ineffective assistance of counsel by failing to obtain a provide [sic] W-2 or 1099 statements for all years in question demonstrating that the Beneficiary was paid by the Petitioner. Such statements are enclosed."

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

Here, the petitioner has not met any of the *Lozada* requirements to establish ineffective assistance of counsel. [REDACTED] affidavit did not set forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the petitioner in this regard. There is no evidence that the petitioner informed prior counsel of the allegations against him, or that the petitioner filed a complaint with appropriate disciplinary authorities (or explained why it did not do so).

On motion, the petitioner submits IRS Forms W-2 from 2008, 2009 and 2011. The petitioner had previously submitted the forms for 2008 and 2009, and the 2011 form falls outside the two-year qualifying period immediately preceding the petition's August 28, 2009 filing date. The petitioner still has not submitted the 2007 IRS Form W-2, which the director specifically requested before denying the petition.¹

In a newly submitted affidavit, the beneficiary states:

At all times since I have been employed by the Petitioner, I have been paid the salary which was set forth in the visa petition. Copies of W-2 forms are attached which demonstrate this.

I have lived at an apartment located in the Temple since I began working for the [REDACTED]. The temple is located at [REDACTED] Richmond Hill, New York. I was told that USCIS stated that I claimed on a biographic data form to live at [REDACTED]. I do not know if USCIS made an error in stating that in its decision, if my attorney erroneously completed the form, or if I made an error in providing the address to my attorney. It is obvious from being only one street number off that a typographical error occurred somewhere. I have always lived at the Temple since I entered the United States.

[REDACTED] in a separate affidavit, repeated the assertion that the beneficiary has always resided within the temple. The petitioner submitted several photographs purporting to show the beneficiary's apartment inside the temple.

It is plausible that "[REDACTED]" is, as claimed, a typographical error for the petitioner's very similar address, "[REDACTED]". However, the beneficiary has repeatedly claimed another address that cannot be explained in this manner.

When the petitioner originally submitted copies of the beneficiary's 2007 and 2008 income tax returns, both returns showed the beneficiary's address as [REDACTED], Richmond Hill, New York. The same address appears on the beneficiary's amended 2007 tax return. A copy of the

¹ Future submission of the 2007 Form W-2 would not overcome the denial of the petition. *Cf. Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988) (if the petitioner fails to submit specifically requested evidence in response to a request from the director, USCIS will not accept that evidence if submitted later on appeal).

beneficiary's 2009 income tax return, newly submitted on motion, also shows that address (even though the accompanying IRS Form W-2 for 2009 shows the address as [REDACTED]). The same address also appears on a newly submitted copy of the beneficiary's IRS Form W-2 for 2011.

Because the beneficiary's housing is said to be an integral element of his compensation, and both the petitioner and the beneficiary have asserted that this housing is within the temple building itself, the repeated use of an address in a completely different building (on the other side of [REDACTED]) casts serious doubt on the credibility of the petitioner's and the beneficiary's claims.

The petitioner has submitted copies of real estate documents to establish its ownership of the temple property, but these documents do not show that the petitioner owns the property at [REDACTED] Richmond Hill, New York. The petitioner has never stated that the beneficiary lived in a house near the temple. Rather, the petitioner, as well as the beneficiary, claimed that the beneficiary lived in an apartment located inside the temple itself.

When discussing discrepancies on the beneficiary's income tax returns, it is noted that the 2007 and 2008 returns list his filing status as "single" with no dependents, whereas his 2009 return shows his status as "married" (to [REDACTED]) with three children. On Form G-325A, the beneficiary stated that he married [REDACTED] in March 2003, which indicates that he misrepresented his marital status on at least two tax returns.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 582, 591-92.

The petitioner's assertions regarding the beneficiary's compensation have been inconsistent and contradictory, and therefore lack credibility. Given these discrepancies, even if the petitioner had successfully made an ineffective assistance of counsel claim, it is not clear that the outcome of these proceedings would have been any different. The petitioner has not shown that the AAO's decision was incorrect at the time of its issuance, and therefore the motion does not qualify as a motion to reconsider under 8 C.F.R. § 103.5(a)(3). The petitioner has submitted new evidence on appeal, in the form of real estate records and other materials, which meets the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2), but that evidence does not overcome the stated grounds for denial of the petition. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the AAO will affirm its dismissal of the appeal.

ORDER: The AAO's decision dated April 23, 2012 is affirmed. The appeal remains dismissed, and the petition remains denied.