

(b)(6)

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

DATE: **JAN 09 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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

Thank you,

A handwritten signature in cursive script, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) remanded the petition for further consideration and the director again denied the petition. The matter is now again before the AAO on appeal. The appeal will be dismissed.

The petitioner is a 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), to perform services as a priest (granthi). The director determined that the petitioner failed to establish how it intends to compensate the beneficiary.

On appeal, the petitioner submits a brief from counsel, a letter from the petitioner listing the temple's assets, copies of bank statements from Frost Bank, a copy of the beneficiary's 2012 tax return, and a copy of a 2004 U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum.

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 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.

In addition, the regulation at 8 C.F.R. § 204.5(m)(7) requires the petitioner to attest to the following additional aspects of the past and proposed compensation:

(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; ...

(xi) That the alien will not be engaged in secular employment, and any salaried or non-salaried compensation for the work will be paid to the alien by the attesting employer; and

(xii) That the prospective employer has the ability and intention to compensate the alien at a level at which the alien and accompanying family members will not become public charges, and that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization.

The petitioner filed the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, on July 19, 2010. On the petition, the petitioner described the beneficiary's proposed compensation as follows: "Alien [REDACTED] will get 18000 per annum (1500 Per month) as his salary and he will get free boarding and lodging for his entire stay in sikh temple (Gurudwara)." The petitioner indicated that it had employed the beneficiary since June 18, 2008, and listed the beneficiary's address on the petition as that of the petitioning temple. An accompanying employment contract, dated May 26, 2010, and signed by both the petitioner and the beneficiary, also listed compensation of \$18,000 per year, plus free boarding and lodging at the temple. The signed employer attestation affirmed the petitioner's intent and ability to pay the proffered wage.

At the time of filing, the petitioner submitted payroll records indicating that the beneficiary earned \$1,400 per month for November and December of 2008, and February through November of 2009. Pay statements for December 2009 through June 2010 indicated earnings of \$700 per month. The petitioner submitted copies of the beneficiary's tax returns for the years 2008 and 2009 listing earnings of \$4,200 and \$16,100, respectively.

The petitioner submitted bank statements dated December 31, 2007 and April 20, 2010 for a business checking account held by the petitioner at [REDACTED]. The December 31, 2007 statement listed a balance of \$55,388.08, and the April 20, 2010 statement listed a current balance of \$35,713.82.

On February 9, 2011, USCIS issued a Notice of Intent to Deny the petition (NOID), based on the negative findings of a compliance review. The notice instructed the petitioner to submit additional documentation of its past compensation of the beneficiary, including official Internal Revenue Service (IRS) printouts of the beneficiary's tax returns and Forms W-2, Wage and Tax Statements, for the years 2008 and 2009, copies of the petitioner's Forms W-3, Transmittal of Wage and Tax Statements, for 2008 and 2009, and copies of petitioner's quarterly wage reports for the last four quarters.

In response to the NOID, the petitioner submitted IRS printouts of the beneficiary's tax returns and Forms W-2 for the years 2008 and 2009, reporting income from the petitioner of \$4,200 and \$16,100 respectively. The petitioner also submitted copies of its quarterly reports for the last quarter of 2008 and the first three quarters of 2009. The reports indicated that [REDACTED] was paid \$2,800 during the first quarter of 2009, and \$4,200 during each of the other quarters. The petitioner submitted copies of its Forms W-3 for 2008 and 2009, showing the issuance of two Forms W-2 for 2008 and three Forms W-3 for 2009, and total wages paid of \$8,400 and \$36,400 respectively. The petitioner also submitted copies of the beneficiary's payroll documents, including some of those filed with the petition and additionally including an October 2008 pay statement showing earnings of \$1,400. Additionally, the petitioner submitted copies of its utility bills, a Certificate of Occupancy for the petitioning temple, and captioned photographs including an external photograph of a building with the caption [REDACTED].

On March 29, 2011, the director denied the petition, finding that the petitioner failed to establish that the beneficiary would be employed in a qualifying religious occupation and that the petitioner qualified as a bona fide non-profit religious organization. The petitioner appealed the decision and on June 29, 2012, the AAO remanded the matter to the director for further consideration.

