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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

[REDACTED]

DATE: JUL 17 2015

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:

[REDACTED]

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center (“director”), denied the employment-based immigrant visa petition and we dismissed a subsequent appeal. The matter is now before us on a motion to reopen and reconsider. The motion to reconsider will be denied, the motion to reopen will be granted, and the petition will be approved.

The petitioner is a church that 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. The director denied the petition, finding that the petitioner had not established that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the date the petition was filed. We dismissed the petitioner’s appeal and affirmed the director’s determination that there was insufficient evidence to establish the two-year work experience requirement. Beyond the director’s decision, we also found that the petitioner did not establish how it intends to provide the beneficiary with the nonmonetary compensation as claimed. The petitioner now submits a brief and additional evidence in support of its motion.

RELEVANT LAW AND REGULATIONS

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 U.S. Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

Section 203(b)(4) of the Act, 8 U.S.C. § 1153(b)(4), 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]) 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 regulation at 8 C.F.R. § 204.5(m) states that in order to be eligible for classification as a special immigrant religious worker, the beneficiary must:

(1) For at least the two years immediately preceding the filing of the petition have been a member of a religious denomination that has a bona fide non-profit religious organization in the United States.

(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.

(3) Be coming to work for a bona fide non-profit religious organization in the United States, or a bona fide organization which is affiliated with the religious denomination in the United States.

(4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. A break in the continuity of the work during the preceding two years will not affect eligibility so long as:

(i) The alien was still employed as a religious worker;

(ii) The break did not exceed two years; and

(iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.

The 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 [Internal Revenue Service] documentation, such as IRS Form W-2 [Wage and Tax Statement] 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.

The 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.

However, on April 7, 2015, the Court of Appeals for the Third Circuit held that the lawful immigration status requirement in 8 C.F.R. 204.5(m)(4) and (11) is *ultra vires* and impermissibly conflicts with section 245(k) of the Act with respect to adjustment of status. *See Shalom Pentecostal Church v. U.S. Dep't of Homeland Sec.*, 783 F.3d 156, 165-67 (3rd Cir. 2015). In accordance with this decision, USCIS will no longer deny special immigrant religious worker petitions based on the lawful status requirements at 8 C.F.R. 204.5(m)(4) and (11) in the Third

Circuit. As a result of this decision and other district court cases,¹ USCIS implemented a policy to apply the *Shalom Pentecostal Church* decision nationally, pending the issuance of amended regulations that will remove the lawful status requirements in 8 C.F.R. 204.5(m)(4) and (11). See USCIS Policy Memorandum PM-602-0119, *Qualifying U.S. Work Experience for Special Immigrant Religious Workers* (July 5, 2015), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0705_Lawful_Status_PM_Effective.pdf [hereinafter July 15 Policy Memorandum]. Accordingly, USCIS no longer requires that the qualifying religious work experience for the two-year period preceding the submission of a Petition for Special Immigrant (Form I-360) be in lawful immigration status.

PERTINENT FACTS AND PROCEDURAL HISTORY

The petitioner filed the Petition for Special Immigrant (Form I-360) seeking to classify the beneficiary as a special immigrant religious worker on August 5, 2013. The director issued a Request for Evidence (RFE) and a Notice of Intent to Deny (NOID), requesting, among other things, information about the beneficiary's prior work experience during the two years immediately preceding the filing of the petition (in this case, during the period beginning August 5, 2011, and ending August 5, 2013). The petitioner submitted a brief and additional evidence in response to the RFE and NOID, which the director found insufficient to establish the petitioner's eligibility. The director denied the petition because the petitioner did not establish that the beneficiary was employed as a religious worker for at least the two-year period immediately preceding the filing of the petition.

