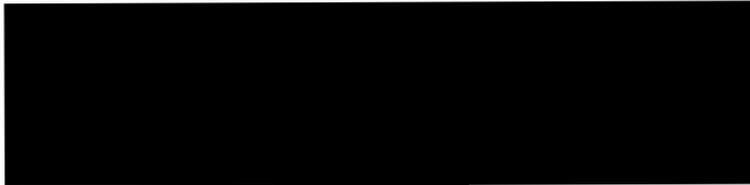




U.S. Citizenship
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FILE:

WAC 06 236 52403

Office: CALIFORNIA SERVICE CENTER

Date: **JAN 16 2008**

IN RE:

Petitioner:

Beneficiary:



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, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner is a religious educational and outreach organization affiliated with The Local Churches and Living Stream Ministry. 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 religious translator. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a religious translator immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established that the beneficiary qualifies for the proffered position.

On appeal, the petitioner submits a brief from counsel and additional 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,

(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 we will consider concerns the beneficiary's qualifications as a translator. The regulation at 8 C.F.R. § 204.5(m)(3)(ii)(D) requires the prospective employer to certify that the beneficiary is qualified in the religious vocation or occupation in which the beneficiary seeks to work.

The petitioner's initial joint letter from officials [REDACTED] and [REDACTED] contains a description of the beneficiary's qualifications:

[The beneficiary] enrolled in National Taiwan Ocean University in Taiwan in 1989, graduated in June 1993 and received her Bachelor degree. . . . From 1993 to 1994, [the beneficiary] attended the Bible Truth and Church Service Training program held by the Church in Taipei. In the year of 2001, [the beneficiary] attended another Bible Truth Training program offered by Living Stream Ministry in Anaheim. . . . In addition to these full-time trainings, [the beneficiary] has attended the annual trainings held by Living Stream Ministry continuously for over 14 years.

(Evidentiary citations omitted.) The record shows that the beneficiary's bachelor's degree is not in any field relating to religious translation, but rather a Bachelor of Science degree in Naval Architecture in 1993.

In a request for evidence, the director noted that the beneficiary's academic degree is unrelated to the proffered position. The director stated: "the evidence is insufficient to establish the beneficiary is proficient in English to qualify for the proffered position. Please submit documentary evidence to show that the beneficiary is qualified for the position." In response, [REDACTED] stated that the beneficiary "learned sufficient English for the position from several other sources" both before and after her university education. The petitioner claimed that many of the beneficiary's academic courses used English-language textbooks, which clearly would have necessitated fluency in English.

The petitioner submitted what [REDACTED] identified as "a listing of the titles and sources of the articles that the beneficiary has been translating," and "two samples of actual website articles . . . which the beneficiary translated from English to Chinese."

In denying the petition, the director stated that the petitioner had failed to verify the extent of the beneficiary's English education, and that the petitioner had provided no evidence that the beneficiary was the translator who had prepared the sample translations in the record.

On appeal, officials of the petitioning entity state that it is not their usual practice to identify or credit the individual translators of their publications. Certainly, the materials in the record do not identify anyone *other than* the beneficiary as the translator. Because the petitioner does not credit its translators in its publications, some other evidence is necessary to establish the nature and extent of the beneficiary's duties. While inclusion of the translator's name in the published materials would have simplified the matter, the director cannot arbitrarily require the petitioner to credit translators in its publications.

The record firmly establishes that the petitioner employs the beneficiary in some capacity, and the record contains no indication that the beneficiary works in some non-qualifying secular capacity. The director seems to be dissatisfied with the level of evidence regarding the beneficiary's proficiency in English. The record contains English-language statements from the beneficiary, and her university diploma, issued in Taiwan, is printed in English, which is consistent with the assertion that much of her classwork was in English. In the absence of evidence that affirmatively demonstrates that the beneficiary speaks poor or little English, the

director's misgivings do not appear to be sufficient to warrant a finding that the beneficiary is unqualified as a translator. The AAO hereby withdraws the director's finding relating the beneficiary's qualifications.

The remaining issue under consideration concerns the beneficiary's past experience. 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 July 31, 2006. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a religious translator throughout the two years immediately prior to that date.

