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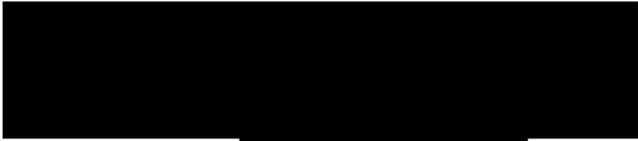
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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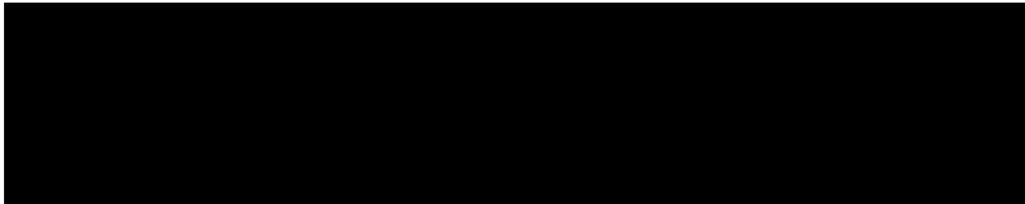


FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **AUG 06 2007**
SRC 06 076 53510

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

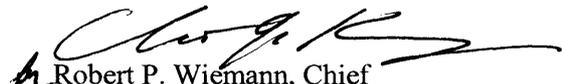
PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification 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 an associate minister at Evangelical Church Winning All, a Southern Baptist church in Louisville, Kentucky. The director determined that the petitioner had not established that he had the requisite two years of continuous work experience as an associate minister immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established his prospective employer's ability to pay his salary.

On appeal, the petitioner submits a brief from counsel.

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 regards the petitioner's past experience. Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 204.5(m)(1) indicate 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." 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate that, immediately prior to the filing of the petition, the alien has the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on January 31, 2006. Therefore, the petitioner must establish that he was continuously performing the duties of an assistant minister throughout the two years immediately prior to that date.

In a letter accompanying the initial submission, counsel stated:

For the past two years, [the petitioner] has been studying at the Southern Baptist Theological Seminary to further his understanding of the Gospel and its practical application. Notably, studying in the U.S. under an F-1 [nonimmigrant student visa] may be considered carrying on the vocation [of a minister] “if it can be demonstrated that such study is consistent with the . . . Ministerial vocation and provided that the [minister]¹ continues to perform the duties of a minister of religion.” Letter, [redacted] Acting Ass. Comm. Adjudications CO 204.26-C (May 8, 1992). [The petitioner’s] study has, in fact, been consistent with the ministerial vocation. Moreover, as a voluntary associate minister and Christian Education Coordinator with the Evangelical Church Winning All (ECWA) . . . [, the petitioner] has continued to perform the duties of a minister of religion.

In a joint letter, [redacted] and [redacted] respectively the Pastor and Secretary of ECWA, state that the petitioner “is currently a student in Southern Baptist Theological Seminary. . . . He joined our Church in January 2003 and has volunteered to serve as our Christian Education Coordinator. He has performed extremely well despite his constraint as a student and even though he is not being paid for this position.”

The petitioner also submitted documentation relating to his F-1 nonimmigrant student status. We shall address this material in the context of the appeal, as the evidence is relevant in the discussion thereof.

On March 16, 2006, the director issued a notice of intent to deny, based in part on a finding that the beneficiary was not a compensated religious worker during the two-year qualifying period immediately prior to the filing date. The director stated: “In the case of special immigrant ministers, the alien must have been engaged solely as a minister of the religious denomination for the two-year period [in] order to qualify for the benefit sought and must intend to be engaged solely in the work of a minister of religion. *Matter of Faith Assembly Church*, 19 I&N 391 (BIA 1986).” The director also cited *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980), in which the Board of Immigration Appeals ruled that an alien student who volunteered at a church did not accumulate qualifying experience as a minister. The director concluded that “this petition appears to have been filed prematurely,” before the petitioner had had the opportunity to work exclusively as a compensated minister.

