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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536



File: [Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: DEC 03 2003

IN RE: Petitioner: [Redacted]

Beneficiary: [Redacted]

Petition: 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:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Cindy N. Gomez for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks classification of 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 employ him as a minister. The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for the two years immediately preceding the filing date of the petition.

On appeal, counsel submits a brief and additional evidence.

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 October 1, 2003, 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 October 1, 2003, 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 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).

8 C.F.R. § 204.5(m)(1) states, in pertinent part:

Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States. The alien must be coming to the United States solely for the purpose of carrying on the vocation of a minister of that religious denomination, working for the organization at the organization's request in a professional capacity in a religious vocation or occupation for the organization or 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. All three types of religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition.

The issue to be addressed in this proceeding is whether the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing date of the petition.

Pursuant to 8 C.F.R. § 204.5(m)(1):

All three types of religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two year period immediately preceding the filing of the petition.

The petition was filed on July 18, 2001. Therefore, the petitioner must establish that the beneficiary was working continuously as a religious worker from July 18, 1999 until July 18, 2001. The petitioner indicated on Form I-360, Petition for Amerasian, Widow, or Special Immigrant, that the beneficiary last entered the United States on November 15, 1998 as a nonimmigrant B-1 visitor with stay authorized to December 10, 1998.

The legislative history of the religious worker provision of the Immigration Act of 1990 reflects that a substantial amount of case law has developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision. See H.R. Rep. No. 101-723, at 75 (1990).

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. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he or she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

The term "continuously" also is discussed in a 1980 decision where 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 (BIA 1980).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he or she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Comm. 1963); *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 1963).

In line with these past decisions and the intent of Congress, it is clear, therefore, that to be continuously carrying on the religious work means to do so on a full-time basis. That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is not paid, the assumption is that he or she is engaged in other secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation, who, in accordance with their vocation, live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and salaried. To find otherwise would be outside the intent of Congress.

The petitioner submitted an undated letter from In Jin Choi, President of The Mission for Native Americans in North America, North American Mission Church of Seattle, Washington. Mr. Choi stated:

This is to affirm that [the beneficiary] served under my direct supervision from January 1999 to March 2000 as a volunteer [m]issionary/teacher with the Mission for Native Americans in North America, North American Mission Church of Seattle Washington.

[The beneficiary's] duties included traveling to two different Native American reservations or center[s] to give instruct[i]on in Tae Kwon Do or other athletic activities, accompanied by Bible studies for the participants. . . He also shared in the responsibility of preaching and teaching for the Sunday services in Seattle. . .

During this period [the beneficiary] did not receive cash salary from our organization, clothing or services towards his volunteer support, and he was reimbursed for travel expenses.

In a letter dated May 1, 2002, Dwight T. Gregory, Associate Pastor of Willow Vale Community Church, stated:

[The beneficiary] has been continuously engaged in ministry with the Free Methodist Church in San Jose since 1999. . . , and under my direct supervision since March of 2000, when he was assigned to develop new ministries in Northern California, following a period of ministry internship in the Seattle, Washington area.

* * *

[I]n addition to developing the Korean congregation at our own church site, Pastor Park conducts a weekly service at a nearby nursing home with many Korean residents. He also travels to outlying sites in two other counties, conducting classes and religious services among Native American peoples as a special mission outreach of the Korean church. He is also developing a "Sports Mission" program, teaching free Tae Kwon Do classes and organizing other sports teams, to open opportunities for religious instruction accompanying these activities. . .

Willow Vale Church, with assistance from the Sierra Pacific Conference of the Free Methodist Church, paid [the beneficiary's] rent for an apartment at \$1120 per month through June 2001. This does not appear on a W2 form, as the ordained minister's housing allowance is, by IRS regulations, non-taxable.

Willow Vale Church, the sponsoring church for the new Korean congregation being developed by [the beneficiary], began paying cash salary as noted on the enclosed W2 form in July 2001.

The Sky Church (the name used by the yet-to-be-incorporated Korean congregation), reimburses [the beneficiary] for costs of purchase and maintenance of a

vehicle for travel to the outlying sites.

The petitioner submitted a copy of the beneficiary's 2000 Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, reflecting an annual income of \$3106, along with the beneficiary's IRS Form W-2, Wage and Tax Statement, for the year 2000. This document shows that the beneficiary was paid an annual salary of \$3106.30 by Pacific Dental Arts of Santa Clara, California.

