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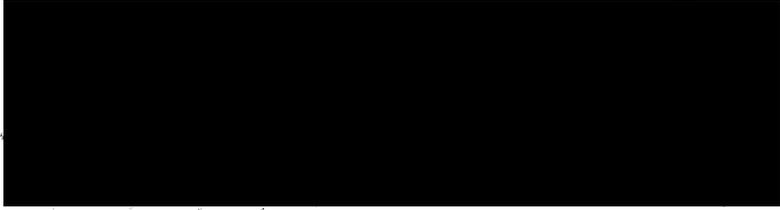
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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

**SEP 23 2004**

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.

*Mari Johnson*

~~to~~ Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The petition 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 director of its community welfare center. 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 or that the position qualified as that of a religious worker. The director also determined that the petitioner had failed to establish that it had extended a valid job offer to the beneficiary or that it had the ability to pay the beneficiary the proffered wage.

On appeal, counsel submitted a brief and additional documentation. Counsel also requests oral argument.

The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

The director initially determined that the petition was deficient and did not contain sufficient information to complete processing of the visa petition. Therefore, in a Notice of Intent to Deny (NOID) dated April 11, 2003, the director requested the petitioner to submit additional documentation to establish eligibility under this statutory provision. The petitioner was notified that it had 30 days in which to submit this additional documentation.

The petitioner's response to the NOID was received in the service center on May 20, 2003, 39 days after the date of the NOID. As the additional information was not timely submitted, the director based her decision only on the documentation that was included with the petition.

On appeal, counsel asserts that the response to the NOID was timely filed. Citing 8 C.F.R. § 103.5a(b), counsel states that the envelope containing the NOID was postmarked on April 14, 2003, and that the petitioner received the NOID on April 17, 2003. Therefore, according to counsel, the statutory deadline for the petitioner's response was May 20, 2003, and that the petitioner's response was made on May 16, 2003. Counsel also argues that, even if the NOID was deemed to have been received by the petitioner on April 14, 2003, its response, which was dated May 16, 2003, was timely filed.

Counsel's argument is without merit. The regulation at 8 C.F.R. § 103.5a(b) states:

*Effect of service by mail.* Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing.

The petitioner included a copy of the postmarked envelope, which indicates the NOID was mailed on April 14, 2003. The petitioner's response was therefore due in the service center no later than May 17, 2003.

Counsel attempts to apply the provisions of 8 C.F.R. § 103.5a(b) to a petitioner's response to a service request. Clearly, the language of the regulation does not support counsel's interpretation.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to timely submit the requested evidence. The petitioner resubmits the requested evidence on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding timely before the director.

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) echoes the above statutory language, and 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 petition was filed on November 5, 2002. Therefore, the petitioner must establish that the beneficiary was continuously working in the religious occupation throughout the two-year period immediately preceding that date.

The petitioner submitted a “Certificate of Employment” dated March 20, 2002 from the president of the Council of Bishops of the Korean Methodist Church. The certificate states that the beneficiary is an associate secretary of the Board of Laity and Social Welfare of the Korean Methodist Church in Seoul, Korea. The bishop does not describe the beneficiary’s job responsibilities, his hours of work or the compensation received from the Board of Laity and Social Welfare.

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).

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).

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 director noted that the bishop's March 20, 2002 letter indicated that the beneficiary worked for the Board of Laity and Social Welfare from May 1993 to "the present." The director determined that the petitioner had not established that the beneficiary was continuously employed until November 5, 2002, the date the petition was filed.

On appeal, counsel asserts that the beneficiary's employment did not end in March 2002, the date of the bishop's letter. Counsel further asserts that the "Certificate of Employment" merely reflected the date it was prepared at the request of the petitioner. However, without documentary evidence to support the claim that the beneficiary continued to work until November 5, 2002, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The evidence does not establish that the beneficiary worked continuously in a religious occupation for two full years prior to the filing of the visa petition.