On August 1, 2012, USCIS issued a Request for Evidence (RFE), in part instructing the petitioner to submit additional evidence to establish how it intends to compensate the beneficiary.

In response to the RFE, the petitioner submitted copies of its Forms 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2008, the first, second and fourth quarters of 2009, the third and fourth quarters of 2010, the first and second quarters of 2011, and the first and second quarters of 2012. The petitioner also submitted the beneficiary's Forms W-2 for the years 2008, 2009, 2010, and 2011, showing earnings from the petitioner of \$4,200, \$16,100, \$14,575, and \$13,100 respectively. The petitioner also submitted a copy of a mortgage bill, and a copy of a July 31, 2012 bank statement showing a balance of \$11,621.08. The petitioner submitted an additional photo purportedly showing the "preist [sic] residential home," as well as copies of bills addressed to

the beneficiary at the same street address as the petitioning temple. The petitioner also submitted additional payroll documents for 2010 and 2011.

On February 2, 2013, the director again denied the petition. The director found that the petitioner failed to establish how it intends to compensate the beneficiary. The director stated, in part:

The beneficiary is being paid \$1,375.00 per month which equals to \$16,500.00 a year. This amount does not match the amount stated on the petition, job offer/contract letter, petitioner letter, secretary letter, and other documentation provided in the petition.

On appeal, counsel for the petitioner notes that the director stated that the petitioner paid the beneficiary \$16,500 per year, which is \$1,500 per year less than the proffered wage. Counsel argues that, according to 8 C.F.R. § 204.5(m)(10), past evidence of compensation is only one of the acceptable ways to demonstrate how the petitioner intends to compensate the beneficiary. Counsel states that the petitioner's evidence demonstrates that it has more than enough funds to cover the additional \$1,500 per year. Counsel additionally asserts that the beneficiary earned more than the proffered salary in 2012. The petitioner submits a list of its current assets, a copy of its balance sheet as of March 1, 2013, and copies of its monthly bank account statements with [REDACTED] for the years 2010 through 2012. The petitioner also submits a copy of the beneficiary's tax return for the year 2012, listing total income of \$18,496, including \$13,175 in wages and \$5,321 in "Tips."

To the extent that the director found that the petitioner paid the beneficiary \$16,500 per year, this is not consistent with the evidence discussed above, which indicates that the beneficiary earned less than that amount each year from 2008 to 2011. Counsel notes that the balances on the petitioner's bank account statements show that the petitioner has, and had at the time of filing, enough money to cover the difference between the amount paid to the beneficiary, and the amount offered to the beneficiary. However, the petitioner indicated its intent to pay the beneficiary \$18,000 per year plus free boarding or lodging when it filed a Form I-129, Petition for a Nonimmigrant Worker, on his behalf on March 17, 2008 and again in the employment contract, dated May 26, 2010. No explanation has been provided as to why the petitioner has not paid the beneficiary this amount despite its asserted ability to do so. 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). Although counsel asserts that the beneficiary's 2012 tax return demonstrates that he earned the proffered salary during that year, the return indicates that only \$13,175 of his income consisted of wages, with the remainder consisting of "Tips." Therefore, the tax return does not establish that the petitioner paid the beneficiary the proffered wage during 2012. Regardless, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Counsel additionally argues that the director's August 1, 2012 RFE regarding compensation was improper as the petitioner had already provided sufficient evidence on this issue. Counsel cites a May 4, 2004, USCIS Interoffice Memorandum stating that "a recent review of [US]CIS practices revealed that in certain instances adjudicators unnecessarily issue an RFE questioning an employer's ability to pay." The memo states that USCIS plans to amend the regulations at 8 C.F.R. § 204.5(g)(2), and proceeds to provide guidance "in the interim" about the appropriate circumstances to issue an RFE, specifically in the context of Forms I-140, Immigrant Petition for Alien Worker. The memo cited by counsel specifically stated that "evidence that the petitioner ... currently is paying the proffered wage" is one of the ways that the petitioner can establish its ability to pay. In this case, the petitioner has not demonstrated its intent to pay the wage as attested on the Form I-129 petition or the Form I-360 petition. Regardless, the regulation at 8 C.F.R. § 204.5(g) was issued prior to the current regulations governing special immigrant religious workers, which were issued on November 26, 2008, and include a separate provision regarding ability to compensate.

