



U.S. Citizenship
and Immigration
Services

PUBLIC

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

[REDACTED]

01

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

OCT 27

SRC 05 097 51725

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

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.

Maie Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a Christian mission that provides social services. 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 Christian education director. The director determined that the petitioner had not established that the position qualifies as a religious occupation.

On appeal, the petitioner submits a brief from counsel.

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 sole ground for denial concerns the question of whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The regulation at 8 C.F.R. § 204.5(m)(2) defines "religious occupation" as 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.

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 regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

Citizenship and Immigration Services 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.

Executive Director of the petitioning entity, describes the beneficiary's position:

[The beneficiary] serves as the Christian Education Director, and he is currently working with an R-1 visa. He plans, organizes, and directs Christian education programs designed to promote Christian education among youth congregation membership. He develops Bible courses, vocational Bible school and devotional courses. He orders and distributes school supplies. . . .

[The beneficiary] received a graduation certificate in Theological studies and Bible studies from Word of Life Argentina Foundation in Buenos Aires, Argentina.

On May 21, 2005, the director issued a request for evidence (RFE), instructing the petitioner to submit further information about the beneficiary's duties and schedule and the requirements for the position. In response, states that the beneficiary works Monday through Friday from 8:00 a.m. to 5:00 p.m. for \$1,500 per month. repeats the previous description of the beneficiary's duties, and adds that the beneficiary has "help[ed] run our different programs throughout the year," including numerous programs for needy families such as providing school supplies, a medical clinic, Thanksgiving dinner and Christmas gifts.

In a separate letter, states:

[The beneficiary's] job duties entail the management and coordination of all ministry related activities here at [the petitioning organization]. This includes, but is not limited to, directing the pastoral staff in their daily functions as well as long ranging planning and growth. The daily functions comprise client counseling and evangelism; training programs for volunteers and staff; ministry partnerships program structure and fulfillment i.e. numerous food outreach efforts and special programs like summer camp, back-to-school supplies, Thanksgiving/Christmas, and monthly medical clinic that provides spiritual guidance in assistance to more than 60,000 less fortunate Fort Bend County residents annually.

The petitioner also submitted a transcript of the beneficiary's seminary education in Argentina, along with other evidence. An "Employee List" identifies the beneficiary as the petitioner's "Ministry Team Director"; in an August 10, 2005 letter, states that the beneficiary is "our Christian Education Director/Ministry Team Leader."

The director denied the petition, stating:

The petitioner did not submit evidence to determine if the religious occupation is a traditional religious function within the religious denomination, and if the beneficiary has met all the required training as established by the governing body of the denomination in order to perform the duties [of] the proffered position.

The proffered position is of a Christian Education Director, the duties to be performed clearly defined above, demonstrate to be secular and administrative in nature. . . . Clearly, this position cannot be considered a religious vocation or occupation as defined above.

The evidence does not show that this is or ever was a paid position . . . requiring specific credentials or formal religious education.

On appeal, counsel asserts that the director “committed an error of fact and law by not classifying the position as a minister. The Petitioner submitted documentation and evidence that demonstrates that the position is for a minister. . . . Only a minister can develop and teach Christian bible classes. . . . [T]he position is for a minister and not for a religious occupation.” We do not find this particular argument at all persuasive.

The regulation at 8 C.F.R. § 204.5(m)(2) defines a “minister” as 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.

The record contains no evidence that the beneficiary has been ordained or otherwise authorized to perform the full range of duties reserved for the clergy; his attendance at a seminary in Argentina does not imply that he became a minister upon graduation. Prior to the appeal, the petitioner never described the beneficiary as a minister, and never described his position as being that of a minister. Even the appeal itself contains no statement to that effect by any official of the petitioning entity. Counsel’s new assertion that the beneficiary is a minister, therefore, is sorely lacking in credibility.

The petitioner has supplemented the initial appeal with a brief from counsel. In this brief, counsel states that the beneficiary’s “position fits within the definition of a minister and religious occupation,” thereby contradicting counsel’s earlier assertion that “the position is . . . not for a religious occupation.” Inconsistencies such as this underscore the need to rely on the evidence itself, rather than on counsel’s interpretation or claims regarding that evidence. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 2, 4 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

More persuasively, counsel quotes the regulatory definition of “religious occupation” at 8 C.F.R. § 204.5(m)(2), which specifically includes “religious instructors,” “religious counselors” and “missionaries,” and the beneficiary’s listed duties share salient elements with all of these acknowledged religious occupations. We do

not concur with the director's finding that the beneficiary's duties are primarily administrative or secular. Because that finding was the sole stated basis for denial, the director's decision cannot stand.

