

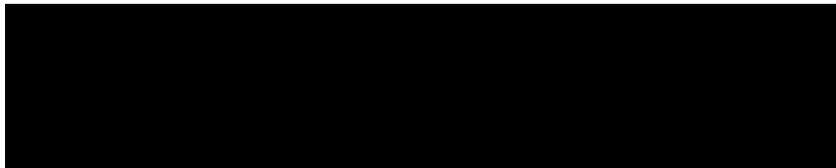
Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



01

FILE: [Redacted]  
WAC 03 125 51074

Office: CALIFORNIA SERVICE CENTER

Date: APR 05 2005

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:

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, California Center, and is now before the Administrative Appeals Office 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 the beneficiary as its president. The director denied the petition, determining that the petitioner failed to establish it had the requisite tax exemption. The director further determined the petitioner failed to establish the beneficiary's position is a qualifying occupation.

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 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 first issue to be determined is whether the petitioner is considered a qualifying tax-exempt religious organization. The regulation at 8 C.F.R. §204.5(m)(2) defines a "bona fide nonprofit religious organization in the United States" as an organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations, or one that has never sought such exemption but establishes to the satisfaction of CIS that it would be eligible if it had applied for tax-exempt status.

The regulation at 8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization qualifies as a non-profit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with section 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 [IRS] to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

As the petitioner had not submitted evidence that its exemption has been determined by the IRS, in order to comply with the requirements of 8 C.F.R. § 204.5(m)(3)(i) the petitioner must submit documentation to establish it *would be* eligible for exemption under section 501(c)(3) of the Code. It is noted that it is not enough for the petitioner to simply show that it is tax-exempt or that it would qualify for tax-exempt status under section 501(c)(3) of the Code. Instead, the regulation makes clear that a petitioner's tax-exempt status or qualification for such status is related to the fact that the petitioner is a religious organization.

On appeal, the petitioner argues that it demonstrated its tax-exempt status and was accepted by the director when he approved the beneficiary's prior R-1 nonimmigrant status. The director's decision does not indicate whether he reviewed the petitioner's prior approval. If the previous nonimmigrant petition were approved based on the same unsupported assertion that is contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). If the previous petition was approved in error, that error does not create a presumptive entitlement to perpetuation of that error.

The petitioner further argues that because it is a church, it is not required to apply for exemption from the IRS. It appears the petitioner is confusing what is required by the IRS versus what is required by CIS. We do not dispute the fact that under the regulations of the IRS, the petitioner is considered to be tax-exempt without the filing of the Form 1023; however, to meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B), the petitioner must submit the documentation required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operations, *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003):

- (1) A properly completed IRS Form 1023;
- (2) A properly completed Schedule A supplement, if applicable;
- (3) A copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization;
- (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

The above list is consistent with the regulatory requirement at 8 C.F.R. § 204.5(m)(3)(i)(B), cited above. The memorandum specifically states that the above materials are, collectively, the “minimum” documentation that can establish “the religious nature and purpose of the organization.” Thus, for example, a petitioner cannot meet this burden by submitting only its articles of incorporation. That being said, it is important to note that item (2), Schedule A of Form 1023, is only required “if applicable.” Further, IRS Publication 557 *Tax Exempt Status for Your Organization* (IRS Publication 557), submitted by the petitioner on appeal, reflects that churches are not required to file Form 1023.

The Yates Memorandum does not state that the petitioner must provide one item from the list. Rather, *all* the listed documents, “at a minimum,” are necessary to establish that the entity has represented itself to the IRS as being primarily a religious organization, in instances where the religious nature of the exemption is not readily apparent from the IRS exemption letter.

The documents listed in the memorandum are, taken together, “such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.” 8 C.F.R. § 204.5(m)(3)(i)(B). The AAO therefore concurs with, and endorses, the valuable guidance contained within the Yates Memorandum.

