



U.S. Citizenship
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Services

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[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: JUL 31 2006

EAC 01 177 55725

IN RE:

Petitioner:

[REDACTED]

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:

[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.

Mari Johnson

2 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion to reopen will be granted; the petition will be denied.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

On motion, counsel submits additional documentation.

The petitioner is an executive office of the Church of God. 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 pastor. The director determined that the petitioner had not established that it is a bona fide nonprofit religious organization, that the position qualifies as that of a religious worker or that the petitioner has the ability to pay the proffered wage.

In its previous decision, the AAO stated that the director's denial was also based on the petitioner's failure to establish that the beneficiary was qualified for the position within the organization. Although, as discussed below, the AAO properly addressed this deficiency in the record, it was not one of the stated grounds for denial of the petition and we withdraw this statement by the AAO.

The first issue on motion is whether the petitioner established that it is a bona fide nonprofit religious organization.

In its previous submissions, the petitioner provided a copy of an October 20, 1972 letter from the Internal Revenue Service (IRS) notifying the Church of God in Cleveland, Tennessee, of a group tax-exemption for its subordinate units that had not been ruled non-exempt. The petitioner, however, submitted no evidence that it was covered under the group exemption granted to the Church of God.

On appeal, the AAO affirmed the director's determination that the petitioner had not established that it was a bona fide nonprofit 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 (IRC) 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.

The petitioner must either provide verification of individual exemption from the IRS, proof of coverage under a group exemption granted by the IRS to the denomination, or such documentation as is required by the IRS to establish eligibility as a tax-exempt nonprofit religious organization. Such documentation to establish eligibility for exemption under section 501(c)(3) includes: a completed Form 1023, a completed Schedule A attachment, if applicable, and a copy of the articles of organization showing, *inter alia*, the disposition of assets in the event of dissolution.

The organization can establish eligibility under 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting documentation that establishes the religious nature and purpose of the organization, such as brochures or other literature describing the religious purpose and nature of the activities of the organization. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operation for CIS, *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003):

- (1) A properly completed IRS Form 1023,
- (2) A properly completed Schedule A supplement, if applicable,
- (3) A copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization, and
- (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

The above list is consistent with the regulatory requirement at 8 C.F.R. § 204.5(m)(3)(i)(B), cited above. The memorandum specifically states that the above materials are, collectively, the "minimum" documentation that can establish "the religious nature and purpose of the organization." Thus, for example, a petitioner cannot meet this burden by submitting only its articles of incorporation. Also, obviously, it is not enough merely for the petitioner to *submit* the documents listed above. The *content* of those documents must establish the religious purpose of the organization.

The director, prior to denying the petition, did not provide the petitioner with an opportunity to submit the materials outlined in that memorandum, and thereby establish its tax-exempt status as a religious organization.

On motion, the petitioner submits documentation establishing that it was included in the *Church of God Directory* on the date the petition was filed and was included under the group tax-exemption granted to the Church by the IRS.

This evidence sufficiently establishes that the petitioner is a bona fide nonprofit religious organization.

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

In its letter of April 16, 2001, the petitioner did not specify the duties of the proffered position, but indicated that the beneficiary had been serving in the position since 1998 as an ordained pastor. The petitioner stated that the beneficiary was responsible for preaching, "administering the rites of Communion, Baptism and the ordinances of the Last Supper . . . counseling . . . and coordinating evangelism efforts." The petitioner stated that the beneficiary would "continue" to work at least 40 hours per week and would be paid a salary of "at least" \$515 per month plus expenses.

In response to the director's request for evidence (RFE) dated February 11, 2001, the petitioner, in a letter dated April 23, 2002, again stated that the beneficiary had been serving in the proffered position since 1998, and enumerated her duties as preparing and delivering the weekly sermon, Christian education, bible study and outreach to the community, hospital and nursing home ministry, bible study seminars and evangelism, and community service.

The director determined that while some of the duties were of a religious nature, they did not require specific religious training and could be performed by any caring and dedicated member of the congregation. On appeal, the AAO affirmed the director's decision.

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.

We withdraw the director's determination and this prior finding by the AAO. The evidence establishes that the position meets the definition of minister as defined by the regulation, and therefore qualifies as a religious worker pursuant to the Act and regulation.

The third issue on motion is whether the petitioner established that it has 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.

The petition was filed on April 25, 2001; therefore the petitioner must establish that it has the continuing ability to pay the beneficiary the proffered wage as of that date. The petitioner indicates that it will pay the beneficiary \$515 per week plus expenses. As evidence of its ability to pay this salary, the petitioner submitted

copies of its unaudited financial statements for the year 2000 and for the period ending August 31, 2001 accompanied by accountants' compilation reports.

