U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

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FILE: [redacted] SRC 03 168 52727 Office: TEXAS SERVICE CENTER Date: DEC 16 2005

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[redacted]

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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas 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 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 it qualified as a bona fide nonprofit religious organization. The director further determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition, that the position qualified as that of a religious worker, that it had extended a qualifying job offer to the beneficiary or that it had the ability to pay the beneficiary the proffered wage.

On appeal, the petitioner submits 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).

The first issue on appeal is whether the petitioner established that it is a bona fide nonprofit 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 meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(A), a copy of a letter of recognition of tax exemption issued by the Internal Revenue Service (IRS) is required. In the alternative, to meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B), a petitioner may submit such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code (IRC) of 1986 as it relates to religious organizations. This documentation includes, at a minimum, a completed IRS Form 1023, the Schedule A supplement, if applicable, and a copy of the organizing instrument of the organization, which contains a proper dissolution clause and which specifies the purposes of the organization.

The organization can establish eligibility under 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting documentation that establishes the religious nature and purpose of the organization, such as brochures or other literature describing the religious purpose and nature of the activities of the organization. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operation for CIS, *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, and
(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. Also, obviously, it is not enough merely for the petitioner to *submit* the documents listed above. The *content* of those documents must establish the religious purpose of the organization.

With the petition, the petitioner submitted copies of its charter and articles of incorporation. The petitioner also submitted a flyer, which appears to be an advertisement for a radio show. However, as the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the

petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

In a request for evidence (RFE) dated June 25, 2003, the director instructed the petitioner to:

> Submit a copy of the IRS's 501(c)(3) certification for the petitioning organization including the copy of the actual request for certification Form IRS 1023; or evidence that the petitioning organization is under an umbrella of a parent organization with IRS's certification.

In response, the petitioner declined to provide the requested evidence, stating that the information was "submitted with the original request." The regulation at 8 C.F.R. § 103.2(b)(11) provides that "All evidence submitted in response to a Service request must be submitted at one time. The submission of only some of the requested evidence will be considered a request for a decision based on the record." Additionally, 8 C.F.R. § 103.2(b)(14) provides, in pertinent part, that "Where an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall be issued based on the record."

On appeal, the petitioner submits a copy of a December 15, 2003 letter from the IRS granting it tax exempt status under section 501(c)(3) as an organization described in sections 509(a)(1) and 170(b)(1)(A)(i) of the IRC. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. The record before the director does not establish that the petitioner is a bona fide nonprofit religious organization as required by the statute and regulation.

The second issue on appeal is whether the petitioner established that the beneficiary was continuously engaged in a qualifying religious occupation or vocation for two full years preceding the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file a Form I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. 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 regulation indicates 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 regulation at 8 C.F.R. § 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

> (ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:
>
> > (A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

The petition was filed on May 30, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a minister throughout the two-year period immediately preceding that date.

In his letter of April 4, 2003 accompanying the petition, the petitioner's pastor, stated that the beneficiary was "currently" working with the petitioning church. The petitioner submitted a copy of a church credit card issued to the beneficiary, which the petitioner said had been used by the beneficiary since 2002 to "help with his ministerial expenses" with the petitioner. The petitioner submitted no documentary evidence of the beneficiary's duties or the terms of his employment with the church.

In his RFE, the director instructed the petitioner to:

> 2. Submit a detailed description of the beneficiary's prior work experience including duties, hours and compensations, (especially compensations) accompanied by appropriate evidence (such as original pay stubs or cancelled checks, earning statements, W-2's or other evidence as appropriate). Submit an IRS certified copy of the income tax returns with all the pertaining W-2s for the two years preceding the filing of this petition.
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> 3. Submit detailed time sheets, weekly time logs and schedules, work logs or reports, etc. clearly establishing that the beneficiary has performed the claimed religious services for the time period in question.

In response, the petitioner submitted a document stating that the beneficiary's prior work experience included leading worship on Sunday and Wednesday evenings, creating a message to speak on Sunday and Wednesday night services, speaking the sermon and bible studies for both Sunday and Wednesday night services, hosting a live daily (excluding Sunday) Christian radio program.

In another document, the petitioner stated, "Because the beneficiary is not paid according to the number of hours that he works, but by a weekly love offering . . . there is no time sheet, weekly time log, or schedule." The petitioner submitted copies of documents that it describes as the beneficiary's "weekly work Journals." The documents appear to be a log or a diary kept by the beneficiary; however, copies of the original documents on which the "work Journals" were based were not submitted as evidence for the record. The record, therefore, does not establish when these "work Journals" were created or by whom. Further, there is no evidence that the work allegedly performed by the beneficiary was verified or certified as accurate by any supervisory authority. The petitioner submitted no corroborative documentary evidence of the beneficiary's work with the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 (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/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).

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

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).

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/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 generally salaried. To hold otherwise would be contrary to the intent of Congress.

On appeal, the petitioner submitted copies of checks written to the beneficiary beginning on April 7, 2003 and continuing through March 6, 2005. The checks are generally in the amount of $250 and indicate they are for "pastoral care" or "pastoral services;" however, the check of April 7, 2003 is for $1,000 and does not state a specific purpose. The checks were not written with a consistent frequency.

