

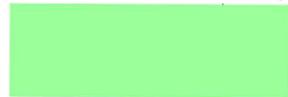


U.S. Citizenship
and Immigration
Services

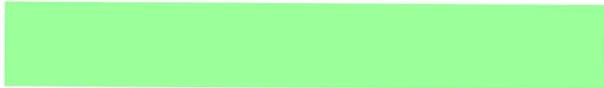
(b)(6)



Date: **MAR 05 2013** Office: CALIFORNIA SERVICE CENTER



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 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 and a subsequent motion to reopen and reconsider. 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 an associate pastor. 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.

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 U.S. 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 October 11, 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 evidence, the beneficiary most recently entered the United States on April 15, 2011 in R-1 nonimmigrant status authorizing his employment with [REDACTED] Lynnwood, Washington. His first entry in such status was in 2007.

On the petition, the petitioner described the beneficiary s qualifications for the proffered position as follows:

Ordained as a minister of religion on April 3, 2004, [REDACTED]

[REDACTED] from April 2004 to Feb. 2007;

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Missionary Pastor with [REDACTED] from Feb. 2007 to Dec. 2008;

Associate Pastor with [REDACTED] from Dec. 2008 to present.

In a letter accompanying the petition, the petitioner stated the following:

[REDACTED] has been serving our church as the Associate Pastor for over two years and has been a member of our church during such time. In 2010, our Senior Pastor, [REDACTED] suddenly retired after 19 years of service to our church. Our current Senior Pastor, [REDACTED] was installed in January 2011 and our church had a big gap in our church leadership. During the vacancy in our Senior Pastor position, [REDACTED] served our church as the Interim Senior Pastor and performed much of the work of the Senior Pastor. He led Bible studies and gave sermons on Sundays. In fact, during 2010, more than half of the sermons were given by [REDACTED]

[REDACTED] has been a gift to our church. He came to our church via a merger of two churches. Prior to becoming our Associate Pastor, he was the Associate Pastor for the [REDACTED], a member of the [REDACTED] merged into [REDACTED] in December 2008. Due to the decline in [REDACTED], it was simply absorbed into [REDACTED] by a vote of members. This was possible because [REDACTED] subscribe to similar beliefs and are organized similarly; both organizations subscribe to the same basic tenets of faith and both denominations are members of [REDACTED] and both are autonomous churches or [REDACTED]

The Church will continue to pay [REDACTED] an annual salary of \$18,000 for his services and will also provide a parsonage allowance of \$1320.25 per month.

The petitioner submitted copies of paychecks from the petitioning church to the beneficiary from November 2010 through February 2011. Additionally, the petitioner submitted copies of its bank account statements for the months of October 2010 through July 2011 on which the petitioner highlighted checks to unidentified recipient(s) in amounts consistent with the beneficiary's purported salary and housing allowance.

On November 11, 2011, USCIS issued a Request for Evidence (RFE), in part requesting 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 held employment authorization. The notice requested evidence that the beneficiary's transfer of employment from the [REDACTED] to Lynnwood [REDACTED] was authorized by immigration law.

In a letter responding to the notice, counsel for the petitioner stated the following:

Prior to 2011 [REDACTED] support was provided by individuals directly and by the benevolence fund of our church. [REDACTED] is not on contract but has served us since 2007, by grace (please refer to the [REDACTED] letter dated January 22, 2012 for more details.) In 2011 we requested that all personal giving for [REDACTED] support be submitted through the church offering, and not directly to him as had been the practice in years past. Hence, no complete official documentation is available prior to 2011.

On March 2, 2012, the director denied the petition, finding that the petitioner failed to establish that the beneficiary was lawfully employed as a religious worker for at least the two years immediately preceding the filing of the petition. The director found that the petitioner's evidence failed to demonstrate that the beneficiary was continuously engaged in compensated employment during the qualifying period. Additionally, the director found that the beneficiary had engaged in unauthorized employment with the petitioning church.

