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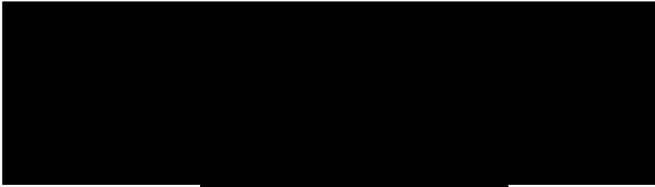
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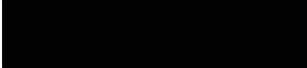
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FILE:



LIN 06 139 51109

Office: CALIFORNIA SERVICE CENTER

Date OCT 28 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*

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 on appeal. The AAO will dismiss the appeal.

In this decision, the term “prior counsel” shall refer to \_\_\_\_\_ who originally represented the petitioner at the time the petitioner filed the petition. The term “counsel” shall refer to the present attorney of record.

The petitioner is a Southern Baptist 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 an associate pastor. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as an associate pastor immediately preceding the filing date of the petition.

On appeal, the petitioner submits arguments from prior counsel, as well as witness letters.

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 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 April 10, 2006. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of an associate pastor throughout the two years immediately prior to that date.

8 C.F.R. § 204.5(m)(3)(ii)(B) requires the prospective employer to attest 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.

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. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

In a letter accompanying the initial filing of the petition, [REDACTED] of the petitioning church stated: "From 03/20/2004 and continuing to the present date [the beneficiary] has been employed full time by [the petitioner] as associate pastor and music minister under an approved R-1 status."

Copies of certificates from South Korea indicate that the beneficiary received a Master of Divinity degree from the Presbyterian College and Theological Seminary on February 13, 1997, and "was ordained as a pastor by the Seoul Presbytery of the Presbyterian Church of Korea" on October 22, 1999. The record indicates that the beneficiary changed denominations within a year of his ordination. The beneficiary entered the United States on August 24, 2000, as an F-1 nonimmigrant student to undergo practical training at Midwestern Baptist Theological Seminary. A Certificate of Membership indicates that the beneficiary joined the Kansas City First Korean Baptist Church in September 2000, serving first as choir director and then as music minister.

On December 11, 2006, the director issued a request for evidence (RFE). This RFE was general in character, essentially listing all of the evidence required for a showing of eligibility, regardless of whether or not the petitioner had already submitted such evidence. Noting the "standardized" nature of the RFE, the petitioner, through prior counsel, essentially resubmitted its initial submission, augmented by updated pay records.

On June 19, 2007, the director issued a second RFE, instructing the petitioner to "[s]ubmit evidence to show that the beneficiary has been ordained and the requirements for ordination. If the religion does not have formal ordination procedures, there must be other evidence that the individual has authorization to conduct religious worship and perform other services usually performed by members of the clergy." In response, the petitioner submitted a copy of a Certificate of Ordination, issued by the petitioner to the beneficiary on November 12, 2006.

stated that each church within the Southern Baptist Convention is "fully autonomous . . . and calls its ministers. The local church is also the sole authoritative entity empowered to ordain those who are

called to ministry.” Pastor ██████ stated that the petitioning church found the beneficiary qualified to act as a minister at the time it hired him.

The director denied the petition on November 4, 2007, stating:

As an associate pastor, classification of the beneficiary as a special immigrant religious worker requires that the beneficiary be 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.

Subsequent to the filing of this petition . . . the petitioner submitted a copy of the beneficiary’s Certificate of Ordination showing that he was ordained [by the petitioner] on November 12, 2006 [which was] subsequent to the filing of this instant petition. Since the beneficiary has not been ordained by the petitioning organization before April 10, 2004, the beneficiary was not qualified to perform the same type of work for two years prior to the filing of this petition.

The director did not contest the continuity of the beneficiary’s work at the petitioning church throughout the qualifying period. The sole issue raised by the director is whether the beneficiary could have been performing the work of an associate pastor during that period.

On appeal, prior counsel states: “The reasoning underlying the Notice of Decision is flawed in that it erroneously assumes that it is impossible to be qualified to serve as an associate pastor with the [petitioning church] without being first ordained. In fact, as an autonomous member of the Southern Baptist Convention, the Missouri Baptist Convention, and the Blue River Baptist Association, the [petitioner] has the discretion to determine whom it hires and authorizes to serve as an associate pastor or minister.”