In supplementary information published with the proposed religious worker rule in 2007, USCIS stated:

The revised requirements for immigrant petitions and nonimmigrant status require that the alien's work be compensated by the employer because that provides an objective means of confirming the legitimacy of and commitment to the religious work, as opposed to lay work, and of the employment relationship. Unless the alien has taken a vow of poverty or similarly made a formal lifetime commitment to a religious way of life, this rule requires that the alien be compensated in the form of a salary or in the form of a stipend, room and board, or other support so long as it can be reflected in a W-2, wage transmittal statements, income tax returns, or other verifiable IRS documents. USCIS recognizes that legitimate religious work is sometimes performed on a voluntary basis, but allowing such work to be the basis for an R-1 nonimmigrant visa or special immigrant religious worker classification opens the door to an unacceptable amount of fraud and increased risk to the integrity of the program. In this rule, USCIS is proposing to implement bright lines that will ease the verification of petitioner's claims in the instances where documentary evidence is required.

72 Fed. Reg. 20442, 20446 (April 25, 2007). When USCIS issued the final version of the regulation, the preamble to that final rule incorporated the above assertion by reference: "The rationale for the proposed rule and the reasoning provided in the preamble to the proposed rule remain valid and USCIS adopts the reasoning in the preamble of the proposed rule in support of the promulgation of this final rule." 73 Fed. Reg. 72275, 72277 (Nov. 26, 2008).

The memo cited by counsel does not purport to confer any right to approval of a petition where eligibility has not been demonstrated. Where the evidence submitted does not establish eligibility, the regulation at 8 C.F.R. § 103.2(b)(8)(iii) gives the director discretion to deny the petition, request additional evidence, or notify the petitioner of her intent to deny the petition and provide an opportunity

to respond. In this instance, the director exercised her discretionary authority to request additional evidence on the issue of compensation. The petitioner has not established that the director erred in her decision regarding this matter. Accordingly, the petitioner failed to provide verifiable evidence of its intent to compensate the beneficiary.

As an additional matter, the petitioner has not established that the beneficiary has the requisite two years of continuous, qualifying work experience immediately preceding the filing of the petition. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 July 19, 2010.

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.

On the Form I-360 petition and in an accompanying letter, the petitioner stated that the beneficiary had been serving as a priest at the petitioning temple since June 18, 2008. The beneficiary was granted R-1 nonimmigrant status authorizing his employment with the petitioning temple on June 18, 2008, expiring April 5, 2011.

However, payroll documents submitted with the petition list the beneficiary's "Hire" date as October 1, 2008. The petitioner submitted pay statements for October, November, and December of 2008 stating that the beneficiary was paid \$1,400 during each of those months. The beneficiary's tax documentation for 2008 lists total income of \$4,200, indicating that those three payments of \$1,400 constituted the beneficiary's entire annual income. Accordingly, the petitioner's evidence of past compensation is consistent with an October 1, 2008 start date. Additionally, in a signed statement submitted in response to the February 9, 2011 NOID, the beneficiary states: "I have been employed here from October 2008 until now." No explanation is provided for the discrepancy between the start date listed on the petition and that indicated by the evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

Regardless of the discrepancy, the petitioner has not submitted evidence that the beneficiary was engaged in compensated employment prior to October 1, 2008. Although the petitioner submitted correspondence addressed to the beneficiary at the petitioning temple as proof that he received the non-salaried compensation of room and board, none of the correspondence was dated during the period in question. 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 nonimmigrant 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. In addition, the evidence previously discussed demonstrating that the petitioner was paying the beneficiary less than the promised wage fails to establish the continuity of the beneficiary's qualifying employment. Accordingly, the petitioner has not established that the beneficiary was performing qualifying work throughout the two years immediately preceding the filing of the petition.

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

ORDER: The appeal is dismissed.