

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass. Ave, N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

CL



FILE: [redacted] Office: VERMONT SERVICE CENTER Date: **SEP 23 2004**

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. A subsequent appeal to the Administrative Appeals Office (AAO) was untimely filed, and remanded to the service center. On Citizenship and Immigration Service (CIS) motion, the director affirmed the previous decision and the petition is now before the AAO on appeal. As the decision was adverse to the petitioner, the reopened decision should have been certified to the AAO for review. The appeal will be rejected. The AAO certifies the decision of the director to itself for review. The director's decision will be affirmed.

The regulation at 8 C.F. R. § 103.3(a)(1)(iii) states, in pertinent part:

(B) *Meaning of affected party.* For purposes of this section and §§ 103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

The regulation at 8 C.F.R. § 103.3(a)(2)(v) states:

Improperly filed appeal – (A) Appeal filed by person or entity not entitled to file it – (1) Rejection without refund of filing fee. An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

Only an affected party, a person or entity with legal standing, may file an appeal of an unfavorable decision. It is noted that the only G-28, Notice of Entry of Appearance as Attorney or Representative, in the record of proceeding is on behalf of the beneficiary, and has been signed by the beneficiary and not by the petitioner. The appeal has not been filed by the petitioner, nor by any entity with legal standing in the proceeding, but rather, by counsel for the beneficiary. Therefore the appeal has not been properly filed and must be rejected.

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. The director determined that the petitioner had not established that the position qualified as that of a religious worker, or that it had the ability to pay the beneficiary the proffered wage.

With its initial appeal, the petitioner submitted a letter and additional documentation.

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, 2008, 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, 2008, 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).

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a "religious occupation" and the regulation states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The list reveals that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as cantor, missionary, or religious instructor are examples of qualifying religious occupations. Persons in such positions must perform services directly related to the creed and practice of the religion. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

CIS therefore interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

The petitioner submitted a copy of a January 12, 2001 certificate appointing the beneficiary as a lay minister with the petitioning organization, with authority to "publish, preach and defend the Gospel of Jesus Christ; to conduct prayer meetings and to hold revivals." The record also contains several letters addressed to the beneficiary, two of which address his approval for a lay minister's certificate in October 1999 and a renewal certificate in February 2000.

The petitioner also submitted an April 24, 2001 letter from the Virginia state overseer of its parent church, notifying the beneficiary that he was "now a fully licensed Minister with the Church of God Prophecy." The accompanying "Minister's Certificate," dated April 23, 2001, authorizes the beneficiary to "preach and defend the Gospel of Jesus Christ, to establish churches, to baptize, to administer the Lord's Supper and Washing of the Saints' Feet, and as a pastor to perform marriages."

The record is sufficient to establish that the duties of the position occupied by the beneficiary prior to the filing of the visa petition and the duties of the proffered job are religious occupations.

A petitioner must also demonstrate its ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part, that:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of annual reports, federal tax returns, or audited financial statements.

The petitioner proposes to pay the beneficiary \$200.00 per week. To establish its ability to pay the proffered wage, the petitioner submitted a copy of a document entitled "Profit and Loss by Class" for the year 2000. In its subsequent appeal to the AAO, the petitioner submitted a 2001 "Profit and Loss by Class" and a balance sheet as of December 2001.

The above-cited regulation states that evidence of ability to pay "shall be" in the form of tax returns, audited financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only in addition to, rather than in place of, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of evidence, and therefore has not established its ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has not established that the beneficiary was engaged continuously as a minister for two full years immediately preceding the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m)(1) states that the "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 April 27, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as a minister throughout the two-year period immediately preceding that date.

The petitioner states that the beneficiary has been serving it as a volunteer pastor/minister since November 1999. As discussed above, the beneficiary was certified as a lay minister in the church prior to becoming a licensed and ordained minister in April 2001.

The regulation at 8 C.F.R. § 204.5(m)(2) defines minister as:

[A]n individual duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion. In all cases, there must be a reasonable connection between the activities performed and the religious calling of the minister. The term does not include a lay preacher not authorized to perform such duties.

It is evident from the record that the beneficiary was in training and studying to become a licensed minister with the petitioner, and finally accomplished that fact in April 2001. The statute and regulation require that the alien must be working in the same occupation for which he seeks entry into the United States. A person who is training for a vocation is not working in that vocation. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

The evidence establishes that the petitioner, while permitting the lay minister to preach and perform other ministerial duties, clearly distinguishes the position from that of a licensed minister, who has additional responsibilities including performing traditional religious rites such as baptisms and marriages.

The evidence does not establish that the beneficiary was continuously engaged as a licensed minister for two full years prior to the filing of the visa petition. This deficiency constitutes an additional ground for denial of the petition.

The petitioner has also failed to establish that it qualifies as a bona fide religious organization. The regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

(3) *Initial evidence.* Unless otherwise specified, each petition for a religious worker must be accompanied by:

(i) Evidence that the organization qualifies as a nonprofit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases, evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organization.

To address this requirement, the petitioner submitted a copy of July 5, 1957 letter from the IRS to The Church of God of Prophecy in Cleveland, Tennessee. The letter grants that organization exemption from taxation under section 501(c)(3) as an organization organized and operated exclusively for religious purposes. The letter does not state that the exemption was applicable as a group exemption.

The petitioner must either provide verification of individual exemption from the IRS, proof of coverage under a group exemption granted by the IRS to the denomination, or such documentation as is required by the IRS for tax exemption purposes. Such documentation to establish eligibility for exemption under section 501(c)(3) includes a completed IRS Form 1023, a completed Schedule A attachment, and a copy of the articles of organization showing the purpose of the organization and the disposition of assets in the event of dissolution. The petitioner's failure to do so constitutes an additional ground for denial of the petition.

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 sustained that burden. Accordingly, the petition is denied.

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