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U.S. Citizenship
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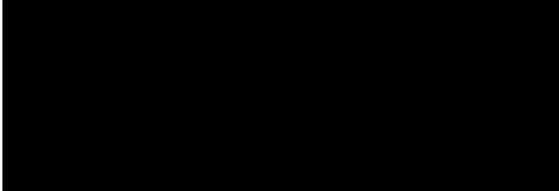
FILE: [Redacted]
SRC 98 077 52518

Office: TEXAS SERVICE CENTER Date: **MAY 26 2005**

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:



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 Director, Texas Service Center, initially approved the employment-based immigrant visa petition. On further review, the director determined that the petitioner was not eligible for the visa preference classification. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke the approval of the preference visa petition and her reasons therefore, and subsequently exercised her discretion to revoke the approval of the petition on December 14, 2004. 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 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. The director also determined that the petitioner had not established that the position qualified as that of a religious worker, that the petitioner had extended a qualifying job offer to the beneficiary, or that the petitioner had the ability to pay the proffered wage.

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department of Homeland Security, "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the BIA has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.*

On appeal, counsel submits a brief.

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 petition was filed on January 15, 1998. At that time, attorney [REDACTED] represented the petitioner as counsel. Subsequently, on May 23, 2003 [REDACTED] was convicted on several counts relating to immigration fraud. Because [REDACTED] was involved in facilitating numerous fraudulent immigration petitions, the director instructed the petitioner to submit additional documentation to establish that the petitioner had, in fact, filed a credible visa petition based on a bona fide job offer.

The first issue on appeal is whether the petitioner established that the beneficiary was continuously engaged in a qualifying vocation or occupation for two full years immediately preceding 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 must establish that the beneficiary was continuously working as a minister throughout the two-year period immediately preceding the filing date of the petition, January 15, 1998.

In its December 26, 1997 letter accompanying the petition, the petitioner stated that the beneficiary had been a member of the Assembly of God churches since 1989, and had been ordained a minister with the petitioning organization in 1995. The petitioner stated:

By virtue of his ordination, he is authorized to perform the functions of a pastor in our church, which include conducting worship, and officiating at weddings and funerals . . . He has been a member of the Assembly of God Church since 1990, and has worked assisting other pastors, counseling and providing spiritual and moral guidance to other members not only of our church, but of the Community as well.

In a letter dated November 13, 1997, the petitioner stated that the beneficiary had been a member in good standing with the petitioning organization since December 1995, and had been working voluntarily since 1991. Neither of the letters initially submitted by the petitioner specifically stated that the beneficiary worked as a minister during the qualifying two-year period, only that he was authorized to do so. In his curriculum vitae, the beneficiary indicated that from 1995 "to now," he served as a volunteer pastor of the congregation in Marlboro, Massachusetts, where he conducted worship services, weddings and funerals, and administered religious rites and ordinances. The petitioner submitted no evidence with the petition to substantiate any work performed by the beneficiary during the qualifying two-year period. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In a request for evidence (RFE) dated November 8, 1999, the director instructed the petitioner to:

Submit documentary evidence of the beneficiary's employment for the two years preceding the filing of this petition. Submit the beneficiary's income tax returns for the years 1997 and 1998 along with W-2, wage and tax statements . . . You submitted a letter from [redacted] dated November 13, 1997. This is not acceptable as proof of the beneficiary's employment for the two years immediately preceding the filing of this petition.

In response, the petitioner submitted a letter dated January 8, 2000, in which it appeared to give inconsistent information regarding the beneficiary's prior work history, stating:

[The beneficiary] has voluntarily worked as a minister for the Portuguese Assembly of God in Boston from 1991 to present . . . [He] was ordained as a minister in 1995 by the General Convention of the Assemblies of God in Brazil. By virtue of such ordination, he is fully authorized to perform the functions of a pastor in our Church . . . [The beneficiary] has been working as a minister for over five years. He has taken several positions inside our churches since 1990.

The petitioner also submitted copies of the beneficiary's Form 1040, U.S. Individual Income Tax Return, that he filed jointly with his wife for the years 1997 and 1998. Both of the Forms 1040 contain original signatures and are dated January 8, 2000. The petitioner submitted no evidence that the tax returns were ever filed with

the Internal Revenue Service (IRS) and submitted no copies of any Forms W-2 reporting wages or Form 1099-MISC, Miscellaneous Income, reporting nonemployee compensation.