That being said, review of the record reveals other serious issues that, at present, prevent a finding of eligibility. The AAO may make additional findings not identified in 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 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," and that, during that same two years, the beneficiary must have "been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States." 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 denominational membership and experience in the religious vocation, professional religious work, or other religious work. The petition was filed on February 17, 2005. Therefore, the petitioner must establish that the beneficiary was a member of the petitioner's denomination, continuously performing the duties of a Christian education director, throughout the two years immediately prior to that date.

The record indicates that the beneficiary arrived in the United States on April 21, 2003, less than two years before the petition's filing date. Therefore, the beneficiary was outside the United States for part of the two-year qualifying period, and employment documents from the petitioner alone cannot suffice to meet the two-year experience requirement.

In his first letter in support of the petition, _____ states that the beneficiary has been "a member of our church since April 2003." He does not specify when the beneficiary began working for the petitioner. Church membership is not the same thing as employment.

The petitioner submits copies of letters from churches in Mexico and Argentina, attesting to religious work performed by the beneficiary between 1996 and 2002. All of this work falls outside the 2003-2005 qualifying period and therefore cannot count as qualifying experience. The beneficiary moved from Argentina to Mexico in August 2002; the record is virtually silent as to his activities in Mexico between August 2002 and April 2003.

The director, in the RFE, instructed the petitioner to submit further "evidence [of employment] . . . for the time frames of February 17, 2003 up to February 17, 2005." The director also requested evidence to show denominational ties between the petitioner and the beneficiary's former employers. In response, the petitioner submitted detailed pay records from 2004 and 2005 and certified copies of the beneficiary's 2003 and 2004 income tax returns. The 2003 return shows that the beneficiary reported only \$1,502 in wages that year, and \$3,331 in "business income," along with \$7,304 in "other income." The beneficiary's certified tax returns specify only the amount of income that the beneficiary reported for the year; they do not identify the source. The petitioner also submits a copy of a Form W-2 Wage and Tax Statement issued to the beneficiary for the

2004 tax year; there is no comparable document for 2003. The only payroll showing the beneficiary's compensation in 2003 is a pay stub dated November 25, 2003, indicating that the petitioner paid the beneficiary \$600.00 for "Contract Labor."

The petitioner's quarterly state tax returns identify the petitioner's employees by name. Throughout the last three quarters of 2003, the petitioner claimed either two or three employees at any given time. None of the 2003 returns contain the beneficiary's name. A telefax message attached to one return indicates "an employee - [REDACTED] . . . is missing from the report." The wording of this message suggests that [REDACTED] is the only name "missing from the report." There is no comparable message to indicate that the beneficiary's name should have been included as well. The beneficiary's name appears for the first time in the return for the first quarter of 2004; every subsequent return lists his "Date Hired" as "01/04," or January 2004.

The state returns contain the following information about the beneficiary's work:

Quarter	Total wages	Weeks worked
First quarter 2004	\$2,075.00	13
Second quarter 2004	3,000.00	4
Third quarter 2004	3,000.00	13
Fourth quarter 2004	3,000.00	4
First quarter 2005	4,500.00	9

It seems likely that there are errors in the "weeks worked" column on the quarterly returns.

In short, the evidence does not indicate that the petitioner has continuously employed the beneficiary since his April 2003 arrival. The record very strongly indicates a January 2004 hire date, and even the minimal, fragmentary evidence of prior work dates back only to late November 2003. Beyond this evidence, the petitioner has not even identified any employer for the beneficiary between February and April of 2003, a period when the beneficiary was outside the United States and, by the petitioner's admission, not yet a member of the petitioning organization.

