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U.S. Citizenship  
and Immigration  
Services

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FILE:

WAC 07 020 53243

Office: CALIFORNIA SERVICE CENTER

Date:

JUL 07 2008

IN RE:

Petitioner:

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:

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 employment-based immigrant visa petition was denied by the Director, California 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 the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition.

On appeal, counsel asserts that the director's denial of the petition was arbitrary, capricious and unfair to both the petitioner and the beneficiary. Counsel further asserts that the director failed to consider the evidence presented. Counsel submits a brief and additional documentation in support of the appeal.

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 issue presented on appeal is whether the petitioner established that the beneficiary had been continuously employed in a qualifying religious vocation or occupation for two full years prior to 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 petitioner initially submitted a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant in October 2004. The director returned the petition on October 30, 2006, instructing the petitioner to provide an original signature on the document. The petition was properly filed with Citizenship and Immigration Services (CIS) on December 5, 2006. Therefore, the petitioner must establish that the beneficiary was continuously working as a minister throughout the two-year period immediately preceding that date.

In an October 1, 2004 letter, the petitioner stated that the beneficiary “has successfully performed all manner of duties or activities as a minister of The Church of God of Prophecy.” The petitioner stated that the beneficiary “commits 5½ days 24 hrs weekly . . . in addition to his sermons, mentorship and continual theological training or advancement.” The petitioner stated that it had “offered the beneficiary \$434.00 per week to pay for services rendered;” however, it did not state that it had paid the beneficiary the proffered wage in the past. Further, the petitioner submitted no evidence that it paid the proffered wage subsequent to its 2004 letter.

On March 13, 2007, the director issued the petitioner a request for additional evidence (RFE), in which she instructed the petitioner to:

Provide evidence of the beneficiary’s work history from December 4, 2004 to the present. Provide experience letters written by the previous and current employers that include a breakdown of duties performed in the religious occupation for an average week. Include the employer’s name, specific dates of employment, specific job duties, number of hours worked per week, form and amount of compensation, and level of responsibility/supervision. In addition, submit evidence that shows monetary payment, such as pay stubs or other items showing the beneficiary received payment. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported himself during the two-year period or what other activity the beneficiary was involved in that would show support.

In response, the petitioner submitted an April 13, 2007 letter from its pastor, [REDACTED] in which he certified that he had known the beneficiary for the past seven years, and that he had served as a minister with the St. Albans Church of God of Prophecy in Queens, New York. Reverend [REDACTED] also stated that the beneficiary served as youth minister and Sunday school teacher, in addition to singing in the choir, serving in the men’s ministry, and “heavy involvement in the district, comprising [] seven churches.” The petitioner also submitted letters from [REDACTED] chairman of its finance committee; [REDACTED] its public relations director and praise team coordinator; and [REDACTED], its youth minister, all attesting to the beneficiary’s work with the petitioning organization as a minister for several years prior to the filing date of the petition.

The petitioner submitted no evidence that the beneficiary had been compensated for his work at the church, and submitted no evidence of the source of the beneficiary's financial support during the qualifying period. The director determined that the petitioner had failed to establish that the beneficiary worked full time as a minister during the two-year period immediately preceding the filing date of the petition and denied the petition on May 8, 2007.

On appeal, counsel asserts that the petitioner cannot prove it has employed the beneficiary on a full-time basis because all of the beneficiary's requests for a work permit have been rejected by CIS. Counsel further asserts that the petitioner cannot establish that the beneficiary was compensated for his services through reported wages to the Internal Revenue Service because he does not have a social security number. Counsel argues that the only other alternative open to the petitioner to establish that it paid the beneficiary is through its financial statements prepared by an accountant. The petitioner submitted copies of its 2003 through 2005 financial statements accompanied by an accountant's compilation report. However, these documents provide no evidence of any compensation paid to the beneficiary by the petitioner.

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).

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.

The evidence presented indicates that the beneficiary served with the youth ministry of the petitioning organization. However, the record does not establish that he worked in a full-time capacity with the organization. The petitioner submitted no evidence of any compensation received by the beneficiary, either as a minister with its organization or from any other source. Therefore, the record does not establish that the

beneficiary worked solely as a minister throughout the qualifying period and was not dependent upon secular employment for his support.

Accordingly, the petitioner has not submitted evidence that the beneficiary has continuously worked as a minister for two years immediately preceding the filing of the visa petition.

Beyond the decision of the director, the petitioner has not 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 [IRC] 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.

With the petition, the petitioner submitted a copy of a February 22, 1979 Exempt Organization Certification from the State of New York, exempting the petitioner from payment of sales tax on its purchases. In response to the RFE, the petitioner submitted a copy of a July 5, 1957 letter from the IRS to The Church of God of Prophecy in Cleveland, Tennessee, granting the organization exemption from federal income tax as a religious organization. However, the letter does not indicate that the exemption was applicable to any subordinate unit of the organization, and the petitioner submitted no evidence that the Cleveland, Tennessee organization applied for or received a group exemption.

Under IRS regulations, churches that meet the requirements of section 501(c)(3) of the IRC are automatically considered tax exempt and are not required to obtain recognition of its tax-exempt status from the IRS. Nonetheless, the petitioner must establish its tax-exempt status for the purpose of this visa petition. Absent a letter from the IRS confirming that it is tax exempt under section 501(c)(3) of the IRC, the petitioner can do this pursuant to the regulation at 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting the documentation that the IRS would require to determine it is a tax-exempt religious organization. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operation for Citizenship and Immigration Services (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.

The petitioner submitted none of the documents required by 8 C.F.R. § 204.5(m)(3)(i) to establish its tax-exempt status. Therefore, the evidence submitted does not establish that the petitioner is a bona fide nonprofit religious organization.

Additionally, the petitioner has not established that it has the ability to pay 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.

In its October 1, 2004 letter, the petitioner stated that it would offer the beneficiary a salary of \$434 per week as compensation for his services. The petitioner submitted no evidence that it has paid the beneficiary this wage in the past.

In an effort to establish its ability to pay the proffered wage, the petitioner submitted copies of its financial statements for the years 2003 through 2005, each accompanied by an accountant’s compilation report. As the compilation is based primarily on the representations of management, the accountant expressed no opinion as to whether they fairly present the financial position of the petitioning organization. In light of this, limited reliance can be placed on the validity of the facts presented in the financial statements that have been submitted. No further supporting documentation is included in the record to reflect the assertions made by the accountant in the financial documentation, or contained within the unaudited financial statements. The petitioner submitted none of the other evidence, such as federal tax returns or audited financial statements, required by the above-cited regulation. Therefore, the petitioner has failed to establish that it has the ability to pay the beneficiary the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.