In response, counsel asserts that the petitioner has been working at ECWA for more than two years, and has therefore fulfilled the two-year experience requirement. Counsel did not distinguish or even acknowledge the case law that the director had cited as binding precedent in this matter; counsel simply repeated the previous reference to a letter from [redacted] who at the time was Acting Associate Commissioner for Adjudications. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the

¹ Counsel’s insertion.

writer's analysis of an issue. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

Counsel cited *Camphill Soltane v. US Department of Justice, Immigration & Naturalization Service*, 381 F.3d 143, 150 (3d Cir. 2004). In that decision, the Court stated:

The requirement that the position be "salaried" appears to be inconsistent with the list of religious occupations given in the regulation itself, which includes positions-perhaps most notably "missionaries"-who do not always receive salaries. We further note that in promulgating the final rules at issue, the agency explicitly stated that they had been "revised to account more clearly for *uncompensated* volunteers, whose services are engaged but who are not technically employees." 56 Fed. Reg. 66965 (Dec. 27, 1991) (emphasis added).

According to the record of proceeding, the beneficiary's intended place of work is in Kentucky, which is not under the jurisdiction of the Third Circuit. *Camphill Soltane* was never a binding precedent for this case.

It is also crucial to note that the cited passage from the Federal Register concerns a regulation that applies only to R-1 nonimmigrant religious workers, not to special immigrant religious workers. The final rule for special immigrant religious workers was promulgated separately, at 56 Fed. Reg. 60897 (Nov. 29, 1991).

There is nothing in the implementing regulations for special immigrant religious workers to indicate that "uncompensated volunteers" can qualify for that classification. For nonimmigrants, the regulation at 8 C.F.R. § 214.2(r)(3)(ii)(D) requires petitioners to specify "[t]he arrangements made, *if any*, for remuneration for services to be rendered by the alien" (emphasis added). This "if any" clause was inserted "to account more clearly for uncompensated volunteers," as reported in the Federal Register. With regard to the immigrant classification, the parallel regulation at 8 C.F.R. § 204.5(m)(4) contains no comparable "if any" clause. Therefore, the reasoning cited in *Camphill Soltane* is not applicable here.

The director denied the petition on December 5, 2006, repeating previously-cited case law to the effect that unpaid volunteer work is not generally qualifying experience, and that an alien seeking special immigrant classification as a minister must have been employed solely as a minister throughout the two-year qualifying period.

On appeal, counsel protests that the director's requirement of prior compensation makes it nearly impossible for an F-1 nonimmigrant student to accumulate the required experience, because F-1 students generally cannot work off-campus. Counsel's argument is noted, but it does not in any way weaken the director's reasoning. Counsel does not explain why the statute must be interpreted in a manner that is more favorable to F-1 students. Congress, by creating the R-1 nonimmigrant classification, has already made ample provision for aliens who desire to accumulate qualifying religious work experience in the United States.

Counsel quotes the director's decision and alleges a flaw in the director's logic:

The Service Center's decision [states] "The Act also encompasses vocations (i.e. priests) that are not paid, but that omission is not meant to allow volunteer activities to satisfy the prior work experience requirement. Priests, while not paid employees per se, are not volunteers." I'm not sure how the Service Center can acknowledge that the Act carves out an exception for unpaid positions, and then claim that there is no such exception. . . . The Service Center cannot have it both ways.

The confusion appears to arise from unclear wording in the director's decision. In some religious vocations, workers are not "paid" *in the form of a fixed wage or salary*, but they nevertheless receive material support from the religious organization to which they belong. The Board of Immigration Appeals ruled that an alien who "receives compensation in return for his efforts on behalf of the Church" is "employed" for immigration purposes, even if that compensation takes the form of material support rather than a cash wage. *See Matter of Hall*, 18 I&N Dec. 203, 205 (BIA 1982).