On April 2, 2012, the petitioner filed a motion to reopen and a motion to reconsider the director's decision. In a letter submitted on motion, the petitioner stated that [REDACTED] and the petitioning organization voted to combine in December 2008, but that [REDACTED] continued to exist as a separate entity and the petitioner became like a parent organization responsible for the financial support of [REDACTED]. The petitioner additionally stated:

After the combination of the two churches, [REDACTED] [the petitioner] issued salary checks to [REDACTED] but [REDACTED] did not withhold taxes or treat him as an employee for tax purposes. Copies of checks issued to [REDACTED] were previously submitted with the initial application and are enclosed again to highlight the fact that [REDACTED] paid the salary and the housing allowance. When we paid these amounts or when our members contributed directly toward [REDACTED] salary, it was our understanding that [REDACTED] would treat [REDACTED] as its employee and pay withholding taxes and issue him W-2 forms. In fact, this is actually what occurred.

In the decision by the Service dated March 2, 2012, the basis for the denial is that the beneficiary's transfer of employment was not authorized by the Service. The beneficiary did not change employers. He continues to perform services for [REDACTED] continues to exist and is now affiliated with [REDACTED] and through such, it is affiliated with the [REDACTED].

Accompanying the Form I-290B, Notice of Motion, the petitioner also submitted an affidavit from In [REDACTED] a representative of [REDACTED] [REDACTED] asserted that [REDACTED] merged with the petitioner due to financial problems stemming from a severe decline in membership. He further stated that under the agreement, the petitioner would become the dominant organization and would provide financial support to [REDACTED] and that the beneficiary would act as interim minister for the petitioner. Regarding the beneficiary's compensation, [REDACTED] stated the following:

When [REDACTED] and its members paid the salary and parsonage allowance for [REDACTED] [REDACTED] the checks were endorsed to [REDACTED] accounted for these items. We paid for the employment taxes and filed W-2 forms for [REDACTED], not [REDACTED]

Without the financial support of the [REDACTED] as an organization would not exist. So long as [REDACTED] supports [REDACTED] it will continue to exist as a separate entity and has and will continue to employ [REDACTED]

The petitioner submitted the beneficiary's Internal Revenue Service (IRS) Wage and Income Transcripts for the years 2008, 2009, and 2010, which indicated that the beneficiary earned \$12,000, \$10,800, and \$17,600 from [REDACTED] in those years respectively. The petitioner also submitted Forms W-2 from [REDACTED] for the years 2008, 2010, and 2010, which indicated that, in 2008 the beneficiary earned \$12,000 in wages and \$8,400 in housing allowance, in 2010 he earned \$17,600 in wages and \$14,500 in housing allowance, and in 2011 he earned \$22,500 in wages and \$13,500 in housing allowance. Additionally, the petitioner submitted the beneficiary's IRS Tax Return Transcripts for 2008 through 2011, which listed total wage amounts matching those listed on the Forms W-2 and Wage and Income Transcripts.

On April 9, 2012, the director granted the petitioner's motion to reopen the petition and on April 19, 2012, issued an RFE. In the notice, the director instructed the petitioner to submit evidence of a legal merger between the petitioner and the beneficiary's authorized R-1 employer, and to account for the failure of the beneficiary's authorized employer to notify USCIS regarding the changes in the beneficiary's terms of employment. The director additionally noted contradictions in statements made by the petitioner regarding the beneficiary's employment history, and instructed the petitioner to resolve any inconsistencies in the record through independent objective evidence.

In a letter responding to the notice, counsel for the petitioner asserted that there was never a legal merger but a combining of functions for the two churches, and that they share the same church building but continue to exist as separate legal entities. Counsel additionally stated: While the beneficiary's compensation originates from [REDACTED] this compensation is channeled through to the beneficiary's legal employer. In a separate letter, the petitioner stated:

Beginning in April 2008, [REDACTED] began to provide sermons on Sundays from time to time when our Senior Pastor, [REDACTED] was unavailable. In December 2008, a discussion began to add an additional [REDACTED]

service at the Lynnwood location of [REDACTED] in addition to the [REDACTED]

In January 2010 at our annual meeting, we formally requested that [REDACTED] join the Board of Elders at [REDACTED]. He accepted and we were very delighted to have him join the Board. This was the official beginning of the combination of the two ministries. Functionally, nothing changed for [REDACTED].

