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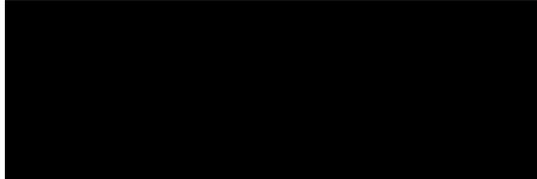
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 05 034 51905

Office: VERMONT SERVICE CENTER

Date: SEP 06 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

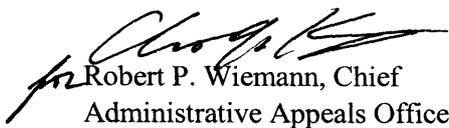
PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

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, Vermont 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 is identified as 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: (1) that it qualifies as a tax-exempt religious organization; (2) that the beneficiary had the requisite two years of continuous work experience as a minister immediately preceding the filing date of the petition; (3) that the beneficiary possessed the necessary qualifications of a minister; or (4) its ability to compensate the beneficiary.

On appeal, the petitioner submits arguments from counsel and supplementary exhibits.

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 . . .; 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).

First, we will consider the issue of the petitioner's tax-exempt status. 8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization seeking to employ the beneficiary 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 to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

The petitioner's initial submission did not contain any documentation from the Internal Revenue Service (IRS) to indicate that the IRS considers the petitioning church to be exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 (the Code) as a religious organization. The only tax-related document in the initial submission was a letter from the City of New York, Department of Finance, Taxpayer Identification and Processing Division. The document is a "form" letter that begins: "Thank you for your response to our inquiries concerning New York City General Corporation Tax or Unincorporated Business Tax." This letter says nothing about exemption from any tax, and it relates to local taxes rather than to federal income tax.

The director issued a request for evidence (RFE) on May 31, 2005. The director quoted the regulatory language relating to evidence of qualifying tax-exempt status. In response, the petitioner submitted a copy of an Exempt Organization Certificate, showing that the petitioning church "is exempt from payment of the New York State and local sales and use tax." Like the letter accompanying the initial submission, this letter does not pertain to federal income tax.

The director denied the petition on January 30, 2006, stating that the petitioner had failed to submit the required evidence of federal tax-exempt status. On appeal, counsel claims: "Substantial evidence in the record indicates that the [petitioner] is a religious denomination having a bona fide nonprofit religious organization in the United States." Counsel does not identify this "[s]ubstantial evidence." The assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has not submitted any evidence that would satisfy the regulatory requirements relating to evidence of qualifying federal tax-exempt status. We therefore affirm the director's finding to that effect.

Next, we turn to two related issues, concerning the beneficiary's experience and his qualifications. The regulation at 8 C.F.R. § 204.5(m)(1) 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." 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 November 16, 2004. Therefore, the petitioner must establish that the beneficiary was continuously performing (and was qualified to perform) the duties of a minister throughout the two years immediately prior to that date.

8 C.F.R. § 204.5(m)(3)(ii)(B) requires the petitioner to show that "if the alien is a minister, he or she has authorization to conduct religious worship and to perform other duties usually performed by authorized members of the clergy, including a detailed description of such authorized duties. In appropriate cases, the certificate of ordination or authorization may be requested." These issues are related because, if the beneficiary was not a duly authorized member of the clergy during the qualifying period, then he cannot have been performing those duties at that time.

In a letter accompanying the initial filing, [REDACTED] Pastor in Charge of the petitioning church, stated:

[The beneficiary] has a diverse and unique background that makes him very qualified for the position of a minister with our church. [The beneficiary] worked as an Exalter with the Korean Methodist Church in Korea from January of 1995 to October of 1998. Prior to this position, he worked as a Deacon for the Korean Methodist Church from January 1993 until January 1995. Therefore, [the beneficiary] has more than two years experience in his religious vocation. Furthermore, the Korean Methodist Church awarded a certificate to [the beneficiary] on January 3, 1995 after he had completed a prescribed training course as an Exalter. An Exalter in Korea performs religious duties and functions for the church.

Upon [the beneficiary's] arrival in the United States, he has worked as a minister/missionary with our church.

We note that it cannot suffice to show that the beneficiary worked two years as a religious worker at some point in the past. From the wording of the statute and regulations, quoted above, the two years of qualifying employment must immediately precede the petition's filing date.

[REDACTED] said nothing about the terms of the beneficiary's work in the United States. We note that, on the Form I-360 petition, the petitioner identified the beneficiary's "Current Nonimmigrant Status" as "Undocumented," meaning that the beneficiary had no lawful nonimmigrant status. The petitioner added that whatever nonimmigrant status the beneficiary may once have had expired on April 30, 1999, six months after the beneficiary's October 30, 1998 entry into the United States. The petitioner also answered "No" when asked if the beneficiary had ever worked in the United States without permission. The only way these statements could be true is if the beneficiary never worked in the United States, at least after April 30, 1999.

