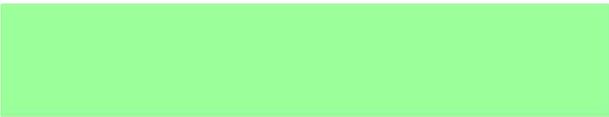


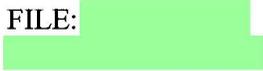
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

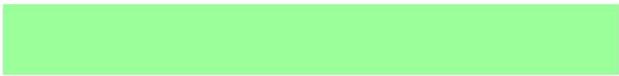
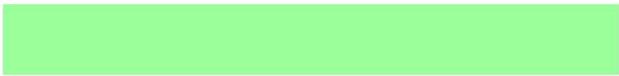


U.S. Citizenship  
and Immigration  
Services

(b)(6)

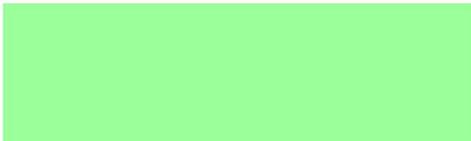


DATE: **MAY 14 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:



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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO subsequently remanded the petition to the director for a new decision based on revised regulations. The director again denied the petition and certified the decision to the AAO. The AAO affirmed the director's decision. The petitioner then filed a motion to reopen and reconsider. The AAO granted the motion and reaffirmed its prior decision. The matter is now before the AAO on another motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner, according to its president, is "a non-profit Catholic ministry geared towards the media." 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 director of pastoral music.

The petitioner filed the Form I-360 petition on November 13, 2006. The director denied the petition on May 16, 2009, in part because the beneficiary's pay receipts showed part time employment. The director concluded that the beneficiary does not have a full-time position with the petitioner. The AAO dismissed the petitioner's appeal on January 31, 2011. The petitioner filed a motion to reopen and reconsider. The AAO granted that motion and reaffirmed the dismissal of the appeal on March 2, 2012. The AAO incorporates its prior decisions by reference, and will quote from those decisions as necessary.

On motion, the petitioner submits a brief from counsel and supporting exhibits.

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 USCIS regulation at 8 C.F.R. § 204.5(m)(2) requires that the beneficiary must be coming to the United States to work in a full-time (average of at least 35 hours per week) compensated position in a qualifying religious occupation or vocation. At issue in this proceeding is whether the position is truly full time.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). Therefore, the AAO must begin by determining whether the latest motion meets the requirements of a motion to reopen and/or a motion to reconsider.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

As discussed in greater detail in the AAO's previous decisions, the petitioner submitted fragmentary evidence regarding the beneficiary's employment before the filing of the Form I-360 petition. This evidence indicated that the beneficiary generally worked part-time from 2004 to 2007. Counsel contended that this information is irrelevant, because the full-time requirement applies only to future employment, not past employment before the filing date. The AAO maintained that the information about earlier employment is relevant, for two reasons: (1) The petitioner intends to employ the beneficiary in the same position he held before. If that position was part-time, then the petitioner must have a credible explanation for why the same position is now full-time. (2) The petitioner's credibility is at issue. As the AAO stated in its January 31, 2011 decision:

The petitioner filed a Form I-129 nonimmigrant petition (with receipt number WAC 06 030 51216) on the beneficiary's behalf on November 7, 2005. On that petition form, the petitioner claimed that the beneficiary would work full time for \$22,880 per year starting in 2006. The petitioner signed the Form I-129 at part 10 under penalty of perjury, certifying that "this petition and the evidence submitted with it is all true and correct." The petitioner's own IRS [Internal Revenue Service] Forms W-2 [Wage and Tax Statements] show that the beneficiary's 2006 salary fell short of that amount by more than ten percent. The beneficiary's reduced salary is consistent with the payroll documents that show, on average, less than 35 hours worked per week. In short, the petitioner has failed to employ the beneficiary on a full-time basis for the wage declared on the Form I-129 petition. 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 noted: “In response [to a December 11, 2006 request for evidence], [redacted] president of the petitioning entity] stated that the beneficiary “has been working as a Director of Pastoral Music for [the petitioner] since March 21, 2003,” where he “spends at least 40 hours per week performing his religious work duties.” Thus, in March 2007, Mr. [redacted] specifically referred to the beneficiary’s employment, in the present tense, as full-time. The petitioner subsequently submitted copies of pay receipts from July 2007, showing that the beneficiary worked only 64 hours per two-week pay period. The AAO noted that only one pay receipt, from September 2006, showed 80 hours worked. The evidence, therefore, contradicts Mr. [redacted]’s specific claim that the petitioner works “at least 40 hours per week,” and the petitioner’s claim on Form I-129 that the position was full-time as of 2005.

