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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE

425 Eye Street, N.W.

BCIS, AAO, 20 Mass, 3/F

Washington, D.C. 20536

CI

[REDACTED]

AUG 19 2003

File: [REDACTED] Office: Texas Service Center Date:

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

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: [REDACTED]

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Texas Service Center, and is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a church. It seeks classification of 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), in order to employ him as an associate minister (family counseling) at an annual salary of \$24,000.

The director denied the petition finding that the petitioner had failed to establish that the beneficiary had the required two years of continuous experience in a religious occupation, and that it had the ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner states that the applicable statutes and regulations regarding the prior two-years experience requirement never utilize the terms "job," "employ," "paid," or "full-time;" rather, they utilize the terms "work," "vocation," "occupation, and "continuously carrying on." Therefore, counsel asserts, the Bureau's interpretation thereof is arbitrary and incorrect.

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, 2003, 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, 2003, 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 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 beneficiary is a native and citizen of Korea who was last admitted to the United States as a nonimmigrant visitor (B-2) on April 24, 2000, with authorization to remain until October 23, 2000.

In order to establish eligibility for classification as a special immigrant religious worker, the petitioner must satisfy each of several eligibility requirements.

The first issue to be examined in this proceeding is whether the petitioner has established that the beneficiary has had the requisite two years of continuous work experience in the proffered position.

Regulations at 8 C.F.R. § 204.5(m)(1) state, in pertinent part, that:

All three types of 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 petition was filed on April 16, 2001. Therefore, the petitioner must establish that the beneficiary had been continuously engaged in a religious occupation for the two-year period beginning on April 16, 1999.

The record includes a letter dated July 26, 2000 from the moderator general of the General Assembly of Presbyterian Church in Korea, stating that the beneficiary served as a pastor of Chungsung Church from June 1, 1986 to April 2000. The letter does not indicate the beneficiary's duties, salary, or hours of employment. The record also includes a letter dated March 22, 2001 from the commanding officer of the Salvation Army, Atlanta International Corps, stating that the beneficiary served as a volunteer minister in family counseling from May 2000 through February 2001. During that time, the beneficiary was provided with housing and all utilities, valued at \$2,100.

On appeal, counsel cites *St. John the Baptist Ukrainian Church v. Novak*, 00-CV-745 (Northern District, New York), an unpublished decision of a federal district court in New York. Counsel asserts that the Bureau conceded in that matter that an alien's voluntary work was acceptable. Counsel's assertion is not supported by the record as counsel has not provided a complete copy of the court's decision. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less precedential value.

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. 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 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" is also 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 studies. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Comm. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 1963).

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 salaried. To be otherwise would be outside the intent of Congress.

Beyond the decision of the director, the evidence presented indicates that the beneficiary's purported experience during the qualifying period was with two distinct religious denominations: the Presbyterian Church and the Salvation Army. The statute and the regulations are clear that the qualifying experience should be with the same religious denomination.

Based on the information contained in the record, the Bureau is unable to conclude that the beneficiary had been engaged in a full-time salaried religious occupation during the two-year qualifying period. For this reason, the petition may not be approved.

The second issue to be addressed in this proceeding is whether the petitioner has the ability to pay the beneficiary the proffered wage.

Regulations at 8 C.F.R. § 204.5(g)(2) state, in pertinent part, that:

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.

The records submitted concerning the petitioner's revenues and expenses in 2001 and budget for 2002 are not audited financial statements. The petitioner has also failed to submit evidence of any annual reports. The petitioner has stated that it has eight employees, but no evidence has been submitted to show their job titles, duties, or salaries. The petitioner has also submitted bank statements for a three-month period ending April 30, 2002, showing a total average account balance of approximately \$100,000. However, the Bureau is unable to determine if this amount is sufficient to establish the petitioner's ability to pay without specific information concerning the petitioner's total

salary expenditures.

On appeal, counsel submits no new information or documentation to establish the petitioner's ability to pay the beneficiary the proffered wage. Counsel asserts that, in a non-precedent decision, the Bureau previously found the petitioner to have the ability to pay the beneficiary the proffered wage.

With respect to counsel's objection to the denial of this petition in view of the approval of a prior petition, it is noted that the Bureau is not required to approve applications or petitions where eligibility has not been demonstrated. This record of proceeding does not contain copies of the prior petition and its supporting documentation. If the prior petition was approved based on evidence similar to the evidence contained in this record of proceeding, the approval of that petition may have been erroneous. The Bureau is not required to approve a petition where eligibility has not been demonstrated, merely because of a prior approval that may have been erroneous. See e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither the Bureau nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988). Moreover, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D.La.).

After a careful review of the record, it is concluded that the petitioner has failed to satisfactorily demonstrate its ability to pay the beneficiary the proffered wage at the time of filing the petition and continuing until the beneficiary obtains lawful permanent residence.

While the determination of an individual's status or duties within a religious organization is not under the Bureau's purview, the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests with the Bureau. Authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States. *Matter of Hall*, 18 I&N Dec. 203 (BIA 1982); *Matter of Rhee*, 16 I&N Dec. 607 (BIA 1978).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.