

(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: **JUN 03 2014** 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 (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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. On appeal, the Administrative Appeals Office (AAO) withdrew the director's decision and remanded the petition for further consideration. The director again denied the petition and, based on our instructions, certified the decision to us for review. We will affirm the denial of the petition.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a minister/associate pastor. The director found that the petitioner failed to establish that the beneficiary would be employed in a qualifying ministerial position.

On certification, the petitioner submits a letter from [REDACTED] Member of Congress.

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)(2) provides that in order to be eligible for classification as a special immigrant religious worker, an alien must:

(2) Be coming to the United States to work in a full time (average of at least 35 hours per week) compensated position in one of the following occupations as they are defined in paragraph (m)(5) of this section:

- (i) Solely in the vocation of a minister of that religious denomination;
- (ii) A religious vocation either in a professional or nonprofessional capacity; or
- (iii) A religious occupation either in a professional or nonprofessional capacity.

The regulation at 8 C.F.R. § 204.5(m)(5) includes the following definition:

Minister means an individual who:

- (A) Is fully authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct such religious worship and perform other duties usually performed by authorized members of the clergy of that denomination;
- (B) Is not a lay preacher or a person not authorized to perform duties usually performed by clergy;
- (C) Performs activities with a rational relationship to the religious calling of the minister; and
- (D) Works solely as a minister in the United States, which may include administrative duties incidental to the duties of a minister.

The Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, was filed on April 5, 2012. Although the petitioner indicated on the petition that the beneficiary would be working in a ministerial position as a "Minister/Associate Pastor," the proposed duties described on the petition and in an accompanying letter and employment agreement included teaching at the [REDACTED]. The petitioner submitted copies of the beneficiary's 2011 Internal Revenue Service (IRS) Forms W-2VI, U.S. Virgin Islands Wage and Tax Statements, indicating that the beneficiary earned \$6,000 from [REDACTED] Inc. and \$10,422.51 from [REDACTED] Inc. [REDACTED] DBA [REDACTED] [REDACTED] during that year.

In an October 4, 2012 letter responding to the director's August 21, 2012 Request for Evidence (RFE), the petitioner asserted that the beneficiary's typical work week would include "[a]ssist[ing] at our school as needed as phys. Education and computer teacher." Further, in

response to the director's November 1, 2012 Notice of Intent to Deny the petition (NOID), the petitioner stated:

Mr. [REDACTED] assists at our school approximately ten hours per week, but the Church and school are located on the same property at [REDACTED]. The School is a ministry of the Church; therefore we did not see any conflict of interest or deviation of purpose. Therefore when we reported that Mr. [REDACTED] works on average of 40 hours per week as a religious worker we were looking at the whole not the part.

In our October 3, 2013 decision, we found that the petitioner had not established that the beneficiary is performing activities with a rational relationship to the religious calling of a minister and that the beneficiary will be employed "solely in the vocation of a minister," as required under 8 C.F.R. §§ 204.5(m)(2) and (5). We remanded the petition to the director for further consideration, with instructions to allow the petitioner to submit additional evidence in support of its position.

The director issued a NOID on February 4, 2014, which stated that the petitioner had not established that the beneficiary would be working solely in the vocation of a minister, and provided the petitioner an opportunity to submit additional information, evidence or arguments to support the petition. In response, the petitioner submitted a letter, dated February 18, 2014, which stated:

We were unaware, prior to the [NOID], that [the beneficiary] assisting at our church's school was unacceptable, however upon us hearing that it was not a favorable practice we stopped all his activities at the school. Incidentally we have closed our school in August of [REDACTED], see attached letter from The Dept. of Human Services.

Mr. [REDACTED]'s present duties are:

- Assistant Pastor
- Lead in Praise and Worship
- Be the Youth Pastor
- Assist in the weekly outreach program of the church
- Assist in the Men's ministry
- Teach in church services (Sunday School, children's church, community clubs, etc.)
- Assist in hospital, sick and shut-in visitation

He works closely with the Pastor and Administrative Team of the church, for approx. 35-40 hours per week, developing and implementing ministries in the church and to the communities around the church.

The petitioner also submitted a letter from the Government of the Virgin Islands of the United States, Department of Human Services, confirming the closure of [REDACTED] as of September, [REDACTED]

On March 24, 2014, the director denied the petition, finding that the changes to the beneficiary's proposed duties in response to the February 4, 2014 NOID constituted an impermissible material change to the nature of the proffered position. Accordingly, the director found that the petitioner failed to overcome the grounds for denial as stated in the NOID.

On certification, the petitioner submits an April 13, 2014 letter from [REDACTED] Member of Congress. Congresswoman [REDACTED] states that, "with the school being closed, the only status to review would be [the beneficiary's] ministerial duties – the duties that were supplied in the original Petition."

As noted previously, the Form I-360 and the evidence submitted at the time of filing indicated that the beneficiary would be engaged in both ministerial and teaching duties. The petitioner now states that it has closed its school and that the beneficiary will solely be engaged in ministerial duties. However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Furthermore, 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). Accordingly, we will affirm the director's decision.

As an additional matter, the 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 regulation at 8 C.F.R. § 204.5(m)(5) defines minister, in part, as one who "works solely as a minister." The evidence indicates that, during the qualifying period, the beneficiary was working as both a minister and a teacher, and the submitted Forms W-2VI indicate that he was provided separate compensation for these two distinct roles.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." See H.R. Rep. No. 101-723, at 75 (Sept. 19, 1990). *See also Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. The Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399, 402 (BIA 1980).

An alien seeking classification as a special immigrant minister must have been engaged solely as a minister of the religious denomination for the two-year period in order to qualify for the benefit sought, and must intend to be engaged solely in the work of a minister of religion in the United States. See *Matter of Faith Assembly Church*, 19 I&N 391, 393 (Comm'r. 1986). The Ninth Circuit Court of Appeals has upheld the AAO's interpretation of the two-year experience requirement. See *Hawaii Saeronam Presbyterian Church v. Ziglar*, 243 Fed. Appx 224, 226 (9th Cir. 2007).

The above case law indicates that to be continuously carrying on the religious work means to do so on a full-time basis. While there have been numerous legislative extensions and amendments to the special immigrant religious worker program since 1990, at no time has Congress legislatively modified or overruled this agency's understanding of the term "continuous" as shaped by the case law described above.

For the reasons discussed above, the petitioner failed to establish that it sought to employ the beneficiary in a qualifying ministerial position and that the beneficiary's purported work as a minister was qualifying experience as he was not working "solely as a minister" during the requisite two-year period.

We conduct appellate review on a *de novo* basis. See *Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3^d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2^d Cir. 1989).

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, 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). The petitioner has failed to meet this burden.

ORDER: The director's decision is affirmed. The petition is denied.