Matter of Hall becomes particularly relevant here when we consider the evidence pertaining to the petitioner's studies. The petitioner submitted a copy of Form I-20 A-B, setting forth the terms of his F-1 nonimmigrant student visa allowing him to study at the Southern Baptist Theological Seminary. The form lists the following figures for sources of the petitioner's financial support:

a. Student's personal funds	\$1,000.00
b. Funds from this school	700.00
Specify type: Scholarship	
c. Funds from another source	17,000.00
Specify type: See remarks.	
d. On-campus employment	6,000.00
Total	24,700.00

Remarks: Sponsors: \$ [redacted] Lagos; [redacted] Gombe, Nigeria; family friend, [redacted], Willowbrook, IL; ECWA Church, Louisville, KY.

The Form I-20 indicates that ECWA Church contributed an unspecified amount to the petitioner's studies at Southern Baptist Theological Seminary. Older Forms I-20, dating from before the petitioner worked for ECWA, do not list ECWA as a source of support. Only after the petitioner began working for ECWA did the church begin to contribute toward the petitioner's education. Based on this information, one could fairly draw the inference that ECWA's financial support was contingent on the beneficiary's work at that church. In this respect, ECWA's financial support could be construed, under *Hall*, as a form of compensation for the petitioner's work. If that is indeed the case, then the director's argument that ECWA did not compensate the petitioner collapses.

Even so, the issue does not end there. Counsel is entirely correct that, with respect to following the law, "The Service Center cannot have it both ways," but the same applies to the petitioner. The petitioner is subject to all applicable case law, not just the cited fragments that present the most favorable case for him.

Throughout this proceeding, and emphatically on appeal, counsel has maintained that the beneficiary “is a minister,” and therefore subject to statutory and regulatory provisions that apply specifically to ministers. One such provision is that an alien minister must be engaged *solely* in the vocation of a minister. With this in mind, we note that the director has repeatedly cited case law, such as *Matter of Faith Assembly Church* discussed above, indicating that an alien minister cannot qualify for classification as a special immigrant religious worker unless the minister worked solely and exclusively as a minister throughout the two-year qualifying period. Any other employment is inherently disqualifying.

The Form I-20 indicates that the petitioner derives a substantial portion of his income from “On-campus employment.” This is consistent with another document in the petitioner’s initial submission, specifically Form G-325A, Biographic Information, which the petitioner signed and dated December 12, 2005. On that form, under “employment last five years” (*i.e.*, December 2000 through December 2005), the petitioner listed only one employer. The petitioner stated that he had been a “Student Worker” at Southern Baptist Theological Seminary from December 2003 to the “Present Time.”

The record contains no information about the nature of the petitioner’s on-campus employment. Counsel has repeatedly stressed that the petitioner was studying for a degree in “Divinity/Ministry” at a seminary, and that therefore the beneficiary’s studies were “consistent with the . . . ministerial vocation.” The religious nature of the institution, however, does not force the conclusion that *employment* on its campus is ministerial in nature or “consistent with the . . . ministerial vocation.” Indeed, it is difficult to imagine a situation where every student employed on-campus at a theological seminary would be employed as a minister.²

The petitioner has twice indicated, on government forms under penalty of perjury, that he worked on-campus at Southern Baptist Theological Seminary. The petitioner, on whom the burden of proof rests, has not produced any evidence to show that this on-campus employment was ministerial rather than secular in nature. Because the burden of proof does not rest on CIS or the AAO, we are under no obligation to presume that the employment was ministerial or religious in nature, nor are we required to prove that the employment was secular. Therefore, the record as a whole supports the director’s conclusion that the petitioner has not demonstrated that he was employed *solely* as a minister throughout the two-year qualifying period.

The remaining issue concerns the prospective employer’s ability to compensate the petitioner. 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

² Regarding the seminary, counsel urged the director to “please check their website at <http://www.sbts.edu>.” A page from that site, http://www.sbts.edu/campus_life/Human_Resources_and_Employment/Employment_Opportunities.aspx, details employment opportunities at the seminary. The available jobs (for cooks, bookstore clerks, etc.) appear to represent the typical spectrum of on-campus employment not just at seminaries but at secular colleges and universities as well.

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.