As evidence that it qualifies for tax-exemption, the petitioner submits a copy of a letter from the IRS, a copy of a letter from the Arizona Corporation Commission acknowledging the filing of the petitioner’s articles of incorporation, a copy of the petitioner’s articles of incorporation, and a copy of its bylaws. As previously noted, the petitioner is not required to submit Form 1023 or its supplement. Thus, we must determine whether the organizing instrument contains the appropriate dissolution clause and whether there is appropriate documentation describing the petitioner’s religious purpose and nature of activities.

IRS Publication 557 states:

Section 501(c)(3) is the provision of law that grants exemption to the organizations described in this chapter. Therefore, the organizational tests may be met if the purposes stated in the articles of organization are limited in some way by reference to 501(c)(3).

The requirement that your organization’s purposes and powers must be limited by the articles of organization is **not satisfied** if the limit is contained only *in the bylaws or other rules or regulations*.

\*

\*

\*

#### **Dedication and Distribution of Assets**

Assets of an organization must be permanently **dedicated** to an exempt purpose. This means that should an organization dissolve, its assets must be **distributed** for an exempt purpose described in this chapter, or to the federal government or to a state or local government for a public purpose.

[Additional emphasis added.]

Although the petitioner claims that the director “received the Articles of Incorporation which includes Article 12 the dissolution clause,” a review of the petitioner’s articles of incorporation, which contains only nine articles,

reflects that there is no clause related to the dedication and distribution of the petitioner's assets. Instead, it appears that the petitioner is referring to its bylaws which do, in fact, contain a dissolution statement. However, as clearly indicated in Publication 557, the petitioner does not meet the IRS' organizational test if the limit on dissolution is only contained in the bylaws and not the articles of incorporation. Without the appropriate dissolution clause the IRS would not approve the petitioner's tax-exempt status. Therefore, the petitioner is unable to establish that it is eligible for exemption under section 501(c)(3) of the Code.

As the petitioner is demonstrably aware of Publication 557 (having submitted a copy into the record with highlighted excerpts and underlined paragraphs), it would serve no useful purpose to now remand the matter to the director, for the purpose of advising the petitioner about the insufficiency of its dissolution clause. Having taken active steps to ensure the inclusion of Publication 557 into the record, the petitioner cannot now reasonably expect the AAO to ignore the requirements spelled out therein. Thus, the petitioner was aware of the requirements listed in the publication to show eligibility for tax-exemption.

The petitioner submits ample documentation regarding the religious activities undertaken at the petitioning church. We do not dispute that such activities take place. At issue here is not whether religious activities take place. Rather, what must be established and, thus far, has not been established, is whether the petitioner would be eligible for tax-exemption based upon the fact that it is a religious organization.

The next issue is whether the beneficiary's work for the petitioner constitutes qualifying employment in a religious occupation or vocation.

8 C.F.R. § 204.5(m)(2) states, in pertinent part:

*Religious occupation* means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

*Religious vocation* means a calling to religious life evidenced by the demonstration of commitment practiced in the religious denomination, such as the taking of vows. Examples of individuals with a religious vocation include, but are not limited to, nuns, monks, and religious brothers and sisters.

With regard to religious occupations, the lists in the above regulation reflect that nonqualifying positions are those whose duties are primarily administrative or secular in nature. Citizenship and Immigration Services 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 has indicated that it intends to hire the beneficiary as president to perform the following duties:

1. Act as [p]resident and give leadership to the Mission and goals of the Church and Ministry.
2. Plan and direct all International mission outreaches in Mexico, Africa and Europe as ministry opportunities present themselves.