As the compilations are based primarily on the representations of management, the accountant expressed no opinion as to whether they fairly present the financial position of the petitioning organization. In light of this, limited reliance can be placed on the validity of the facts presented in the financial statements that have been submitted. No further supporting documentation is included in the record to reflect the assertions made by the accountants in the financial documentation, or contained within the unaudited financial statements.

Further, in a letter dated April 12, 2001, the petitioner stated that the beneficiary would be "eligible to receive a minimum weekly salary of \$525.00 as soon as the church is able to do so." The petitioner also stated that "to date," it had provided financial support to the beneficiary in the amount of \$2,750.

On motion, the petitioner submitted copies of pay stubs reflecting that, beginning in March 2002, the Ministry New Hope of Church of God began paying the beneficiary \$7.00 an hour for 20 hours work per week. This wage is less than half of the proffered salary, and the petitioner provided no evidence of payment as of April 25, 2001, the filing date of the petition.

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 primary evidence.

Accordingly, as the petitioner failed to establish that it has paid the beneficiary the proffered wage in the past and failed to submit any of the required types of evidence, it has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the date the petition was filed.

In its previous decision, the AAO addressed the petitioner's failure to establish that the beneficiary was qualified for the position within the organization. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The AAO erred in stating that the petitioner's failure to establish that the beneficiary was qualified for the religious worker position was a basis for the director's decision. This additional finding was the result of the AAO's *de novo* review.

The proffered position is that of minister. While the petitioner alleged that the beneficiary had been serving as an ordained minister since 1998, it failed to submit evidence of the beneficiary's ordination or of her authorization to perform services as an ordained minister within its denomination. 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 response to the RFE, the petitioner submitted a copy of an October 13, 2000 "lay minister's certification" awarded to the beneficiary by the Church of God International Offices. The petitioner submitted a copy of the supplement to the "Minutes of the 68th General Assembly of the Church of God," which outlines the

qualifications and authority of the lay minister. According to the supplement, the lay minister is to be actively involved in at least one "specialized area[] of local church ministry, such as children's ministry, youth ministry, prison ministry, elderly ministry, music ministry, and so forth." The supplement also indicates that the lay minister is to serve as a "helper" to the pastor and is eligible to conduct various services and church activities under pastoral supervision.

On motion, the petitioner submits a copy of a May 19, 2003 "certificate of achievement," indicating that the beneficiary has "completed the prescribed program of training, evaluation, and assessment for ministry in the Church of God," and a June 7, 2003 "certificate of achievement," which apparently permits the beneficiary to enter the Church of God's "Ministerial Internship Program." The petitioner also submitted a copy of a "certificate of identification and appointment" recognizing the beneficiary as an "exhorter" in the Church. According to the supplement to the Church's minutes, an exhorter is the "primary" rank of minister, "and all applicants for the ministry must serve as exhorter before being promoted in rank." The date of the beneficiary's appointment to exhorter is not reflected on the certificate, which was void after October 1, 2004.

The regulation at 8 C.F.R. § 204.5(m)(3)(ii)(B) requires the petitioner to establish that, if the alien is seeking entry into the United States to work as a minister, that "he or she has authorization to conduct religious worship and to perform other duties usually performed by authorized members of the clergy."

The evidence submitted by the petitioner does not establish that the beneficiary was authorized to serve as a member of its clergy prior to April 25, 2001, the filing date of the visa petition. Therefore, the evidence does not establish that the beneficiary was qualified for the proffered position at the time the petition was filed.

Beyond the decision of the director and the AAO, the petitioner has not established that the beneficiary was continuously employed in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the visa petition. Although this was not addressed in either the director's decision or the prior AAO decision, the AAO's reopening of the proceedings in response to the petitioner's motion has caused the AAO to fully consider everything in the record.

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 petition was filed on April 25, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as a minister throughout the two-year period immediately preceding that date.

As discussed above, the petitioner has not established that the beneficiary was qualified to serve as minister within its denomination prior to the filing of the visa petition. Further, the petitioner submitted no evidence such as canceled pay checks, pay vouchers, or authenticated work schedules to document any work performed by the beneficiary during the qualifying period. *Matter of Soffici*, 22 I&N Dec. at 165. This deficiency constitutes an additional ground for denial of the petition.

The petition will be denied 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. Here, that burden has not been met. Accordingly, the decisions of the director and the previous decision of the AAO will be affirmed. The petition is denied.

ORDER: The petition is denied.