In a subsequent motion, the petitioner did not resolve these contradictions, instead submitting new pay receipts from 2009 to 2011, showing full-time employment. The AAO, in its March 2, 2012 decision, stated:

Furthermore, the submitted pay receipts cover only the period beginning May 30, 2009. By that time, the director had twice denied the petition based on concerns about the claimed full-time nature of the beneficiary’s employment. The timing of this change in the beneficiary’s work hours inevitably appears to be a reaction to the director’s decision, rather than the implementation of a long-intended plan by the petitioner.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm’r 1998). At the time of filing, in 2006, the petitioner did not state that the beneficiary was a part-time employee whom the petitioner intended eventually to employ full-time. Rather, in its 2005 nonimmigrant petition, the petitioner stated that it would employ the beneficiary full-time at an annual salary of \$22,880.00. [redacted] claimed in November 2006 that the beneficiary “has been” – not “will be” – “employed as a religious worker on a full-time basis for more than two years.” Mr. [redacted] then claimed, in March 2007, that the beneficiary “spends” – not “will spend” – “at least 40 hours per week performing his religious work duties.” The petitioner’s own evidence discredits these claims. Payroll and tax documents from 2009 and 2010 cannot retroactively show that Mr. [redacted]’s statements in 2006 and 2007 were true or correct.

Now, on motion, counsel quotes a passage from a July 9, 2007 letter from Mr. [redacted] who stated that the beneficiary’s “work schedule is Monday thru Thursday from 9:00am to 5:30pm,” as well as “during special celebrations.” Counsel states that this letter constitutes “a written clarification and amendment of the Beneficiary’s work schedule at the time the petition was pending. As such, the Petitioner’s own evidence on the record does not discredit its earlier statements from November 2006 and March 2007.” Mr. [redacted] in his July 2007 letter, did not frame his statement as a “clarification and amendment of the Beneficiary’s work schedule”; that is a new interpolation by counsel. The AAO must look to the plain

language of the documents executed by the petitioner and not to subsequent statements of counsel. *Matter of Izummi*, 22 I&N Dec. 185.

The record does not support the assertion that the July 2007 letter resolves the credibility issues. As the AAO noted in its January 31, 2011 decision, IRS Forms W-2 show that the petitioner paid the beneficiary \$15,137.00 in 2004, \$19,018.00 in 2005 and 20,568.80 in 2006, well below the \$22,880 claimed on the Form I-129 petition.

Mr. [REDACTED] did not acknowledge that the stated hours did not match his own previous statements, nor did he state that the schedule marked a change from the beneficiary's previous work schedule. Rather, his July 2007 letter coincided with the petitioner's submission of payroll records that contradicted prior claims that the beneficiary's employment was full-time. The July 2007 letter may be consistent with those payroll records (most of which showed a 32-hour work week), but it is not consistent with repeated prior claims (made during the period covered by those payroll records) that the beneficiary was a full-time employee who worked a 40-hour week. The abandonment of an untenable claim is not the same as a resolution or "clarification" of resulting credibility issues.

Counsel asserts that the petitioner "has provided sufficient documentation that satisfies [the] preponderance of evidence standard." Counsel cites the following passage from a December 22, 2010 USCIS policy memorandum, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions: Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14*:

USCIS officers are reminded that the standard of proof for most administrative immigration proceedings . . . is the "preponderance of the evidence" standard. *See Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). Thus, if the petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is "more likely than not" or "probably true," the petitioner has satisfied the standard of proof. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989); *see also U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place).