In her Notice of Intent to Revoke approval of the visa petition (NOIR), the director instructed the petitioner to:

Submit a detailed description of the beneficiary's prior work experience including duties, hours, and compensations, (especially compensations) accompanied by appropriate evidence (such as original pay stubs or cancelled checks, earning statements, W-2's or other evidence as appropriate. Submit an IRS certified copy of the income tax returns with all the pertaining W-2s for the two years preceding the filing of this petition . . . Submit detailed time sheets, weekly time logs and schedules, work logs or reports, etc. clearly establishing that the beneficiary has performed the claimed religious services for the two years preceding the filing of this petition.

In response, the petitioner submitted a letter dated May 26, 2004, stating that the beneficiary had been a full-time minister with the petitioner since August 1995, and that the church had supported the beneficiary since then, "primarily through donations and monthly assistance for his living expenses, such as rent, insurance, car payments, ect [sic]." The petitioner submitted a copy of a January 10, 2000 letter previously submitted in response to the RFE, which stated that the beneficiary had worked voluntarily for the church since 1990, and provided a weekly schedule of his duties, including worship service, teaching Sunday school, visiting the sick and shut-in, and "secretary practice." The petitioner submitted copies of a certificate of ordination that it issued to the beneficiary on August 31, 1995 and a certificate of ordination issued by the General Council of the Assemblies of God on November 17, 1998. The petitioner also submitted copies of photographic identification cards issued to the beneficiary and identifying him as a minister. One of the cards was issued in August 1996 by the Convenção de Ministro e Igrejas Assembléias de Deus de Lingua Portuguesa U.S.A. The other cards, issued by the General Council of the Assemblies of God, indicated that they are valid for one year at a time and all are dated subsequent to the filing of the visa petition.

The petitioner also submitted a list of names with the beneficiary's name highlighted; however, the source of the document and its purpose are not identified. Therefore, the document has no evidentiary value. The petitioner additionally submitted copies of checks drawn on the petitioner's account and made payable to the beneficiary from June 2003 through April 2004, and copies of the beneficiary's year 2003 Form 1040. However, as these documents are also dated subsequent to the filing of the visa petition, they provide no evidence of the beneficiary's work experience prior to the filing of the visa petition.

The record also contains photographs that counsel identifies as the beneficiary performing his ministerial duties. Although most of the photographs are undated and therefore are of no evidentiary value in establishing the beneficiary's prior work experience, three are dated within the qualifying two-year period, two in June 1997, and one in April 1996. However, counsel's assertions of what these photographs depict and establish are not evidence. The unsupported 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). Further, the photographs and the ordination certificates, without more, are insufficient to establish that the beneficiary worked full-time as a minister during the two years immediately preceding the filing of the visa petition.

Several pieces of documentation submitted by the petitioner, including evidence that the beneficiary had performed marriage ceremonies and copies of flyers and other documentation featuring the beneficiary are

either undated or dated after the petition was filed. Therefore, they also lack evidentiary value. Other documents are dated after January 15, 1998, the date the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.

In the rare case where volunteer work might constitute prior qualifying experience, the petitioner must establish that the beneficiary, while continuously and primarily engaged in the traditional religious occupation, was self-sufficient or that his or her financial well being was clearly maintained by means other than secular employment.

The only evidence submitted by the petitioner of work performed by the beneficiary during the qualifying period consists of three unauthenticated photographs. The petitioner submitted no contemporaneous documentary evidence, such as pay vouchers, canceled checks, verified work schedules, or other documentary

evidence to corroborate work performed by the beneficiary during the two-year qualifying period. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, the petitioner submitted no evidence of how the beneficiary supported himself financially during the relevant period. Although the petitioner stated that it provided the beneficiary with assistance with his living expenses, the petitioner submitted no documentary evidence of having done so. *Id.*

On appeal, counsel asserts that, as the proffered position is that of a minister, the regulation and previous AAO decisions do not require that the petitioner show that the beneficiary was engaged in "salaried employment" in the "conventional sense." Nonetheless, the petitioner submitted no corroborative evidence of the beneficiary's work as a minister for the two years prior to the date the petition was filed.

In her decision, the director referenced a letter from [REDACTED] stating that the General Council of the Assemblies of God Church would not "knowledgeably credential those who are in the country illegally, or who are here as students, or who are here seeking to apply for legal status either through a green card or R-1 worker's visa."

