U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

C1

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 0 4 2005
SRC 03 078 52618

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:

PUBLIC COPY

[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.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and 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 an associate pastor. The director determined that the petitioner had not established that it qualified as a bona fide nonprofit religious organization. The director also 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, that the beneficiary possessed the required two years membership in the denomination, that the position qualified as that of a religious worker, or that the beneficiary was qualified for the position within the organization. The director further determined that the petitioner had not established that it had extended a qualifying job offer to the beneficiary or that it had the ability to pay the beneficiary the proffered wage.

On appeal, counsel submits 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 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 that contains a proper dissolution clause and which specifies the purposes of the organization.

In response to the director's request for evidence (RFE) dated April 10, 2003, the petitioner submitted a copy of a "Certificate of Existence" from the Georgia Secretary of State, a copy of an IRS Form 1023 filed on June 20, 2003, and a copy of the "Official Manual with the Doctrines and Discipline of [redacted] On appeal, the petitioner submitted a copy of a "Certificate of Amendment" that it filed with the Georgia Secretary of State in September 2003, and which became effective on September 20, 2003. The amendment adds the dissolution clause required by the IRS to grant tax-exempt status to an organization and also reflects the purpose of the organization. The petitioner did not submit a complete copy of its articles of incorporation.

All of the documentation submitted by the petitioner to establish its eligibility as a bona fide nonprofit tax-exempt religious organization is subsequent to the filing date of the visa petition, January 21, 2003. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The evidence does not establish that the petitioner submitted sufficient evidence that it qualified as a nonprofit tax- exempt religious organization at the time the visa petition was filed.

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.

As noted above, the petition was filed on January 21, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as an associate pastor throughout the two-year period immediately preceding that date.

Evidence submitted by the petitioner includes a May 15, 2003 letter from [redacted] astor of the Christian Fellowship Church in [redacted] indicating that the beneficiary was a member of the church's congregation since 1992, a minister of "outreach and evangelism" since 1999, a member of the church's media ministry since 2000, and that he received a monthly salary of $650.00 (U.S. dollars). On appeal, Pastor [redacted] states that the beneficiary's employment with the church ended on October 10, 2002. The letters from [redacted] do not specify the beneficiary's duties or hours of employment with the Christian Fellowship Church. The petitioner submitted no other evidence, such as pay vouchers or canceled checks, to substantiate the beneficiary's employment with the Christian Fellowship Church.

The record is unclear as to when the beneficiary began his association with the petitioner. A letter from the petitioner's pastor dated November 14, 2002 to the immigration service states that the pastor is pleased "to receive [the beneficiary] as a workman of the Gospel of Jesus Christ . . . By his often visits, we have seen how God uses him in the fullness of his calling . . . Because of this, [the beneficiary] will be placed in our Evangelistical [sic] Department focusing on the youth department."

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.

On appeal, the beneficiary states that the Christian Fellowship Church could not provide "primary or secondary evidence" of his salary during his employment. The petitioner included statements from individuals who state that they knew the beneficiary as a minister with the Christian Fellowship Church [redacted] president of the St. Maarten chapter of the Gospel Business Men's Fellowship International, also states that he knew the beneficiary was paid for his work, although he does not state the nature or source of his knowledge.

The record contains no explanation as to the inability of the Christian Fellowship Church to provide documentary evidence of the beneficiary's employment. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Furthermore, there is nothing in the record to establish that the beneficiary has been employed in any capacity since October 2002. On appeal, the petitioner submits a September 8, 2003 letter in which officials of the petitioner and [redacted] tate that, it is their understanding "that [the beneficiary] was not allowed to work until [he is] granted a social security number, as such we did not commence with a salary for him."

The evidence does not establish that the beneficiary was continuously engaged in a religious occupation or vocation for two full years preceding the filing of the visa petition.

The director determined that the petitioner provided no evidence of its denomination or that of the beneficiary's prior church. The director therefore determined that the petitioner had not established that the beneficiary had the two years required membership in the religious denomination.

On appeal, the petitioner submits a letter from the Christian Fellowship Church signed [redacted] and [redacted] who state that the Christian Fellowship Church is of the Pentecostal denomination and share the same Biblical principles of the petitioner. The September 8, 2003 letter from the officials of the [redacted] indicate that the churches are of the Pentecostal denomination and shared the same biblical doctrines and principles.

The evidence is sufficient to establish that the beneficiary has the required two years experience in the denomination.

The director determined that the petitioner did not sufficiently identify the proffered position and that the duties are characterized by administrative and secular duties. The director therefore determined that the petitioner had not established that the position qualified as that of a religious occupation.

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.

In her letter of June 27, 2003, the petitioner's pastor stated:

> [The beneficiary's] many task[s] will be to develop an effective outreach ministry reaching those in the streets in the area of substance abuse, the youths in particular, and ministering to men in prison and in the home on their important role of fatherhood in the community. Besides the above task[s], his position as associate pastor is to assist me in the general operation of the church as leader of minister in teaching, training and church administration.