The petitioner submitted copies of payroll, bank and tax documents, indicating that the petitioner paid the beneficiary \$4,900 in 2003, \$6,600 in 2004, and \$8,400 in 2005. The petitioner paid the beneficiary \$500 per month from January 2004, increasing to \$700 per month as of October 2004, \$900 per month beginning January 2006 and \$1,200 per month beginning June 2006.

[REDACTED], the petitioner's Chinese Section Administrator, explained the changes in the beneficiary's compensation:

The salary paid to the beneficiary was based on her actual personal needs. She is single without any dependents. She has been renting a room in a church member's home for her living accommodations. In 2005, her salary was increased to cover her increased transportation expenses due to maintenance and repair costs of an older automobile. In 2006 her salary was increased again to cover an increase in her personal living expenses including an increase in her room rental and in her health insurance premium upon switching to a different insurance plan. Our organization covers her special need expenses such as for travel and her immigration matters (attorney's and filing fees), as each need arises.

The director denied the petition on June 19, 2007, in part because the variations in the beneficiary's compensation suggested fluctuations in her work. The director rejected the petitioner's explanations, for instance stating that the beneficiary's bank statements do not appear to corroborate the petitioner's claims about an increase in the beneficiary's rent in 2006. The director also noted that the beneficiary's compensation before 2006 was so low that, unless the beneficiary worked part-time, the petitioner paid the beneficiary less than the federal minimum wage.

On appeal, counsel asserts: "the special immigrant religious worker immigration regulations . . . do not impose minimum wage requirements." Enforcement of minimum wage laws fall under the jurisdiction of the Department of Labor, rather than the Department of Homeland Security. The director's point in raising the minimum wage issue was not to allege a disqualifying violation of minimum wage laws, because the director has no jurisdiction to enforce those laws. Rather, the director sought to illustrate the point that the beneficiary's compensation in 2005 (and earlier) was so low as to suggest part-time employment.

Counsel asserts that “an employer’s violation of [minimum wage laws] would not legally per se preclude the worker from satisfying the requirement of full time and continuous employment.” The petitioner has extensively, consistently and credibly established that it paid the beneficiary a monthly salary (not an hourly wage) throughout the two-year qualifying period. Pay stubs show that the beneficiary’s low pay in earlier years was due not to interruptions in her work, but rather to a lower monthly rate of pay.

The AAO withdraws the director’s finding that the beneficiary’s low pay in 2004-2005 demonstrates part-time work. Any consequences that may arise from the petitioner’s possible violation of minimum wage laws lie outside this proceeding and outside our jurisdiction. The beneficiary’s compensation is, however, at the heart of another issue that prevents the AAO from approving the petition outright.

The petition may not be approved because the petitioner has not established its ability to pay the beneficiary’s proffered wage. The petitioner has stated its intent to pay the beneficiary at the rate of \$1,200 per month, which is \$14,400 per year. 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.

Tax and payroll documents (discussed above) show that the petitioner began paying the beneficiary at the proffered rate, \$1,200 per month, in June 2006, shortly before the filing date.

The petitioner’s Internal Revenue Service Form 990 Return of Organization Exempt From Income Tax for 2005 shows that the petitioner began 2005 with current assets consisting of \$75,254 in cash, and ended the year with \$33,232. The petitioner’s reported income for the year was \$740,510, offset by \$789,687 in expenses, yielding a net loss of \$49,177. This rate of loss does not readily suggest long-term viability. Rather, if the petitioner loses \$49,000 per year and has current assets of only \$33,000, then those current assets will be depleted in a matter of months. Furthermore, in 2005 the petitioner paid the beneficiary a salary below the proffered rate, meaning that the increase in the beneficiary’s salary would accelerate the rate of loss. The director must address this issue in a new decision. We note that, while a Form 990 return meets the regulatory requirement regarding the *type* of documentation to be submitted, the *content* of such documentation must also establish ability to pay.

As of the date of this decision, calendar year 2006 is finished and 2007 nearly so, meaning that the Form 990 return for 2006 should be available now, and the return for 2007 should be available in the near future if prepared and filed in a timely manner. (As an organization described under section 170(b)(1)(A)(vi) of the Internal Revenue Code, the petitioner is required to file Form 990 returns annually.) The AAO instructs the director to request copies of these returns, certified by the Internal Revenue Service.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence to establish ability to pay the proffered wage within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.