In the RFE, the director instructed the petitioner to submit evidence to show that the beneficiary performed qualifying religious work during the two-year period ending November 16, 2004 (the filing date). The director requested additional details about the beneficiary's purported work during this specified two-year period, as well as "evidence that explains how the beneficiary supported himself" during that time. The director also stated: "A copy of the certificate of ordination or other authorization should be submitted."

Although the director specifically requested a copy of the beneficiary's ordination certificate, the petitioner neither submitted that document, nor explained its failure to do so.

The petitioner's response to the RFE included no evidence regarding the beneficiary's material support during the 2002-2004 qualifying period. [REDACTED] claimed, without supporting evidence, that the beneficiary resides with family members who support him. [REDACTED] provided few details about the beneficiary's work during the qualifying period, and the petitioner submitted no evidence of the beneficiary's ordination or other authorization to perform the duties of the clergy. [REDACTED] stated that the beneficiary received "a Diploma from the Korean Methodist School in Seoul, Korea on July 24, 2000." The petitioner did not submit a copy

of that diploma. We note that the petitioner had previously indicated that the beneficiary has been in the United States since 1998, which means that he cannot have been studying in Korea as late as 2000.

In denying the petition, the director observed that there is no evidence that the beneficiary had ever received any remuneration for any religious work since 1998. The director also cited the petitioner's failure to provide a copy of the beneficiary's ordination certificate or other documentary evidence that the religious denomination has authorized the beneficiary to perform the duties of a minister. The director concluded that the petitioner had not shown that the beneficiary has worked as a minister, or that he has been or will be qualified to do so.

On appeal, the petitioner submits a copy of a certificate of ordination which the petitioning church issued to the beneficiary on April 30, 2006, three months after the denial of the petition. The certificate indicates that the petitioning church ordained the beneficiary "on the First day of March, 2006," more than a month after the denial date. There is no evidence that the beneficiary was an ordained minister at the time of filing in 2004. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. *Id.* The petitioner's 2006 ordination of the beneficiary cannot retroactively demonstrate that the beneficiary was eligible and fully qualified in 2004.

Regarding the beneficiary's past experience, counsel states without elaboration that the director "erred in concluding that the beneficiary . . . did not have the requisite experience as a religious minister." Counsel does not elaborate, and subsequent additions to the record have not addressed this issue.

For the reasons described above, we affirm the director's findings relating to the beneficiary's experience and qualifications.

The final issue concerns the petitioner's ability to compensate the beneficiary. 8 C.F.R. § 204.5(m)(4) requires the petitioner to set forth the terms of employment, including compensation. To demonstrate the petitioner's ability to meet those terms, 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.

The petitioner's initial submission contained no information about the beneficiary's proposed compensation or the petitioner's ability to compensate the beneficiary. In the RFE, the director requested "[a] photocopy of the [petitioner's] most current fiscal year Form 990 or 990 EZ (Return of Organization Exempt From Income Tax; or . . . A photocopy of a current financial statement that either has been reviewed or audited by a Certified Public Accountant."

In response to the RFE, [REDACTED] stated that the beneficiary “will serve as a minister an average of 45 hours a week” and “will earn a salary of \$17,000 a year.” The petitioner submitted a financial statement, compiled but “not audited or reviewed” by a certified public accountant, indicating that the petitioner had \$34,921 “cash in bank” as of December 31, 2004, and that the petitioner’s “revenue over expenditures” totaled \$30,286 in 2004. The financial statement identified no expense that could be interpreted as the beneficiary’s \$17,000 annual salary.

The director, in the denial notice, stated that the petitioner “submitted financial documentation for 2004, [but] did not submit the requested financial documentation for 2003.” On appeal, counsel states that the director “erred in concluding that the petitioner . . . did not have the financial ability to pay the beneficiary, based on substantial evidence in the record.” The petitioner subsequently supplemented the appeal with a compiled financial statement for 2003.

The director, in the RFE, did not request “financial documentation for 2003.” Rather, the director had requested information for “the most current fiscal year.” Therefore, the petitioner’s failure to submit financial documentation for 2003 would not be valid grounds for denial. Also, the petitioner need not establish its ability to pay the proffered wage in 2003. The petition was filed in late 2004, and therefore the first relevant year, in terms of the petitioner’s finances, would be 2004. The financial documents facially suggest that the petitioner’s income is sufficient to cover the beneficiary’s salary.

At the same time, we must note that the above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay “shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.” The director, in citing this regulation, omitted these documentary requirements, substituting instead an overlapping but distinct set of requirements. A petitioner, reading the instructions in the RFE, could comply with those instructions by submitting a reviewed financial statement, but in doing so the petitioner would not be in compliance with the regulatory requirements. In this respect, the director’s instructions were deficient.

That being said, we have already shown that the record shows other sufficient grounds for denial of the petition and dismissal of the appeal. The director’s errors regarding the petitioner’s ability to pay do not overcome those other grounds, and if those errors are fully excised, there remains a petition that cannot be approved. Therefore, while the director’s findings regarding the petitioner’s ability to compensate the beneficiary are flawed, we will uphold the ultimate outcome of the director’s decision.

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.