The new evidence submitted on motion consists of an uncertified copy of the beneficiary's 2011 federal income tax return with IRS Form W-2, indicating that the petitioner paid the beneficiary \$41,058.53; and copies of pay receipts that the petitioner issued to the beneficiary between February 25, 2011 and March 9, 2012, showing that the beneficiary worked between 72 and 94 hours per two-week pay period. Counsel states that this documentation establishes, by a preponderance of evidence, that the beneficiary's position is full-time.

The petitioner had previously submitted documentation of full-time employment in 2009 and 2010. In its March 2, 2012 decision, the AAO stated:

Furthermore, the submitted pay receipts cover only the period beginning May 30, 2009. By that time, the director had twice denied the petition based on concerns about the claimed full-time nature of the beneficiary's employment. The timing of this change in the

beneficiary's work hours inevitably appears to be a reaction to the director's decision, rather than the implementation of a long-intended plan by the petitioner. . . .

Section 204(b) of the Act, 8 U.S.C. § 1154(b), provides for the approval of immigrant petitions only upon a determination that "the facts stated in the petition are true." False, contradictory, or unverifiable claims inherently prevent a finding that the petitioner's claims are true. *See Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988). The AAO cannot now find that the petitioner's claims about the beneficiary's future employment are more credible than its discredited past claims. In the face of the other evidence of record, the petitioner's adjustment in the beneficiary's work schedule after the denial of the petition offers little assurance that this adjustment is permanent, rather than a short-term strategy intended to secure immigration benefits.

On motion, counsel states: "the Beneficiary has been employed by the Petitioner since March, 2003. . . . This fact does not go in line with the AAO's finding of a 'short-term strategy intended to secure immigration benefits.'" The AAO did not state that the beneficiary's employment was a "short-term strategy." Rather, the AAO used that phrase in reference to the petitioner's submission of new payroll records showing full-time employment in 2009 and beyond. Given the serious credibility issues with the petitioner's past claims, the AAO gives little weight to the claim that the petitioner would continue to employ the beneficiary full-time, at a full-time salary, after the approval of the petition.

When the petitioner first sought immigration benefits on the beneficiary's behalf in 2005, the petitioner stated that the employment would be full-time. The petitioner did not state that the beneficiary would begin as a part-time employee, to become full-time at some point years into the future. In 2006 and again in early 2007, Mr. [REDACTED] stated not that the petitioner would become a full-time employee, but that he already was a full-time employee.

When asked for copies of the beneficiary's 2004-2006 payroll documents, Mr. [REDACTED] stated that the beneficiary worked 32 hours per week, and submitted payroll records showing not that the beneficiary's schedule had recently changed, but rather that he had worked such a schedule all along, and that he had consistently received compensation well below the \$22,880 per year listed on Form I-129. He did not acknowledge or explain the contradiction between the July 2007 letter and his earlier claims.

The petitioner has not established, by a preponderance of evidence, that the petitioner's claims are most likely true. Rather, the preponderance of evidence establishes that both the 2005 nonimmigrant petition and the 2006 special immigrant petition rested on inaccurate claims of full-time employment, and that, after first acknowledging the part-time nature of the employment, the petitioner changed the beneficiary's hours to a full-time schedule.

Counsel contends: "The fact that the Petitioner may have failed to employ the Beneficiary full-time before is irrelevant in application and interpretation of 8 CFR § 204.5(m)(2)." The credibility of the petitioner's claims, however, is of central relevance to the outcome of the current benefit request.

The AAO's 2012 decision rested on the petitioner's credibility. The latest payroll documents, submitted on motion, do not constitute "new evidence" that address that issue. The payroll documents are "new" in that they did not exist previously, but they do not address the issue at hand. The repeated submission of more and more recent payroll documents will not justify repeatedly reopening this proceeding. The AAO therefore will dismiss the motion to reopen.

Likewise, the petitioner has not established that the AAO's decision was incorrect based on the evidence of record at the time of that decision. Therefore, the motion does not meet the requirements of a motion to reconsider, and the AAO will dismiss the motion to reconsider.

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 dismiss the appeal.

**ORDER:** The appeal is dismissed.