In October 2010, [REDACTED] was officially called as an Associate Pastor of the combined ministries of [REDACTED]. His duties and responsibilities did not change with this official calling; his duties and responsibilities has remained the same since April 2008. Thus, in our view, [REDACTED] has not changed employers merely by becoming a member of our Board or by a formal recognition by [REDACTED] of what [REDACTED] had been doing all along. Please note that [REDACTED] has been providing financial support for [REDACTED] ministry since 2008.

The petitioner also submitted meeting minutes from various board meetings of the petitioning church during the qualifying period.

On June 20, 2012, the director again denied the petition finding the petitioner failed to establish that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition. The director again noted the petitioner's failure to demonstrate the continuity of the beneficiary's qualifying, compensated employment and to resolve inconsistencies in the record. Additionally, the director again found that the beneficiary engaged in unauthorized employment and thus failed to maintain his lawful nonimmigrant status.

On appeal, counsel for the petitioner asserts that [t]he petitioner never claimed that the beneficiary was an employee of the petitioner, and that he was instead continuously employed by [REDACTED] throughout the qualifying period. Counsel points out that the regulations do not require the beneficiary to have worked for the petitioning organization during the qualifying period, only to have been engaged in qualifying employment. Counsel states:

The beneficiary is currently an employee of the [REDACTED] and works as a minister. The beneficiary has been continuously receiving salary and benefits from [REDACTED] and the beneficiary has otherwise maintained his R-1 non-immigrant status. The beneficiary meets the two year continuous employment requirement by having worked for [REDACTED] as a minister for at least two years immediately prior to the filing of the petition.

The AAO agrees that the regulations do not require the beneficiary's qualifying experience to have been with the petitioning organization. However, the AAO does not agree that the petitioner has established that the beneficiary was continuously engaged in qualifying employment with [REDACTED] during the qualifying period or that he maintained his lawful nonimmigrant status.

There are serious inconsistencies in the evidence related to the beneficiary's work history which call into doubt not only the continuity of the beneficiary's employment with [REDACTED] but also the reliability of the petitioner's evidence. Doubt cast on any aspect of the petitioner's proof may, of course, 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). The AAO disagrees with counsel's assertion that the petitioner never claimed to have employed the beneficiary. Although on motion and in subsequent communications, the petitioner indicated that the beneficiary remained an official employee of [REDACTED] these assertions directly contradict statements made by the petitioner at the time of filing the petition. As a description of the beneficiary's qualifications on the Form I-360 petition, the petitioner stated that the beneficiary worked as a missionary pastor for [REDACTED] from February 2007 until December 2008, and then worked as an associate pastor for the petitioner from December 2008 to the present. Further, in the letter accompanying the petition, the petitioner asserted that the beneficiary came to the petitioner's church as a result of a merger with [REDACTED] in December 2008 and stated: Prior to becoming our Associate Pastor, he was the Associate Pastor for the [REDACTED]. According to copy of meeting minutes from a Special Congregational Meeting of the petitioning church, submitted in response to the April 19, 2012 RFE, the beneficiary was voted in as Associate Pastor of our church on October 24, 2010, not in December 2008. 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. at 591-92.

Additionally, there are inconsistencies in the record regarding the purported merger or combination of functions between the petitioning church and [REDACTED]. As discussed above, at the time of filing, the petitioner indicated that [REDACTED] was absorbed into the petitioning church in December 2008 due to a decline in the membership of [REDACTED]. However, in response to the April 19, 2012 RFE, the petitioner asserted that the official beginning of the combination of the two ministries began in January 2010. In an affidavit submitted on motion, a representative of [REDACTED] asserted that, through the merger, the petitioner became the dominant organization, providing financial support to [REDACTED]. The meeting minutes from a January 9, 2010 board meeting of the petitioning church contained the following item:

[REDACTED] [the beneficiary] came with a proposal for his father's church [REDACTED] [REDACTED] affiliated with the [REDACTED] organization) to rent [REDACTED] for Sunday services at a fee of \$300 per month. After discussion it was MSC to bring this approved recommendation to the congregation for a vote.

This calls into question the assertions noted above regarding the nature of the relationship between the two organizations. The AAO agrees with the director that the petitioner has failed to resolve serious inconsistencies in the record through objective documentary evidence.

