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U.S. Citizenship
and Immigration
Services

C-1

[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date: **AUG 02 2004**

IN RE:

Petitioner:
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:

[Redacted]

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, Director
Administrative Appeals Office

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

The petitioner is the international headquarters of a church organization. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(4), to perform services as a pastor at one of its member churches. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a pastor immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established that it had made a qualifying job offer to the beneficiary, or that it is able to pay the beneficiary's proffered wage.

On appeal, counsel asserts that the director's decision violated proper procedure, and that the regulations are flawed.

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 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 membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on May 8, 2002. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a pastor throughout the two years immediately prior to that date.

The term "continuously" has been 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 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).

[REDACTED] national president of the petitioning church, and Rev. Luis Horacio Farfan, secretary of the petitioning church, assert in a joint letter that the beneficiary "has been authorized to conduct religious worship in our church" since 1988, and that the beneficiary "received his ordination license" in 1996. It is not clear what "authorization" the beneficiary possessed, short of ordination, between 1988 and 1996. The petitioner submits copies of licenses, issued annually to the beneficiary since the 1980s. The petitioner has not explained the difference between licensure, which clearly expires annually and requires renewal, and ordination, which (according to the beneficiary's 1996 Certificate of Ordination) is for "the rest of his life."

A February 2002 letter identifies the beneficiary as the pastor of the petitioner's [REDACTED]. The petitioner's April 2002 General Directory includes the beneficiary's name. A document from June 2001 (apparently another General Directory) identifies the beneficiary as the secretary of the petitioner's national board. The General Directory for June 1999 identifies the beneficiary as the leader of the "Western District." The July-September 2000 issue of *El Heraldito Pentecostal* contains a reference to the beneficiary as "Secretary General in Mexico." The April-December 2001 issue of the same publication refers to the beneficiary as a "pastor" who spoke at the petitioner's national convention in Mexico.

The director stated that the beneficiary's work as an executive of the petitioning church "cannot be considered a religious vocation." The director also stated that the petitioner has not shown how long the beneficiary has occupied his intended position of pastor. In response, counsel asserts that the beneficiary "has been a duly ordained minister with the Pentecostal denomination since November 24, 1988." Leaving aside the fact that there are numerous Pentecostal denominations, rather than just one, counsel does not explain why, if the beneficiary has been ordained since 1988, the petitioner found it necessary to ordain him again in 1996.

Counsel asserts that the beneficiary was a pastor before and throughout the two-year qualifying period, and that the director "misconstrued" the evidence that identifies the beneficiary as a secretary of the petitioning entity. Counsel's response does not discuss the duties of a secretary, secretary general, or district leader, to establish that these individuals perform essentially the same functions as a parish pastor in the petitioning denomination, or that the duties did not significantly infringe on the beneficiary's work as a parish pastor.

The director denied the petition, stating that there is no evidence "that the beneficiary was paid, or continuously compensated, for any work, including religious work, during the prior two-year period before the filing of the I-360" petition.

On appeal, counsel argues "[w]hile the regulations require continuous work for two years before filing, the Act itself merely requires continuous work for two years before applying for admission. . . . A visa petition is not an application for admission, but a required preliminary step to an application for admission. The conflict between the Act and a regulation implementing the Act must be resolved in favor of the statute." Counsel states "while it is true that [the beneficiary] has not been working as a minister for the entire two year period prior to his filing the petition, he was working as a minister prior to August 2001 . . . and after January 2002." It is true that a visa petition is not strictly an "application for admission." At the same time, firmly established case law indicates that a beneficiary for an employment-based immigrant visa must possess the necessary qualifications as of the date the petition is filed. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). A visa petition cannot be filed prematurely based on a petitioner's anticipation of future eligibility.

Counsel appears to argue that the relevant two-year period ends not with the filing of the visa petition, but rather with the filing of an adjustment application in the United States, or a visa application abroad. The director must adjudicate the petition based upon the facts in evidence at the time the petition is filed. By counsel's reasoning, the director is not permitted to examine the beneficiary's past experience at all; the beneficiary could be an individual with no religious work experience at all, and the petitioner could simply pledge that, upon approval of the petition, the beneficiary will work as a minister for two years before applying for adjustment of status. Therefore, it is entirely reasonable that the regulatory standard regards the petition's filing date.