The director noted that the IRS Form 1023 indicates that 10% of the church's activities would be dedicated to the youth ministry and 15% to administrative tasks. According to the Form 1023, "The Youth Ministry is an important component [redacted] Church. They youth are brought together weekly for youth activities to include bible study, missionary projects, such as assisting in food give-aways, seminars and Christian-based workshops."

The documentation is not necessarily inconsistent. The Form 1023 describes the collective efforts of the petitioner, and does not indicate that the duties of the proffered position would be similarly divided. Additionally, the petitioner indicates that the beneficiary would also pursue a prison ministry, as well as assist the pastor with her duties, including teaching and training.

The evidence is sufficient to establish that the proffered position is a religious occupation within the meaning of the statute and regulation.

The director also determined that the petitioner had not established that the beneficiary was qualified for the position within the organization.

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 her letter of June 27, 2003, the petitioner's pastor stated that the beneficiary's recruitment was based on his "hands on experience in evangelism, prison ministries and community involvement. He comes to us highly recommended." In their letter of September 8, 2003, officials of the petitioner and its governing body stated

that the beneficiary's recruitment was based on "his anointing, knowledge, experience and positive results in evangelism . . . To operate as a minister, requires the individual to have satisfactory theological training and for the anointing of God to be visible in their lives."

The "Official Manual" of the petitioner's governing body sets forth the following requirements for ordination of a minister:

> Persons who apply for ordination with this body are requested to give proof that they have been exclusively in the ministry for at least two years. With the exception of a Brother or Sister who have [sic] raised up a commendable [sic] work, or an Assistant Pastor of a commendable work, though [sic] working with their hands when recommended by their Pastor.

For ordination of an elder, the manual provides:

> Persons who apply for ordination with this body are requested to give proof that they have been exclusively in the ministry for 2 years, and who have raised up a commendable [sic] work, or and Pastor or Assistant Pastor of a commendable work, though [sic] working with their hands when recommended by their Pastor.
>
> Minister must meet the qualifications of the Scriptures . . .
>
> Minister must meet these qualifications prior to being Ordained as a [sic] Elder in this organization.

The petitioner submitted a copy of a "certificate of ordination" indicating that the beneficiary was ordained as an associate minister with the Christian Fellowship Church in May 1999. The record also contains a copy of a "certificate of ordination" presented by the Fellowship at Christian Assembly Ministries in March 1999, and ordaining the beneficiary as a "full gospel" minister.

On appeal, the petitioner submitted a copy of a "Certificate of Eldership," indicating that the beneficiary was ordained by the petitioner's governing body on December 22, 2002. A letter from the St. Maarten Evangelical Ministerial Fellowship indicates that the ordination certificate it presented to the beneficiary was "in keeping without our purpose to recognize and establish Ministries . . . under the purposes of our foundation. [The beneficiary's] ministry proved to be successful in the evangelism of men and their development in the Church and in its Community." [emphasis omitted]

The petitioner submitted a copy of a "certificate of achievement," reflecting that the beneficiary completed a semester at the Caribbean Mission Bible School in August 1998, and letters of recommendation from the beneficiary's prior church and associations for the position with the petitioner.

The record contains sufficient evidence to establish that the beneficiary is qualified for the position within the petitioning organization.

The director determined that the petitioner had not 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.

The director noted that the evidence does not reflect that the proffered position was a salaried position. The director further noted that the Form 1023 does not indicate that any position with the petitioner is a full time or salaried position. Although the petitioner states that it will pay the beneficiary a monthly salary, as discussed below, the evidence does not establish that it has the ability to do so. Additionally, as the petitioner does not currently have any full time or salaried employees, its offer to pay the beneficiary and to employ him on a full time basis lacks credibility. Part time or volunteer work is not qualifying work for the purpose of this visa petition.

The evidence does not establish that the petitioner has extended a qualifying job offer to the beneficiary.

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 states that it will compensate the beneficiary at the rate of $1,500 per month. The petitioner submitted a letter from the [redacted] of Deliverance in Newnan, Georgia, in which its pastor states that "beginning in November 2003, the [redacted] Center of Deliverance church would become the financial backer and supporter of the petitioner as its sister church. The pastor does not identify the nature or extent of his church's backing for the petitioner, or the authority by which he obligates his church to support the petitioner. The petitioner also submitted a copy of a webpage printout from "BB&T OnLine" reflecting transactions and balances for several checking accounts as of June 20, 2003. The document does not indicate the owner of the accounts, but copies of bank statements submitted on appeal indicate that they belong to the [redacted] of Deliverance.

On appeal, the petitioner submits a statement of its monthly budget and a monthly budget for the Holy Zion Center of Deliverance. It also submits a copy of its August 2003 checking account statement and other financial data for the Holy Zion Center of Deliverance.

Regardless of the financial support received by the petitioner from the Holy Zion Center of Deliverance, the regulation requires the prospective U.S. employer to demonstrate its ability to pay the proffered wage. Further, the 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.

The evidence does not establish that the beneficiary has the ability to pay the proffered wage.

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.