According to 8 C.F.R. § 204.5(m)(1), the alien must be coming to the United States at the request of the religious organization to work in a religious occupation.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a "religious occupation" and the regulation states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The list reveals that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as cantor, missionary, or religious instructor are examples of qualifying religious occupations. Persons in such positions would reasonably be expected to perform services directly related to the creed and practice of the religion. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature. The lists of qualifying and nonqualifying occupations derive from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

CIS therefore interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

In the offer of employment letter to the beneficiary, the petitioner informed the beneficiary that his duties were to "locate the needs of the under-privileged [sic], the poor, and the handicapped and provide social services to meet [] their needs, including assistance in health and welfare." In a document entitled "Community Welfare Center of Asheville Basic Program Plan," the petitioner describes the purpose of the welfare center as to "distribute faith, good will and to promote social welfare." The services listed for the center include counseling, care taking (house cleaning, cooking, laundry), nursing, recreation, communication (find sponsors to cover the recipients' expenses, and foster parents, big brother, and big sister), medical, assisting self-support, education and adaptation (language studies and interpretation). A miscellaneous service is described as church facility usage.

The plan also describes the director's duties as guardian candidate selection and service, volunteer training, fund raising, social service methodology improvement, human resources and accounting, and publicity. A miscellaneous job responsibility is not further described.

On appeal, counsel states that to determine the religious nature of the proffered position, one must also look at additional documentation submitted in response to the NOID. As discussed previously, this documentation is not a part of the record of proceeding and cannot be used to establish eligibility. Further, counsel asserts that the beneficiary is being hired as director of the outreach program. However, no evidence in the record establishes that the proffered position is more than that of director of the petitioner's community welfare center.

The evidence does not establish that the proffered position is not primarily administrative or secular in nature. The duties as described are not directly related to the religious creed of the petitioner's denomination. The evidence does not establish that the proffered job is a religious occupation within the meaning of the statute and regulation.

The petitioner must also demonstrate that a qualifying job offer has been tendered. The regulation at 8 C.F.R. § 204.5(m)(4) states, in pertinent part, that:

*Job offer.* The letter from the authorized official of the religious organization in the United States must state how the alien will be solely carrying on the vocation of a minister, or how the alien will be paid or remunerated if the alien will work in a professional capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support.

The director noted that the compensation for the proffered position is \$19,200 annually, paid in monthly installments of \$1,600. However, on the petitioner's proposed budget for 2002, the salary listed for the director of the community welfare center is \$9,600, payable at a monthly salary of \$1,600 for six months. The director determined that the petitioner had not established that it was offering a full-time, permanent position or that the beneficiary would not be dependent upon supplemental income for his support.

As the petition was filed in November 2002, we do not find the petitioner's 2002 budget dispositive as to whether the petitioner has extended a valid job offer. The budget clearly shows that for some portion of the year the petitioner planned to compensate the director of its community welfare center at the rate of \$1,600 per month. This is consistent with the salary for the proffered position, which is dependent upon approval of the Form I-360 petition.

However, as we do not find that the position qualifies as that of a religious worker, we find that the petitioner has not extended a valid job offer to the beneficiary for purposes of section 203(b)(4) of the Act.

The director also determined that the petitioner had not established that it had 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 support of this requirement, the petitioner submitted a copy of its 2002 budget and expenses plan and a copy of its May 2002 checking account statement. Another document indicates that the petitioner had a balance of approximately \$12,536.00 on June 13, 2002.

The above-cited regulation 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. Further, with the petition, the petitioner submitted no evidence of its financial status as of the date the petition was filed. The evidence does not establish that the petitioner had the continuing ability to pay the beneficiary the proffered salary as of the date the petition was filed.

Beyond the decision of the director, the evidence of record does not establish that the petitioner is a bona fide 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 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.

To meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(A), a copy of a letter of recognition of tax exemption issued by the Internal Revenue Service (IRS) is required. In the alternative, to meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B), a petitioner may submit such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations. This documentation includes, at a minimum, a completed IRS Form 1023, the Schedule A supplement, if applicable, and a copy of the organizing instrument of the organization which contains a proper dissolution clause and which specifies the purposes of the organization.

In his letter accompanying the petition, counsel stated that the petitioner had applied for status as a tax-exempt organization with the IRS on August 29, 2002. The petitioner submitted a letter from an accountant, who states that in her opinion, the petitioner meets all of the qualifications for exemption from federal income taxation. This documentation is insufficient.

To meet this requirement in lieu of an IRS letter granting it tax-exempt status as a religious organization, the petitioner should have, pursuant to 8 C.F.R. § 204.5(m)(3)(i)(B), submitted the documents that it filed with the IRS. The petitioner submitted none of the required documentation. The evidence did not establish that the petitioner was a bona fide tax-exempt religious organization as of the date that it filed the visa petition. This deficiency constitutes an additional ground for dismissal of the appeal.

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.