Citizenship and Immigration Services (CIS) is empowered to interpret, via regulation, statutes governing CIS matters such as immigrant visa petitions. The regulations in question were promulgated in compliance with the Administrative Procedures Act, and counsel has not shown that these regulations have been struck down in federal court. Therefore, the regulations remain valid and fully in effect. We reject counsel's contention that the director erred by following those regulations.

Counsel, on appeal, has stipulated that the beneficiary "has not been working as a minister for the entire two year period prior to [the filing of] the petition." Counsel has therefore, in effect, conceded that the regulations do not allow the approval of the petition. Given the alternatives of discarding the regulations or dismissing the appeal, there is no real choice. The AAO has no jurisdiction to invalidate federal regulations, nor does it have the inclination to do so in this instance.

The next issue concerns the nature of the position offered to the beneficiary. The regulation at 8 C.F.R. § 204.5(m)(2) offers the following pertinent definitions:

Minister means an individual duly 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. In all cases, there must be a reasonable connection between the activities performed and the religious calling of the minister. The term does not include a lay preacher not authorized to perform such duties.

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

While the determination of an individual's status or duties within a religious organization is not under the purview of CIS, the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests within CIS. 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).

Rev. Munoz and Rev. Farfan state that the petitioning church ordained the beneficiary in 1996, and that the beneficiary "is to continue solely carrying on the vocation of a minister" with the petitioning church. They describe the beneficiary's duties:

First, [the beneficiary] performs pastoral visits to the members of the congregation to provide spiritual guidance, group bible study and visit and pray for the sick. . . .

Secondly, [the beneficiary] . . . preaches for the congregation on Wednesdays and twice on Sundays. . . .

Thirdly; [the beneficiary] performs the task of evangelist spreading the word of the Lord from door-to-door.

The director requested a more detailed description of the position. In response, Rev. Ubolmester R. Jaramillo, the petitioner's national secretary, states:

[The beneficiary] will be responsible for all the spiritual aspect, this will include but not be limited to: Development of church programs, plays and activities, preparation of and delivering biblical teachings for our regularly scheduled services, encouragement of other members in faith and other church understanding, prison ministries, ministering in areas such as Sunday School, Women's Fellowship, personal evangelism, pray for the sick, anointing them with oil.

Additionally he will have time for personal devotions & prayer. He will be training and overseeing other officials and members in the church for the development of church growth, programs activities, visits to members of the congregation, [and] personal evangelism.

The director, in denying the petition, stated that the petitioner has provided inconsistent descriptions of the beneficiary's job duties. The director also discussed the job offer in terms of the regulatory definition of "religious occupation." On appeal, counsel correctly observes that the beneficiary seeks employment in the religious vocation of a minister, which falls under a different heading than a religious occupation. Counsel also asserts that the director's previous request for evidence did not raise any questions regarding the nature of the beneficiary's position. Therefore, counsel argues, the director denied the beneficiary due process by denying the petition for a reason of which the beneficiary had not been advised.

It appears that the director's concerns regarding the nature of the beneficiary's duties arose largely from the documents submitted in response to the request for evidence. Thus, those concerns did not yet exist at the time the director issued that request. The request for evidence amounts to an opportunity for the petitioner to clarify and strengthen the evidence of record; the director is not obliged to issue a second request for evidence, if the petitioner's response to the first such request fails to establish eligibility. Because the beneficiary's response to the notice did not establish eligibility, the director was justified in denying the petition, pursuant to 8 C.F.R. § 103.2(b)(12).

We note, also, that no description of the beneficiary's duties appears to include weddings or other functions that are typically reserved for authorized members of the clergy (as opposed to more general functions which can also be the province of lay preachers). In *Matter of Rhee, supra*, the Board of Immigration Appeals found that an individual, whom the church called a minister and who held a certificate of ordination, was not carrying on the vocation of minister because the individual was not called upon to perform such functions.

The final issue concerns the petitioner's ability to pay the beneficiary's salary. In their letter submitted with the initial filing, Rev. Munoz and Rev. Farfan state that the beneficiary "earns a weekly salary of \$700.00 (\$36,400 annually)." 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.