Pastor ██████ states:

[The petitioner] has the sole authority to determine “qualifications” and to hire candidates that meet our standards. This being the case the question of “ordination” was and continues to be a moot issue. . . . It is our view that “ordination” does not qualify a person for ministry, rather it is a “validation” of a candidate[’]s qualifications.

The petitioner submitted a copy of an October 19, 2003 “Certificate of Installation,” signed by ██████ and by ██████, indicating that the beneficiary “was installed Associate Pastor of [the petitioning church] and Korean Congregation and was transferred from Presbyterian Pastor to Baptist Pastor.”

██████, Associate Director of the Blue River-Kansas City Baptist Association, affirms the autonomy of individual Southern Baptist congregations, and states: “it would not be an anomaly for a cooperating church to accept the ordination of another Christian denomination if upon examination it was determined that the candidate was in doctrinal compliance with our ‘beliefs and practice.’”

Multicultural Church Planting Strategist of the Missouri Baptist Convention, states:

In keeping with the history and tradition of the Southern Baptist Convention and the Missouri Baptist Convention, we affirm the full right and authority of [the petitioner] to make all decisions regarding who[m] they will hire and what qualifications will be accepted. This includes full right and authority as an autonomous Baptist church to determine what ordinations they will accept regardless of the ordaining denomination. [The beneficiary] was originally ordained by the Presbyterian denomination. If [the petitioner] chooses to accept that ordination, they have full right and authority to do so in the eyes of both the Missouri Baptist Convention and the Southern Baptist Convention.

The petitioner submitted a copy of a December 22, 2003 letter in which [redacted] referred to the beneficiary with the honorific "Rev." Mr. [redacted] had also used the term "Rev." in a March 29, 2006 letter accompanying the initial submission of the petition. Also with regard to the petitioner's initial submission, copies of the beneficiary's paychecks, reproduced in contemporaneous bank statements, refer to the beneficiary as "Pastor." This indicates that the petitioner has consistently regarded the beneficiary as a pastor, and has not changed his job title in an attempt to secure immigration benefits.

The petitioner has overcome the grounds for denial set forth in the director's decision. Further review of the record, however, reveals an additional ground of ineligibility. On January 31, 2008, an Immigration Officer (IO) conducted a routine site visit to the petitioner's address and learned that the staff and congregation of the petitioning church had been absorbed into Wornall Road Baptist Church, and currently maintains a minimal legal existence in part to sustain an employer/employee relationship with the beneficiary.

The AAO issued a notice of intent to dismiss, issued August 4, 2008, which read in part:

8 C.F.R. § 204.5(m)(4) requires the prospective employer to establish a valid job offer. Your petition, filed in 2006, rested on a job offer from a church that apparently has ceased to exist or will soon do so. Maintaining your church's existence "on paper" while the beneficiary works at a different church (such as Wornall Road Baptist Church) does not establish the continued existence of a *bona fide* offer of employment at your church. Also, given the information obtained in the site visit, it is not clear to what extent the petitioning church still exists as an entity with standing to pursue the present appeal. Wornall Road Baptist Church's claimed absorption of Santa Fe Hill Baptist Church's congregation and staff does not make Wornall Road Baptist Church the petitioner for the purposes of this proceeding.

In the event that Wornall Road Baptist Church (or some other intending employer) has extended a job offer to the beneficiary, that job offer cannot be considered under the present petition, which was specifically predicated on the job offer from Santa Fe Hill Baptist Church.

In response to the AAO's notice, counsel states:

[T]here still is a qualifying relationship between the initial petitioner . . . and the beneficiary . . . even after this merger and that the petitioner has only changed in “name and physical location.”

In a merger, two or more legal entities combine all their assets in what is called the “surviving entity.” Other entities, which are called the “merged entities” cease to exist. The surviving entity assumes all of their liabilities.

The immigration regulations state that an employment-based petition remains valid indefinitely unless revoked. See 8 CFR Section 204.5(n)(3). The US Citizenship and Immigration Service has acknowledged that in cases of “mergers” [in which] the petitioning company has dissolved or been merged into another company, **the beneficiary may continue to have the benefit of the approved petition where the job offer is continued by a true successor in interest, namely, a company that has assumed all of its immigration-related liabilities and operates the same kind of business.**

(Emphasis in original.) There exists no provision (statutory, regulatory, or otherwise) to permit successorship in interest in special immigrant religious worker proceedings. Counsel cites 8 C.F.R. § 204.5(n)(3), but that regulation, by its plain wording, applies only to the “[v]alidity of approved petitions.” The petition in this proceeding was never approved, so 8 C.F.R. § 204.5(n)(3) clearly does not apply here.