We dismissed the appeal, affirming the director's determination that the petitioner did not establish the beneficiary met the requisite prior work experience. Specifically, we found, among other things, that: the petitioner wrote fourteen \$500 checks to the beneficiary totaling \$7,000 for the six-month period from November 1, 2011, to April 30, 2012, which was inconsistent with the beneficiary's stated income of \$500 per month plus rent; the petitioner provided no evidence of any payments to the beneficiary for August, September, and October of 2011, and provided no evidence that it paid the beneficiary's rent for the months of August, September, or October of 2011. Beyond the director's decision, we also found that the petitioner did not establish how it intends to provide the beneficiary's nonmonetary compensation as it claimed it would. We noted that the petitioner did not submit evidence that it has living quarters for the beneficiary, or that it has provided him with food, utilities, telephone, or transportation.

ANALYSIS

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 (3rd Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2^d Cir. 1989). As explained below, we deny the motion to reconsider, but grant the motion to reopen. Upon a full review of the record, we find that the petitioner has established its eligibility for the benefit sought. We withdraw our prior decision dated September 26, 2014, and approve the petition.

¹ See *Congregation of the Passion v. Johnson*, 2015 WL 518284 (N.D. Ill. Feb. 6, 2015); *Shia Ass'n of Bay Area v. United States*, 849 F.Supp.2d 916 (N.D. Cal. 2012).

I. Motions

The petitioner submits a brief in which it contends the denial of the petition was arbitrary and capricious, and our decision was incorrect, improper, and “fail[ed] to apply the discretionary rule.” The petitioner states the beneficiary has been a priest/monk for over thirteen years in several countries. In support of the motions, the petitioner submits new evidence including, but not limited to: a letter signed by nine church members; several copies of photographs of the church and the beneficiary; an updated affidavit from Parish Council Member, [REDACTED] copies of payroll sheets; a letter from the head administrator of the church, [REDACTED] and a document titled “Payment Calculation and Material Error” (payment calculation statement).

The petitioner’s submission does not meet the requirements of a motion to reconsider. The petitioner does not cite any statutes, regulations, precedent decisions, or other pertinent sources or authority to establish that our decision was based on an incorrect application of law or Service policy pursuant to 8 C.F.R. § 103.5(a)(3). Therefore, the petitioner’s motion to reconsider is denied.

The petitioner’s submission does, however, meet the requirements of a motion to reopen at 8 C.F.R. § 103.5(a)(2). The petitioner challenges our finding that the beneficiary did not have the requisite two-year religious work experience prior to the filing of the petition and asserts the beneficiary has been a religious worker for more than thirteen years. The petitioner submits additional documentation in support of that contention. Accordingly, the motion to reopen is granted.

II. Prior Employment

The evidence submitted with the motion to reopen sufficiently addresses the inconsistencies and deficiencies in the record that we noted in our previous decision. An updated letter from [REDACTED] and the payment calculation statement reasonably explain that the church’s payroll system had some errors when it converted to using an automated payroll system. Copies of the petitioner’s payroll register submitted with the motion confirm that the beneficiary was paid \$500 per month as claimed, including for August, September, and October of 2011. The payroll register also shows that the petitioner overpaid the beneficiary when it began using the automated payroll system, and that the overpayment was subsequently corrected. Therefore, the petitioner has established that it paid the beneficiary \$500 per month for August, September, and October of 2011, as it had asserted.

With respect to the lack of evidence regarding the beneficiary’s rent for the months of August, September, or October of 2011, the record shows that the beneficiary entered the United States in July 2011. According to [REDACTED] updated letter, the beneficiary stayed with a parish council member until he moved into his rented apartment on October 1, 2011. [REDACTED] specifies that the beneficiary lived in the rented apartment from October 1, 2011, until he moved into the church’s living quarters on May 1, 2012. The petitioner also submits the front and back copies of rent checks, showing that the petitioner paid the beneficiary’s rent from October 2011 through April 2012. The checks show that they were cashed by the bank in the normal course of business. In addition, the petitioner submits a letter signed by nine church members stating that they have spent time in the beneficiary’s living quarters at the church, help prepare his food, and help him clean and wash clothes as needed.

Photographs of the inside and outside of the church's living quarters have also been submitted with the motion. The photographs are dated and contain descriptions of the beneficiary's residence, office, and car.