The petitioner also submits a copy of a document that it has labeled "Transaction Report From 01/01/2003 to 03/19/2005." The document reflects payments to [redacted] and [redacted] According to the petitioner:

> [These] documents are copies of computerized print outs of all expenses our church has paid for the support of [the beneficiary] for the past few years.

> Payments to [redacted] or [redacted] are rental payments that the church is paying for the parsonage that is being used for [the beneficiary] and his family.
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> Payments to [redacted] are the natural gas payments to the parsonage . . .
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> Payments to Entergy are payments to the electric utility supplying electricity to the parsonage.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As discussed above, as the petitioner failed to submit the evidence in response to the RFE and subsequently submitted it on appeal, the AAO will not consider the sufficiency of the evidence submitted and will adjudicate the record as it was constituted in the proceeding before the director.

The evidence before the director was insufficient to establish that the beneficiary was continuously employed as a minister for two full years prior to the filing of the visa petition.

The third issue on appeal is whether the petitioner established that the position qualified as that of a religious worker.

Pursuant to 8 C.F.R. § 204.5(m)(1), the alien must be coming to the United States at the request of the religious organization to work in a religious occupation.

The proffered position is that of a minister. According to the petitioner, the duties of the position will include "speaking" a message for Sunday and Wednesday evening services, conducting a live radio program, and counseling. The petitioner states that the duties of the position encompass over 40 hours per week. The petitioner also states that while the position does not carry a specific salary, the petitioner will pay the rent and utilities of the beneficiary and that the beneficiary may use church offerings to pay for personal expenses.

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.

The evidence of record is unclear as to whether the position requires the beneficiary to perform the traditional sacerdotal duties of a minister, and the petitioner does not allege that the beneficiary has performed such duties in his past association with the petitioning organization. While the record contains what appears to be a certificate of ordination for the beneficiary issued by the Iglesia Santidad Pentecostal in Costa Rica, the petitioner failed to include an English translation with the document. *See* 8 C.F.R. § 103.2(b)(3). Further,

proof of the beneficiary's ordination does not, by itself, establish that the proffered position requires ordination or that it will involve duties other than those that can be performed by a lay minister.

The record does not establish that the position is that of a minister as defined by the regulation.

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 would reasonably be expected to 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. The lists of qualifying and nonqualifying occupations derive from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

Citizenship and Immigration Services (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 states that the position does not carry a salary and the evidence before the director did not establish that the position is traditionally a permanent, full-time, salaried occupation within the petitioner's denomination. The petitioner also submitted no evidence that the position of lay minister is defined and recognized by its governing body.

The evidence is insufficient to establish that the proffered position is a religious occupation within the meaning of the statute and regulation.

The fourth issue to be discussed is whether the petitioner established that it has extended a qualifying job offer to the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(4) states, in pertinent part, that:

> *Job offer.* The letter from the authorized official of the religious organization in the United States must state how the alien will be solely carrying on the vocation of a minister, or how the alien will be paid or remunerated if the alien will work in a professional capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support.

The petitioner has not established that the position qualifies as that of a religious worker within the meaning of the statute and regulation. Therefore, it has not established that it has extended a qualifying job offer to the beneficiary.

Additionally, the petitioner stated that the position does not carry a specific salary, and that the petitioner will provide housing to the beneficiary and will pay his utilities. The petitioner also stated that the beneficiary is authorized to use church offerings for his personal expenses. The petitioner does not guarantee that the beneficiary will receive a minimum amount of funds with which to meet his personal needs. According to the petitioner, the proffered position is that of a minister. While the evidence does not establish that the position qualifies as that of a minister within the meaning of 8 C.F.R. § 204.5(m)(2), we note that pursuant to 8 C.F.R. § 204.5(m)(4), an alien seeking entry into the United States as a minister, must do so "solely" to work in that vocation. Accordingly, the petitioner's evidence is insufficient to establish that the beneficiary, as a minister, will not be dependent upon supplemental income for his support.

The record, therefore, does not establish that the petitioner has extended a qualifying job offer to the beneficiary.

The fifth issue to be discussed is whether the petitioner established that it has the 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.

With the petition, the petitioner submitted a copy of an "Unaudited Statement of Donations and Expenses For the year ending 12/31/02."

In his RFE, the director instructed the petitioner to

> Submit conclusive evidence that will prove that the organization has the ability to support the applicant in addition to the number of individuals currently receiving compensation and other operating expenses . . . You may submit evidence such as [a] copy of bank letters, recent audits, church membership figures, payroll tax return copies, and other appropriate evidence.

In response, the petitioner stated that the information had been provided with the petition.
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 did not submitted any of the required types of primary evidence.

On appeal, the petitioner submits copies of checks reflecting that it has paid the beneficiary in several months during 2003, 2004 and 2005. The petitioner also submitted copies of the beneficiary's Form 1040, U.S. Individual Income Tax Return, for the years 2003 and 2004.

As discussed previously, however, the petitioner's failure to submit this evidence upon request prior to the adjudication of the petition prevented a material line of inquiry into the beneficiary's eligibility for the benefit sought. Therefore, the AAO will not consider the evidence submitted for the first time on appeal. 8 C.F.R. § 103.2(b)(14); *Matter of Soriano*, 19 I&N Dec. 764; *Matter of Obaigbena*, 19 I&N Dec. 533.

The record before the director did not establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage as of the date the petition was filed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.