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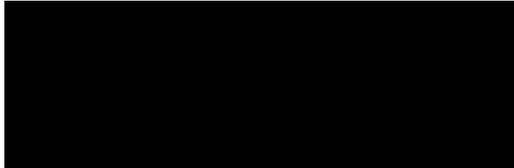
U.S. Department of Homeland Security
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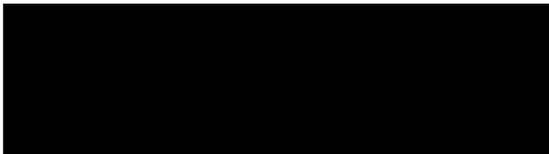


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **SEP 07 2006**
EAC 02 109 51051

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center denied this employment-based immigrant visa petition on May 6, 2003. The petitioner's subsequent appeal of that decision was untimely filed. However, the director, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2), treated the untimely filed appeal as a motion to reopen. On motion, the director determined that the petitioner failed to overcome all of the deficiencies identified by the director in his original decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a temple. 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 Head Granthi (head priest). The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage.

On appeal, counsel submits a brief and additional documentation.

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 single issue on appeal 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 petitioner stated that it would pay the beneficiary \$36,000 per year plus housing and health insurance. The petition was filed on February 7, 2002. Therefore, the petitioner must establish that it had the continuing ability to pay the beneficiary the proffered wage as of that date.

As evidence of its ability to pay this wage, the petitioner submitted a copy of its 2001 Form 990-EZ, Return of Organization Exempt from Income Tax, which reflects net assets of approximately \$20,428. The petitioner also submitted a copy of a year 2001 Form 990-EZ from the [REDACTED] in Hegley, Arizona, which identifies itself as a branch of the petitioner. The Form 990-EZ filed by the [REDACTED] indicates it paid the beneficiary \$23,000 in that year, and a Form W-2, Wage and Tax Statement, issued by the [REDACTED] in 2001 reflects that amount. However, this documentation precedes the filing date of the petition and is not relevant in establishing the petitioner's ability to pay the proffered wage as of the filing date of the petition.

In response to the director's request for evidence (RFE) dated October 31, 2002, the petitioner submitted copies of an income statement for January and February 2002 and a balance sheet for February 2002. With its initial appeal, the petitioner submitted copies of its unaudited financial statements for 2002 and for the ten-month period ending October 31, 2003, accompanied by accountants' review reports. As the compilations are based primarily on the representations of management, the accountants 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.

The petitioner also submitted copies of several pledge statements from temple members. These statements are dated November 5, 2003, and set forth each individual's contributions for the year to date, a promise to contribute more for the year, and a pledge of a specific amount for 2004. On appeal, counsel asserts that Citizenship and Immigration Services (CIS) is attempting to impose the financial requirements of a for-profit organization upon a religious organization, and that the provisions of 8 C.F.R. § 204.5(g)(2) should not apply to religious organizations. Counsel references 8 C.F.R. § 204.5(m)(4), which states that a petitioner must establish that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support, and that "[i]n doubtful cases, additional evidence such as bank letters, recent audits, church membership figures and/or the number of individuals currently receiving compensation may be requested."

8 C.F.R. § 204.5(m)(4) requires religious entities to "state. . . how the alien will be paid or remunerated," but this does not establish a separate standard of evidence for religious employers. That regulation merely requires the employer to describe the terms of the job offer (including the rate of pay); it does not excuse the employer from having to demonstrate that it can, in fact, meet those terms. In this sense, 8 C.F.R. § 204.5(m)(4) does not take the place of the ability to pay requirement; rather, it takes the place of the labor

certification requirement, which includes information describing the job offered and the terms of compensation.

The regulation at 8 C.F.R. § 204.5(g)(2), by its plain wording, applies to “any petition filed by or for an employment-based immigrant which requires an offer of employment.” While the exact phrase “offer of employment” does not appear in 8 C.F.R. § 204.5(m) and its sub-clauses, the regulations plainly require the existence of a specific position with a particular religious organization, an official of which must describe the requirements and terms of that position. In addition, 8 C.F.R. § 204.5(m)(4) begins with the phrase “job offer.” We find, therefore, that the special immigrant religious worker classification requires an offer of employment for the purposes of 8 C.F.R. § 204.5(g)(2).

Furthermore, pursuant to 8 C.F.R. § 204.5(c), for most employment-based immigrant classifications that require an offer of employment, only the employer may file the petition. An alien cannot, for example, self-petition as an outstanding professor or researcher. The only employment-based immigrant classification that requires a job offer, and for which current regulations permit an alien to self-petition, is the special immigrant religious worker classification. Thus, the reference at 8 C.F.R. § 204.5(g)(2) to “any petition filed by . . . an employment-based immigrant which requires an offer of employment” can only refer to special immigrant religious worker petitions. Accordingly, the regulation at 8 C.F.R. § 204.5(g)(2) applies to special immigrant religious worker petitions.

Counsel also asserts that the court in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), ‘recognized that a less formal calculation for the ‘ability to pay’ applies to religious organizations.’ Counsel further asserts that the pledges of the members should be considered in determining the petitioner’s ability to pay, as these pledges are recognized under general accepted accounting practices and by the court in *Full Gospel Portland Church*.

Counsels’ arguments are without merit. We note first that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. In the *Full Gospel Portland Church* decision, after reviewing relevant financial statements, the court found that the petitioner’s working capital and revenue established that it had the ability to pay the beneficiary the proffered wage for every year after the priority date was established, and that if the petitioner was not individually able to establish its ability to pay, legacy Immigration and Naturalization Service should consider the resources of its national organization, with which it was financially linked. In the present case, the petitioner is the parent organization;¹ therefore, in contrast to the church in *Full Gospel Portland Church*, the petitioner has not provided the financial statements required by regulation showing that that it alone has the ability to pay the proffered wage, or evidence from a larger national organization showing that it can pay the proffered wage on behalf of the petitioner.

¹ In a petition filed on August 29, 2003 (WAC 03 252 53617), the petitioner’s subordinate unit in Higley, Arizona petitioned for the beneficiary to serve as the head priest of the Higley organization.

The petitioner has not established that it had the ability to pay the beneficiary the proffered wage in 2002, the year in which the petition was filed, or in 2003. The pledges contain a promise of a contribution of an indefinite amount for the remainder of 2003, and specific amounts for 2004, but do not relate to 2002. The petitioner's Form 990-EZ does not indicate that it had the ability to pay the proffered wage in 2003.

With the petition, the petitioner submitted copies of financial statements from several of its sister or branch temples that it said would assist it in paying the beneficiary, if necessary. The petitioner, however, submitted no evidence of contributions to it, as the parent organization, from any of its subordinate units. The regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be" in the form of tax returns, audited financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only in addition to, rather than in place of, the types of documentation required by the regulation. In this instance, the petitioner submitted unaudited financial statements and its tax returns do not reflect that it has the ability to pay the proffered wage as of the filing date of the petition. The evidence does not establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage as of the date the petition was filed.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.