Even if continuous, the petitioner has not established that the beneficiary's work for [REDACTED] is qualifying experience. The regulation at 8 C.F.R. ^ 204.5(m)(11) requires compensated employment. The petitioner must submit evidence of prior salaried or non-salaried compensation in the form of IRS documentation, or evidence of qualifying self-support. Permissible circumstances for self-support, outlined in the USCIS regulations at 8 C.F.R. ^ 214.2(r)(11)(ii), involve the beneficiary's participation in an established program for temporary, uncompensated missionary work. The petitioner has not shown or claimed that the beneficiary participated in such a program. The petitioner has consistently asserted that the petitioning church and its individual members provided all of the funds for the beneficiary's salary and housing allowance throughout the qualifying period. Thus, even though the funds were channeled through [REDACTED] the evidence does not establish that the beneficiary was actually being paid by [REDACTED] as compensation for work performed for that organization. Rather, as indicated by [REDACTED] in his affidavit, the beneficiary received paychecks directly from the petitioning organization and then endorsed them over to [REDACTED] in order for that organization to file the appropriate tax forms. The AAO does not find that this arrangement qualifies as compensated employment by [REDACTED].

The petitioner has repeatedly described work performed by the beneficiary for the petitioning church and asserted that the petitioner provided the beneficiary's salary and housing allowance. However, counsel asserts on the Form I-290B, Notice of Appeal, that the beneficiary has volunteered his services for the petitioner but such is not equivalent to employment. Regarding the claim of the beneficiary's volunteer work within the United States, 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). Again, 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.

With regard to the beneficiary's employment authorization and immigration status, the regulations at 8 C.F.R. ^ 214.2(r)(3)(ii)(E), as were in effect when the beneficiary was first approved as an R-1 nonimmigrant, required an authorized official of the organization to provide the name and location of the specific organizational unit of the religious organization for which the alien would work. The regulation at 8 C.F.R. ^ 214.2(r)(6) stated:

Change of employers. A different or additional organizational unit of the religious denomination seeking to employ or engage the services of a religious worker

admitted under this section shall file Form I-129 with the appropriate fee . Any unauthorized change to a new religious organizational unit will constitute a failure to maintain status .

Similarly, 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 regulation at 8 C.F.R. ^ 214.2(r)(2) provides 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 regulations.

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.

To the extent that the director found that the beneficiary was authorized to engage in employment with [REDACTED] the AAO disagrees with that finding. Regardless of any relationship between the organizations, the beneficiary was not authorized to engage in employment with any organization other than the named R-1 employer, [REDACTED] in Lynnwood, Washington, without first obtaining authorization through the filing of a separate Form I-129 petition. Further, to the extent that the support provided to the beneficiary from the petitioner was compensation for work performed, this would also constitute unauthorized employment and a failure to maintain lawful status.

For these reasons, the AAO agrees with the director s determination that the petitioner failed to establish that the beneficiary had the requisite two years of continuous, lawful, qualifying employment immediately preceding the filing of the petition.

As an additional matter, the AAO finds that the petitioner has not established its ability to compensate the beneficiary. 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.

At the time of filing the petition, the petitioner indicated that it would provide the beneficiary with an annual salary of \$18,000 per year and a parsonage allowance of \$1,320.25 per month, for a total

compensation package of \$33,843 per year. The petitioner submitted evidence, discussed above, of paychecks issued to the beneficiary. In the letter submitted with the petition, the petitioner indicated that it has an annual budget of \$43,500. A proposed budget for 2011, submitted in response to the November 9, 2011 RFE, listed total anticipated income of \$81,000 for the year, including \$36,000 for Associate Pastor Income.

As noted, the petitioner's response to the April 19, 2012 RFE included meeting minutes from various meetings of the petitioning organization. The minutes from two of the meetings, on April 17, 2010 and January 8, 2011, included the following statement: [REDACTED] is raising additional support to be sent to [REDACTED] to fund his salary.

The USCIS regulation at 8 C.F.R. ^ 204.5(m)(10) requires the petitioner to submit detailed financial documentation showing how the petitioner intends to compensate the alien. Further, the regulation at 8 C.F.R. ^ 204.5(m)(7)(xii) requires 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 (Emphasis added). Although USCIS regulations allow temporary self-support for nonimmigrant employees of missionary organizations, there is no comparable provision for permanent, ongoing employment by special immigrant religious workers.

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 (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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.