The mention of membership in the petitioning organization leads to the issue of the petitioner's religious denomination. To meet the denominational membership requirement, the petitioner has submitted copies of its own "Statement of Faith," that of Word of Life Fellowship, Inc., and the untranslated "*Declaración de Fe*" of Palabra de Vida Argentina (the beneficiary's church until 2002). Even if the petitioner had submitted the translation required by 8 C.F.R. § 103.2(b)(3), this evidence would not suffice to show that the beneficiary has been a member of the petitioner's religious denomination throughout the two-year qualifying period. The record does not even clearly identify the petitioner's religious denomination. Palabra de Vida Argentina appears to be affiliated with Word of Life Fellowship, but this does not establish any connection between the petitioner and Word of Life Fellowship.¹ The petitioner has demonstrated only that the petitioning

¹ We note that the petitioner's web site (identified on its letterhead) includes this "Frequently Asked Question" and response: "Q. Are you affiliated with any particular denomination? A. No. [The petitioner] is a non-denominational organization." Source: <http://www.secondmile.org/faq.asp?id=105605&page=1> (visited October 19, 2006).

organization and Word of Life Fellowship profess similar (but not identical) statements of faith. This similarity does not suffice to show that the petitioner and Word of Life Fellowship (and, by extension, Palabra de Vida Argentina) are so similar as to constitute, in effect, the same denomination. Also, as noted previously, the beneficiary left Argentina in August 2002, and the record is silent regarding the beneficiary's denominational membership while he resided in Mexico between August 2002 and April 2003.

Therefore, the available evidence is not sufficient to establish that the beneficiary meets the requirements of two years of continuous religious work or membership in the petitioner's denomination immediately prior to the petition's filing date. Any new decision by the director must take this into account.

One more issue may merit further attention. The petitioner has offered to pay the beneficiary \$18,000 per year. 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 petitioner's original submission contained none of the above types of evidence. An unaudited balance sheet for calendar year 2004 indicates that the petitioner started the year with \$105,753.59 in cash and ended the year with only \$73,753.98. The balance sheet provides different numbers for the petitioner's net income for the year, but both figures are negative numbers in excess of \$24,000. The petitioner has, therefore, reported a net loss at a rate that would bankrupt the petitioner in less than four years. This balance sheet does not show the petitioner's financial status as of the February 17, 2005 filing date, but it does purport to show financial information from the last full year before that date. An unaudited balance sheet is not among the acceptable types of evidence listed at 8 C.F.R. § 204.5(g)(2).

Subsequently, the petitioner has submitted evidence that is acceptable under the above regulation. Specifically, the petitioner has submitted a copy of its Internal Revenue Service Form 990 Return of Organization Exempt From Income Tax for 2003, showing that the petitioner reported \$2,175,352 in revenue and \$2,145,181 in expenses, leaving a surplus of \$30,171. The petitioner also indicated that it paid \$30,307 in non-officer salaries and wages that year. The petitioner also claimed \$81,250 in "compensation of officers, directors, etc.," but elsewhere on the return, under "List of Officers, Directors, Trustees, and Key Employees," the petitioner listed seven names but asserted that none of these individuals received any compensation. There remain two blank spaces under the list of seven names, and therefore the petitioner clearly did not provide an incomplete list owing to lack of space. the only official said to devote more than four hours per week to the organization. It is therefore not clear who received the aforementioned \$81,250.

We have already mentioned that the petitioner submitted a list of its employees. The list names eight employees, including the beneficiary. The job titles are: Ministry Summer Intern; Warehouse Manager; Ministry Team Director (the beneficiary); Office Manager; Executive Director [REDACTED]; Driver; and two Ministry Team members. The name of [REDACTED] is the only name to appear on both the employee list and the "List of Officers, Directors, Trustees, and Key Employees," and the Form 990 specifically indicates that [REDACTED] receives no compensation.

The beneficiary's Form W-2 Wage and Tax Statement indicates that the petitioner paid the beneficiary \$11,075.00 in 2004. As noted above, the quarterly tax returns corroborate this sum. Subsequent evidence indicates that the petitioner paid the beneficiary's full proffered wage at least for most of 2005. Nevertheless, the 2003 Form 990 return does not establish the petitioner's financial position (and thus its ability to make future payments) as of February 17, 2005, which was the date of filing and would be the priority date if the petition were approved.

The petitioner did not explain why it did not submit the more recent Form 990 return for 2004. As noted above, the petitioner's unaudited balance sheet submitted previously suggests a considerably less favorable financial picture for 2004 than for 2003. It appears, therefore, that the petitioner's Form 990 returns from 2004 and 2005 may present a more complete picture of the petitioner's finances from the filing date onward. The director should, therefore, request certified copies of those returns.

We note that the beneficiary in this proceeding is also the beneficiary of an I-130 immediate relative petition filed October 21, 2002 and approved April 29, 2004. To date, there is no indication that the beneficiary has applied for adjustment of status based on that approved petition.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.