The initial joint letter from two ECWA officials contains the following initial terms of employment: "Salary \$1,500.00/month; Vehicle \$250.00/month; Health \$300.00/month; and Church Annuity \$100.00/month." Thus, the petitioner's complete compensation package is worth \$2,150 per month.

The only financial documentation submitted with the initial filing consists of copies of bank statements showing that, in the autumn months of 2005, ECWA carried a bank balance between \$1,000 and \$3,000, along with a certificate of deposit worth slightly over \$1,000. Because the petitioner was an uncompensated volunteer at the time of filing, these bank balances do not yet reflect the petitioner's \$2,150 worth of monthly salary and benefits. Because the church's bank balance rarely exceeds \$2,150 in a given month, the bank statements do not show that the church is able to afford the petitioner's compensation as described.

In the notice of intent to deny, the director observed that ECWA's bank statements do not conform to the above-cited evidentiary requirements at 8 C.F.R. § 204.5(g)(2). The director also noted: "No information is available that shows the amount of employees . . . [or] the amount of the salary of all the petitioner's [*sic*] employees."

In response, counsel stated: "We would . . . like to note that as evidence of ability to pay we have supplied a letter from the Department of the Treasury confirming that ECWA qualifies as a tax exempt organization." Counsel fails to explain how this letter concerning ECWA's tax-exempt status qualifies as "evidence of ability to pay." ECWA's tax status has nothing to do with the amount of its assets or income. We acknowledge the petitioner's submission of letters showing that member churches of the Kentucky Baptist Convention (including, presumably, ECWA) "gave a total of \$23,070,734 during the 2003-2004 budget year" to the Convention, but these contributions represent outflow from ECWA, rather than income that could be used to compensate the petitioner. The record contains nothing from the Kentucky Baptist Convention, the Southern Baptist Convention, or any other church body to indicate that any church or church organization other than ECWA itself has agreed to be in any way responsible for paying the beneficiary's salary or benefits.

Counsel then asserted that the previously submitted bank statements "clearly show [ECWA's] ability to pay \$1,500 a month." We disagree. The bank statements show that ECWA often had more than \$1,500 in the bank at any given time. This, however, does not demonstrate that ECWA would be able consistently to pay the beneficiary's salary, because each month's bank balance is not a separate sum, completely independent from those of other months. Rather, each month's balance carries over into the next. For instance, ECWA had a bank balance of \$2,344.70 on October 31, 2005, and a balance of \$1,746.59 a month later on November 30, 2005. ECWA, however, did not pay the beneficiary a salary in November 2005. If ECWA had paid the beneficiary \$1,500 in November 2005, then its end-of-the-month balance would have been only \$246.59, to reflect the withdrawal of an additional \$1,500 that would not remain at the end of the month.

The three bank statements submitted with the petition show an aggregate total of \$4,133.47 in deposits, which is \$366.53 less than ECWA would have spent on the petitioner's salary during those three months. Furthermore, ECWA has committed to pay benefits worth \$650 per month, over and above the \$1,500 salary. Therefore, the petitioner must demonstrate that ECWA can afford \$2,150 per month, an amount that exceeds ECWA's end-of-the-month balance on two of the three bank statements. Judging from the bank statements, three months of church income (\$4,133.47) would not be enough to pay two months of the petitioner's salary plus benefits (\$4,300.00). Were we to rely on the bank statements alone (as counsel has argued we should), those bank statements indicate that, if the petitioner's salary were added to ECWA's existing expenses, then ECWA's funds would be exhausted within a year. Counsel's assertion that the bank statements "clearly show [ECWA's] ability to pay" is, therefore, baseless and untenable. As we have proven, the bank statements, on their face, argue powerfully *against* a finding that ECWA is able to pay the petitioner at the level claimed.