In employment-based immigrant petitions such as the petition now under consideration, Citizenship and Immigration Services acknowledges successorship in interest only in the context of labor certification, as discussed in memoranda from James A. Puleo, Acting Executive Associate Commissioner for Operations, *Amendment of Labor Certifications in I-140 Petitions* (December 10, 1993); *I-140 Issues* (April 28, 1992). The latter memorandum cites a March 17 memorandum of understanding between what was then the Immigration and Naturalization Service (INS) and the Department of Labor, indicating that INS (now CIS) will make determinations on successorship of interest in I-140 petitions.

Even assuming, for the sake of argument, that successorship in interest is a viable course of action in this proceeding, counsel’s argument that such a successorship exists here is fundamentally flawed. Counsel’s claims, quoted above, conflict with one another. If “the petitioner has only changed in ‘name and physical location,’” then it has not “cease[d] to exist.” The AAO noted that the petitioner maintains a separate existence as a corporation, and the petitioner has not disputed this fact. The petitioner’s staff and congregation have moved, *en masse*, to a new church, but this does not make the new church legally identical to the petitioner. Otherwise, two separate and distinct legal entities – the new church and the still-existing petitioning corporation – could simultaneously claim to be the petitioner. Because such a result is clearly absurd, any argument leading to that conclusion must be flawed.

Once an entity files a petition, there is no provision for that entity to transfer standing as the petitioner to some other entity, while both entities continue to legally exist. A successor in interest must establish that it has assumed all of the rights, duties, and obligations of the entity it claims to succeed. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Commr. 1986). Simply transferring staff from one entity to

the other does not satisfy this standard. Therefore, we cannot consider Wornall Road Baptist Church to be the petitioner in this matter. At the same time, the record indicates that the petitioner has divested itself of nearly all its assets and no longer independently conducts its own worship services. Therefore, the petitioning entity is no longer in a position to make a *bona fide* job offer to the beneficiary. The beneficiary has changed jobs, accepting a new job offer from a new employer, and it is irrelevant for our purposes that most of the petitioner's staff and congregation moved along with him.

Because there exists no provision for substitution of a petitioner or job offer in a special immigrant religious worker petition, Wornall Road Baptist Church may not pursue the present petition on the beneficiary's behalf. If Wornall Road Baptist Church seeks permanently to engage the beneficiary's services, it must do so via a newly-filed petition. The AAO will dismiss the appeal on this ground.

The same inquiry that revealed the change of employers also revealed information regarding the tax status of both the petitioner and Wornall Road Baptist Church. 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 IO who conducted the site visit discussed above also contacted the Internal Revenue Service (IRS) and the Missouri Baptist Convention, both of which confirmed that neither the petitioner nor Wornall Road Baptist Church were covered under the Convention's group exemption as of early 2008. The AAO advised the petitioner that the petition could not be approved without evidence that the petitioner is recognized as a tax-exempt religious organization under section 501(c)(3) of the Internal Revenue Act of 1986.

In response, counsel asserts that both churches "are tax exempt through [their] affiliation with the Missouri Baptist Convention. . . . So long as the church is associated and in good standing with The Missouri Baptist Convention, the church will be granted tax exempt status . . . under The Missouri Baptist Convention's group exemption."

When a central organization obtains a group exemption, the IRS requires the central organization to provide a list of subordinate entities covered by that group exemption. See IRS Publication 4573, *Group Exemptions*, and <http://www.irs.gov/pub/irs-tege/rp1980-27.pdf> (visited October 17, 2008). The petitioner must therefore overcome its omission from the list of covered organizations; it cannot suffice simply to argue that the affiliation with the Missouri Baptist Convention automatically and unquestionably establishes the tax-exempt status of the petitioner or of Wornall Road Baptist Church. The petitioner has not established its addition to

the required list of subsidiary organizations covered under the Missouri Baptist Convention's group exemption.

Moreover, while a *bona fide* church can be considered tax-exempt even without a group exemption or filing its own IRS Form 1023 Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, the petitioning entity in this proceeding no longer operates as a church or performs the functions that would permit it legitimately to qualify for tax-exempt status. While a stronger case could perhaps be made for the tax-exempt status of Wornall Road Baptist Church, we have already determined that Wornall Road Baptist Church is not the petitioner in this proceeding, and cannot become the petitioner by absorbing the petitioner's congregation, staff, or assets. The tax exemption issue is, like the change of employment, an issue best addressed in the context of a new petition.

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.