The petitioner has also submitted photocopies of cancelled checks issued to the beneficiary by Willow Vale Community Church during the period from June 2000 through December 2001. Annotations on the checks indicate that they were issued for the purpose of paying the beneficiary's monthly rent and purchasing uniforms and supplies for the Tae Kwon Do classes he taught.

Finally, the petitioner submitted a copy of the beneficiary's 2001 IRS Form 1040, U.S. Individual Tax Return, and IRS Form W-2, Wage and Tax Statement, from First Free Methodist Church of San Jose. According to these documents, the beneficiary received a salary of \$10,400 from the church in the year 2001.

The petitioner has provided evidence demonstrating that the beneficiary was serving Mission Church as a volunteer during the period from January 1999 to March 2000. The beneficiary's 2000 Form W-2, Wage and Tax Statement, from Pacific Dental Arts clearly shows that the beneficiary supported himself financially, at least in part, through secular employment during the period he served the church as a volunteer missionary in Seattle, Washington.

Further, although the petitioner has submitted copies of cancelled checks to show that Willow Vale Church paid the beneficiary's rent from June 2000 through December 2000, the record does not contain any evidence to show that the beneficiary was paid a salary during that period. Indeed, Rev. Gregory specifically states that the church did not begin paying the beneficiary a salary until July of 2001.

On appeal, counsel asserts that the beneficiary was working full-time, 52 hours per week, for the Mission for Native Americans in North America from July 18, 1999, to March 2000. Counsel explains:

Because the Mission Church had not yet received 501(C)(3) federal tax exempt status, the benefactors supporting Pastor Park did not contribute to the Mission Church to support his salary, but rather made payment directly to Pastor Park. . . . Pastor Park's work was not incidental volunteer work, it was his sole occupation and the principal business of his life.

It was held in *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA

1988) and *Matter of Ramirez-Sanchez*, 17 I&N Dec. (BIA 1980) that the assertions of counsel do not constitute evidence.

Counsel submits the following, relevant documents in support of the appeal:

- (1) the beneficiary's 1999 federal income tax return (belatedly filed in 2002 "because of beneficiary's misunderstanding of tax requirements");
- (2) a list showing sources of the beneficiary's financial support;
- (3) statements from two of the beneficiary's "benefactors" and copies of cancelled checks made out to the beneficiary by those individuals;
- (4) a memorandum dated September 26, 2002, from Dwight T. Gregory, Associate Pastor of Willow Vale Community Church;
- (5) an IRS tax exemption notice dated March 17, 2000, recognizing The Mission for Native Americans in North America, The North America Mission Church, as a bona fide nonprofit religious organization; and
- (6) copies of two documents indicating that four other pastors serving the Mission Church receive no compensation directly from the church.

In his memorandum, Pastor Gregory states:

[I]t is quite common, particularly among immigrant churches, for pastors to serve with minimal or no stated salary from the local church. Such pastors may be supported by spousal employment, secular employment, personal savings, or gifts from individuals who choose not to channel such gifts through a church account. I have attached a copy of the financial pages for the Sierra Pacific Conference of the Free Methodist Church, from the latest *Yearbook* of the denomination, with notes to indicate that a number of pastors appointed in charge of local churches derive the majority of their income from sources other than the local church.

The evidence submitted on appeal further supports a finding that the beneficiary's service as a volunteer pastor from January 1999 to March 2000 does not constitute qualifying employment in the same vocation, since the beneficiary did not receive a salary during his service for the Mission Church, but instead relied upon secular employment and donations from private "benefactors" for his financial support. The beneficiary performed services as a volunteer minister/missionary during the period from January 1999

to March 2000, and did not begin receiving a salary until July of 2001. Therefore, the petitioner has failed to establish that the beneficiary was continuously engaged in a qualifying religious vocation or occupation throughout the two-year period immediately preceding the filing date of the petition. For this reason, the petition must be denied.

Beyond the decision of the director, the petitioner has not established that it has the ability to pay the beneficiary the proffered wage or that it has extended a valid job offer to the beneficiary. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

In reviewing an immigrant visa petition, the AAO must consider the extent of the documentation furnished and the credibility of that documentation as a whole. The petitioner bears the burden of proof in an employment-based visa petition to establish that it will employ the alien in the manner stated. See *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966); *Matter of Semerjian*, 11 I&N Dec. 751 (Reg. Comm. 1966).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.