The director, in denying the petition, cited the petitioner's failure to submit the documentation required by 8 C.F.R. § 204.5(g)(2). On appeal, counsel acknowledges the cited regulation, but claims:

However, there is a distinction in the regulations under religious workers that lays out different initial evidence required for the filing of an application for religious workers. The appropriate regulation on this matter states: Evidence of Ability to Pay: 8 CFR § 204.5(m)(4) Job Offer. "The letter from the authorized official of the religious organization in the United States must also state how the alien will be solely carrying on the vocation of a minister (including any terms of payment for services or other remuneration), or how the alien will be paid or remunerated if the alien will work in a professional religious capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or solicitation of funds for support. In doubtful cases, additional evidence such as bank letters, recent audits, church membership figures, and/or the number of individuals currently receiving compensation may be requested."

(Counsel's emphasis.) Counsel's wording creates the false impression that the phrase "Evidence of Ability to Pay" appears in the regulations somewhere near 8 C.F.R. § 204.5(m)(4). While the cited regulation obviously contains language specific to special immigrant religious workers, nothing in that regulation specifically supersedes 8 C.F.R. § 204.5(g)(2) or exempts religious workers (ministers or otherwise) therefrom. Even then, 8 C.F.R. § 204.5(m)(4) does not state that bank statements are acceptable evidence of ability to pay.

8 C.F.R. § 204.5(m)(4) requires religious entities to "state. . . how the alien will be paid or remunerated," but this does not establish a separate standard of evidence for religious employers; the regulation merely requires the employer to describe the terms of the job offer (including the rate of pay). 8 C.F.R. § 204.5(g)(2), by its plain wording, applies to "any petition filed by or for an employment-based immigrant which requires an offer of employment." Because the special immigrant religious worker classification requires an offer of employment, it falls within the compass of that regulation. Furthermore, pursuant to 8 C.F.R. § 204.5(c), for most employment-based immigrant classifications that require an offer of employment, only the employer may file the petition. An alien cannot, for example, self-petition as an outstanding professor or researcher. The only employment-based immigrant classification that requires a job offer, and for which current regulations permit an alien to self-petition, is the special immigrant religious worker classification. Thus, the

reference at 8 C.F.R. § 204.5(g)(2) to “any petition filed by . . . an employment-based immigrant which requires an offer of employment” can only refer to special immigrant religious worker petitions.

Furthermore, as we have already discussed, even if the bank statements submitted by the petitioner were acceptable and sufficient evidence, those bank statements convey the impression that the church’s monthly income is not sufficient to cover the beneficiary’s \$1,500 salary and accompanying \$650 benefits package.

Counsel argues that, if the director found the petitioner’s initial evidence to be deficient, then the director should have issued a request for evidence. The director’s failure to issue a request for evidence, as opposed to a notice of intent to deny, would have prejudiced the outcome of the decision *if* there were evidence that the petitioner would have been able to obtain during the 12 weeks allowed by a request for evidence, but would not have been able to obtain during the shorter 30-day response period allowed by the notice of intent to deny. Here, however, counsel has not shown, or even claimed, such to be the case. The petitioner has submitted no new financial documentation on appeal, and counsel has not indicated that any further evidence exists. Therefore, counsel has not shown that the director’s failure to issue a request for evidence affected the ultimate outcome of the decision.³

We note that, when counsel responded to the notice of intent to deny, counsel did not, at that time, protest that the director should have issued a request for evidence. Instead, counsel argued that the petitioner had already submitted all required evidence, and that the director should “expeditiously” issue a decision based on the record as it then stood.

The petitioner has not submitted any of the evidence required to establish ECWA’s ability to pay, and the sparse evidence that the petitioner *has* provided supports a finding that ECWA is *not* able to compensate the petitioner at the proffered rate. We therefore affirm the director’s finding in that regard.

The appeal will be dismissed 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

³ Given counsel’s assertion that the director should have issued a request for evidence, we note that the petitioner had previously filed another special immigrant religious worker petition on his own behalf on August 22, 2005, represented by the same attorney of record. The director issued a request for evidence on August 25, 2005, requesting (among other things) evidence of the prospective employer’s ability to pay. The petitioner failed to respond to the request for evidence and, pursuant to 8 C.F.R. § 103.2(b)(13), the director denied the petition for abandonment on November 28, 2005.