We find that the petitioner has sufficiently explained the inconsistencies in the record and submitted additional documentation to support its contentions. Considering the evidence submitted with the motion, in conjunction with the evidence previously submitted,² we find that the petitioner has established that the beneficiary has been continuously carrying on religious work for at least two years immediately preceding the filing date of the petition, as required by section 101(a)(27)(C)(iii) of the Act and 8 C.F.R. § 204.5(m)(4).

III. Nonmonetary Compensation

We also find that the evidence submitted with the motion to reopen sufficiently establishes how the petitioner intends to provide the beneficiary's nonmonetary compensation of food, rent, utilities, telephone, and transportation. A letter previously submitted from [REDACTED] stated that it is the church's custom that priests/monks take a vow of poverty and depend on their congregation for basic necessities such as room and board. A letter from [REDACTED] submitted with the motion confirms that the church provides the beneficiary with room and board. As described above, a letter from church members attests to church members assisting the beneficiary as needed. In addition, the petitioner submits photographs of the of the car the church has provided the beneficiary as well as the beneficiary's living quarters at the church, including his bedroom, bathroom, living room, kitchen, office, and classroom. Considering the record in its entirety, the petitioner has established its ability and intent to compensate the beneficiary as required pursuant to 8 C.F.R. § 204.5(m)(7)(xii).

IV. Lawful Immigration Status

In our prior decision, we stated in a footnote that because the petitioner had not established that the beneficiary had the requisite qualifying work experience for the two years immediately preceding the date the petition was filed, we did not need to reach the issue of the lawfulness of the beneficiary's work experience under 8 C.F.R. § 204.5(m)(4) and (11). *See AAO Decision* at 3 n.1, dated September 26, 2014. As the director noted, in this case, the record shows that the beneficiary was admitted into the United States in July 2011 pursuant to an approved R-1 visa that was filed by [REDACTED] Church. The record shows that in May 2012, the beneficiary began to work for the current petitioner, [REDACTED]. The record further shows that several months later, in December 2012, the current petitioner filed a Petition for a Nonimmigrant Worker (Form I-129) to request a change of employer and amend the

² As discussed in our previous decision, the petitioner submitted complete copies of checks showing that the petitioner paid the beneficiary \$500 per month from June 1, 2012, through September 1, 2013. *See Decision of the AAO*, dated September 26, 2014, at 6. Copies of the beneficiary's 2011 and 2012 IRS transcripts are also in the record. *Id.* Therefore, the record shows that the petitioner paid the beneficiary for work performed for at least the required two-year period from August 5, 2011, through August 5, 2013. In addition, the record includes a copy of the beneficiary's lease and rental agreement beginning October 1, 2011, as well as a letter from [REDACTED] the church's president, to the apartment complex, stating that the church affirms it will pay the beneficiary's rent.

beneficiary's stay. Therefore, it appears the beneficiary worked for the current petitioner prior to obtaining USCIS approval.

Although the issue of whether the beneficiary worked in unlawful status may be reviewed at a later date if the beneficiary files for adjustment of status, it is no longer a bar to eligibility for the instant petition. See July 15 Policy Memorandum; see also *Shalom Pentecostal Church*, 783 F.3d at 160 (describing the two-step process of first obtaining a visa, and then applying for permanent adjustment of status); *Matter of O*, 8 I&N Dec. 295 (BIA 1959) (the visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws). Therefore, notwithstanding the regulation at 8 C.F.R. 204.5(m)(4) and (11) as currently written, in accordance with the Policy Memorandum, we find that the petitioner has established that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing date of the petition. The petitioner has established eligibility to classify the beneficiary as a special immigrant religious worker pursuant to section 101(a)(27)(C) of the Act. Our prior decision to the contrary is withdrawn.

CONCLUSION

The petitioner has established by a preponderance of the evidence that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing date of the petition. The petitioner has also established its intent and ability to compensate the beneficiary.

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 been met.

ORDER: The motion to reopen is granted. Our decision dated September 26, 2014, is withdrawn and the petition is approved.