3. President ex-officio to all boards and committees.
4. Responsible for fiscal matters pertaining to donations, fund raising and use of all moneys held by Word of Life.
5. Give leadership to the establishment of Word Bible Institute and the training of ministerial candidates.
6. Authorize, examine and ordain men and women candidates in accordance with Word of Life constitutional laws.
7. Appoint, examine and approve all heads of departments who have met necessary qualifications as per the [bylaws] of the Church and Ministry.
8. Sign all legal documents, conveyances, transfers of property, purchase of building and property as agreed upon the Board of Trustees.
9. Ensure that all requirement of Federal and state law are met pertaining to the Church and Ministry as a non-profit organization and the appointment of a qualified bookkeeper.
10. Plan and direct ongoing future expansion programs for all buildings necessary for expansion and growth.

The director determined the beneficiary's duties reflect that her position "is considered a wholly secular position."

On appeal, the petitioner asserts that the beneficiary will be "instructing [sic] in the work of the mission and goals of the church" and will "have the knowledge to lead and to train others." Thus, the petitioner contends that the beneficiary is a missionary *and* a religious instructor, and that the beneficiary's position as "a dual Pastor/President" is related to a traditional religious function. The record offers no support for these assertions.

Although the record contains a copy of the beneficiary's Certificate of Ordination dated August 24, 1998, the petitioner makes no claim that the beneficiary will be working as a minister. Further, the duties described by the petitioner do not indicate any duties normally associated with that of minister, such as conducting religious services. Moreover, the duties of the beneficiary's position do not reflect that the beneficiary will be acting in the position of a missionary, a religious instructor, or a pastor. The duties not appear to involve traditional religious functions or religious activities. Instead, the duties appear to be logistical and administrative, in that the beneficiary will be responsible for the overall management of the church.

The petitioner argues that the director erred in determining that the beneficiary's proposed duties are largely secular in nature, but the petitioner provides no new evidence on appeal to refute the director's findings. The petitioner's own interpretation of the nature of the beneficiary's duties carries no weight. Accordingly, we agree with the determination of the director and find the petitioner has not demonstrated that the beneficiary's duties are essentially religious, rather than secular, in nature.

Beyond the decision of the director we find two additional issues which must be addressed. The first issue relates to the requirement of past experience. The regulation at 8 C.F.R. §§ 204.5(m)(1) and (3)(ii)(A) require the petitioner to demonstrate that the beneficiary was continuously performing the qualifying religious work, throughout the two-year period immediately preceding the petition's filing date. The regulations state that the beneficiary must have carried on *the* vocation or occupation, rather than *a* vocation or occupation, indicating that the work performed during the qualifying period should be substantially similar to the intended future religious work. The underlying statute, at section 101(a)(27)(C)(iii), requires that the alien "has been carrying on such . . . work" throughout the qualifying period. An alien who seeks to work as a president has not been carrying on "such work" if employed in a position other than president for much of the preceding two years.

The petitioner has not submitted any evidence that demonstrates for the two-year period preceding the filing of the petition the beneficiary had been performing the same duties as those duties to be performed for the petitioner as its president. In fact, in the petitioner's original submission, Rev. Whittal indicates that the beneficiary has worked for the petitioner "first as a Licensed Minister and later as an Ordained Minister."

The second issue relates to the petitioner's ability to pay the beneficiary the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* 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 proffered 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 copies of annual reports, federal tax returns, or audited financial statements.*

[Emphasis added].

As evidence of its ability to pay, the beneficiary has submitted copies of two financial statements dated December 31, 2001 and a bank statement covering the period January 2002 to October 2002. The cover letters that accompany the petitioner's financial statements indicate that the statements are "based on information provided by management, and have not been audited." Accordingly, the financial statements and bank statements do not meet the requirements of 8 C.F.R. § 204.5(g)(2) which requires either copies of annual reports, federal tax returns, or *audited financial statements*.

Although the petitioner is free to submit other kinds of documentation, such submissions must only be *in addition to*, rather than *in place of*, the type of documentation required by regulation. In this instance, the petitioner has not submitted any of the required types of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

For these additional reasons, the petition may not be approved. In reviewing an immigrant visa petition, Citizenship and Immigration Services (CIS) 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. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.