The initial submission includes "Income and Expense Statements" for several years, containing the following information:

	4/97-3/98	4/98-3/99	4/99-3/00	4/00-7/01
Opening Balance	\$54,075.51	\$22,603.64	\$31,067.79	\$19,974.68
Total Income	180,653.72	235,684.48	267,192.46	532,970.56
Total Expenses	212,125.59	227,220.33	278,312.57	483,271.14
Ending Balance	22,603.64	31,067.79	19,974.68	69,647.10

The petitioner submits a portion of a subsequent report for the remainder of calendar year 2001, but this fragment does not show the opening balance, total income, or other figures in the above table. The itemized statements do not reflect salary payments to the beneficiary, or to any other paid employee. The very few line item expenses that approach amounts sufficient for one person's annual salary have titles such as "Home Missions" and "Home and Foreign missions assistance," which do not readily translate as ministerial salaries, as well as "offerings" to various named individuals, none of whom are the beneficiary. Only the most recent complete statement (covering sixteen months rather than twelve) shows a sufficient fund balance for the beneficiary's salary. These financial documents are not annual reports, nor are they *audited* financial statements. They are merely the petitioner's assertions regarding its finances.

The director instructed the petitioner to submit additional evidence of its ability to pay, including Forms W-2 to document of all salaries paid during "the two years preceding the filing of this petition." Counsel, in response, claims that Forms W-2 are unavailable because the petitioner is tax-exempt. Its employees, however, are not tax-exempt as individuals, and churches are not exempt from reporting employees' salaries on Forms W-2.

The petitioner's response to the director's request included another copy of one of the above-described financial documents, along with copies of bank statements that do not present a complete picture of the petitioner's assets and liabilities. [REDACTED] states "[w]e are agreeing to compensate [the beneficiary] all his business related expenses as well as trying to provide some housing allowances. It is our goal that this ministry becomes self-supporting and thus provide for [the beneficiary's] financial needs." The petitioner has submitted no evidence that it has, in fact, actually paid the beneficiary \$700 per week as promised.

The director, in denying the petition, stated that the petitioner has offered inconsistent assertions regarding the beneficiary's remuneration, and that the record lacks sufficient documentation. On appeal, counsel asserts that the apparent inconsistencies result from the director's misunderstanding of various letters in the record, rather than from any actual conflicting evidence.

It remains that the above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be" in the form of tax returns, *audited* financial statements, or annual reports. The petitioner is free to submit

other kinds of documentation, but only *in addition to*, rather than *in place of*, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Counsel contends that the regulation at 8 C.F.R. § 204.5(g)(2) does not apply to religious worker petitions, but counsel offers no support for this assertion. That regulation begins with the assertion that it applies to “[a]ny petition filed by or for an employment-based immigrant which requires an offer of employment.” Religious worker petitions fit that description. While 8 C.F.R. § 204.5(m)(4) requires the petitioner to describe the terms of the beneficiary’s remuneration, this requirement is not, as counsel claims, a substitute requirement that supersedes 8 C.F.R. § 204.5(g)(2).

█ statements appear to amount to an admission that the beneficiary’s church is not yet able to pay the beneficiary a regular salary, and that the national organization has not paid the beneficiary’s full salary either. Rather, it is the petitioner’s “goal that this ministry becomes self-supporting” (meaning that it is not yet self-supporting) █ does not state that the beneficiary has received his full salary; rather, the petitioner has paid the beneficiary’s “business related expenses” while “trying to provide some housing allowances” (the term “trying” implying limited success in this area). Rather than providing the required documentation of ability to pay, the petitioner has asserted that it is “trying” to provide some form of limited compensation while the church strives toward the unrealized goal of supporting itself. Given this information, the director was justified in concluding that the petitioner has not established its ability to pay the beneficiary’s proffered wage.

The evidence of record is not sufficient to permit favorable findings with regard to the petitioner’s ability to pay, or a finding that the beneficiary shall conduct the full range of duties of an authorized member of the clergy. The petitioner has admitted to a substantial, disqualifying interruption in the beneficiary’s work during the qualifying period, and we are not persuaded by counsel’s suggestion that the proper remedy is to discard the pertinent regulations.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.