On appeal, counsel states:

Petitioner has previously maintained a fraternal relationship with the General Council of the Assembly of God in Springfield, Missouri. This relationship was never hierarchical; rather it was a loose fellowship of cooperation and a shared philosophy of religious ideals . . . Thus, [t]he General Secretary's statement should have no bearing whatsoever on the credibility of the Petitioner Church or the Beneficiary Minister because the Assembly of God in Springfield, Missouri has no authority over Petitioner.

This statement is inconsistent with the statement of the petitioner in its December 26, 1997 letter stating that the petitioning organization was established in 1985 "under the auspices of the General Council of the Assemblies of God of Springfield, Missouri."

Regardless of [REDACTED] letter, however, the record contains a copy of a 1998 certificate of ordination from the General Council of the Assemblies of God Church, ordaining the beneficiary as a minister within that organization. Additionally, the record also contains several identification cards issued by the General Council of the Assemblies of God Church to the beneficiary. The record contains no evidence to explain this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The evidence does not establish that the beneficiary has worked continuously as a minister for two full years preceding the filing of the visa petition.

The second issue on appeal is whether the petitioner established that the position qualifies as that of a religious worker.

The proffered position is that of a minister. The regulation at 8 C.F.R. § 204.5(m)(2) defines minister as:

[A]n 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.

In its letter accompanying the petition, the petitioner stated that, in the proffered position, the beneficiary's "primary duties will be the performance of religious education and additional pastoral duties, such as conducting prayer meetings, worship services, visiting ill people, officiating at weddings and funerals, and administering Holy Communion." The petitioner also stated that the beneficiary's ordination gives him the authority to perform these services. The petitioner further stated that the position is full-time and salaried.

The evidence sufficiently establishes that the proffered position is a religious occupation within the meaning of the statute and regulation.

The third issue is whether the petitioner established that it had extended a qualifying job offer to the beneficiary.

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.

In its initial submission, the petitioner stated that it would pay the beneficiary \$1,400 per month for his services. In response to the NOIR, the petitioner indicated that the beneficiary's salary would be \$462.00 per week plus living expenses of \$500 for permanent full-time employment. The director found that this constituted a change in the terms of the job offer. However, we note that the original offer was extended in 1997, more than six years before the petitioner's response to the NOIR in 2004, in which it indicated that it would pay the beneficiary more than the original stated amount. We do not find this necessarily inconsistent, and find that the evidence establishes that the petitioner has extended a qualifying job offer to the beneficiary.

The final issue is whether the petitioner established that it had the ability to pay the beneficiary 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.

As evidence of its ability to pay the proffered wage, the petitioner submitted with the petition, copies of its unaudited financial statements for the years 1994 and 1995 accompanied by accountants' review reports, and copies of its monthly bank statements for 1996.

In response to the NOIR, the petitioner submitted copies of its unaudited financial statements for the periods 1998 through 2000, accompanied by accountants' review reports, and a copy of its profit and loss statement for the period January 2002 through July 1, 2003. The petitioner also submitted copies of its monthly bank statements for 2001 through March 2004, and copies of its Form 941, Employer's Quarterly Federal Tax Return, for the first and second quarters of 2003 and the first and second quarters of 2004.

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 submitted copies of its quarterly report of wages paid for the first half of the year for 2003 and 2004. The petitioner submitted none of the required types of primary evidence for 1998, the year the petition was filed, or for the years before 2003.

On appeal, counsel indicated that the petitioner would submit evidence of its ability to pay the proffered wage with counsel's brief within 30 days after the appeal was filed. However, counsel submitted no supplementary documentation with his brief and no additional documents have been submitted.

The evidence is insufficient to establish that the petitioner had the continuing ability to pay the proffered wage as of the date the petition was filed.

Counsel asserts on appeal that the petitioner is being "punished" for [REDACTED] crimes and states that the director's decision to revoke approval of the visa petition is "suspect." Counsel's assertions are clearly without foundation. Given, the nature of [REDACTED] criminal offenses, it is reasonable for Citizenship and Immigration Services (CIS) to reopen and reexamine any petition in which he appeared as counsel. A review of the record reveals that the petition was initially approved in error and that the petitioner had not established that the beneficiary was eligible for the preference visa petition. The director properly exercised her discretion in revoking approval of the petition after the petitioner failed to provide sufficient evidence in response to the NOIR to establish eligibility under the statute and regulation. The petitioner must establish eligibility at the time of filing the visa petition. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

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.