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Washington, DC 20529

U.S. Citizenship and Immigration Services

JAN 25 2005

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 97 134 51196

IN RE: Petitioner:
Beneficiary: [redacted]

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:

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. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner identifies itself as a church and refugee center. 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 youth leader. The director determined that the petitioner had not established: (1) that the beneficiary had the requisite two years of continuous work experience as a youth leader immediately preceding the filing date of the petition; (2) that the petitioner had made a qualifying job offer to the beneficiary; (3) its ability to pay the beneficiary's proffered wage; or (4) that it qualifies as a tax-exempt religious organization.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General 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 Board of Immigration Appeals 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 unrebutted, 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. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

On appeal, the petitioner submits copies of previously submitted documents, as well as arguments 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 first issue concerns the beneficiary's past experience. 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." 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 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 March 31, 1997. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a youth leader throughout the two years immediately prior to that date.

After the approval of the petition, the beneficiary applied for adjustment to lawful permanent resident status. As part of this adjustment application, the beneficiary filed Form G-325A, Biographic Information. This form calls for information about the beneficiary's employment during the preceding five years. The beneficiary listed only one employer, a bakery, and indicated that he worked there from December 1992 to November 1996.

Rev. [redacted] pastor of the petitioning church, states that the beneficiary "has been involved as a Religious Worker/Youth Leader in our Church since January 1990, and has received various Certificates for his voluntary services." Rev [redacted] states that the beneficiary "has more than two [2] years of experience . . . [which] has been continuous without any break of service. . . . All of his time and labor has been voluntarily [sic]."

The petitioner submits copies of certificates the petitioner issued to the beneficiary during the mid-1990s. These certificates contain no information to indicate what the beneficiary was doing, or how many hours per week he was devoting to religious functions.

On December 17, 2003, the director issued a notice of intent to revoke, stating that the evidence of record was inconclusive and that the petition had been approved in error. The director stated that the beneficiary did not accumulate qualifying experience by working in a secular occupation while volunteering at the church.

In response, counsel asserts that, pursuant to a 1997 agreement between the petitioner and the beneficiary, "no salary will be given to the beneficiary until the approval of his I-485 and the granting of his residency. . . . The beneficiary has been receiving . . . room & board since 1997." Rev [redacted] in a new letter, states "[o]ur church has been providing [the beneficiary] with Room and Board since 1997. He has an air-conditioned

efficiency with access to a full kitchen and bathroom. Although [the beneficiary] does not pay for this apartment, it is valued in the market at approx. $650.00/month."

The director, in the revocation notice, observed that the two-year qualifying period ended early in 1997, and therefore Rev. letter still does not indicate that the beneficiary received any compensation during that period.

The director, in revoking the petition, observed that the petitioner apparently did not begin providing room and board to the beneficiary until after the petition's March 1997 filing date. Earlier documents refer to the beneficiary's work as "voluntary," with no references to any compensation at all, either in the form of cash, lodging, or any other means.

On appeal, counsel asserts that the director wrongfully concluded that "the beneficiary had received charity rather than compensation for services." Counsel does not address the director's observation that, according to Rev. Garrido, the petitioner did not provide room and board until 1997, and therefore the beneficiary was entirely uncompensated for all, or nearly all, of the March 1995-March 1997 qualifying period.

Regarding the petitioner's 2004 claim to have provided room and board to the beneficiary since 1997, we note that the beneficiary's 2000 tax return shows the same Miami address as his 1995 Form W-2 from the bakery, issued in early 1996. Thus, the beneficiary did not move to a new apartment in 1997. On his Form G-325A, the beneficiary indicated that he had resided at that same address since 1989, before he had any involvement with the petitioning church at all (the petitioner states that such involvement began in 1990). The petitioner submits no evidence that it owns, controls, or pays the rent on the property where the beneficiary has resided since 1989. On forms that call for an apartment number, the beneficiary has indicated "n/a," meaning "not applicable." Thus, the petitioner's claim to have provided the beneficiary's food and housing since 1997 is not only insufficient on its face; it is also completely unsubstantiated, and it appears to be inconsistent with the minimal evidence available.

Also, pursuant to *Matter of B*, 3 I&N Dec. 162 (CO 1948), one factor to consider when making a determination of continuous religious work is whether the alien has taken up any other occupation. Here, the record amply demonstrates that the beneficiary worked at a bakery in 1995 and 1996, and thus the beneficiary obviously took up a non-religious occupation during the qualifying period.

The next issue is whether the petitioner has extended a valid job offer 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.

Citizenship and Immigration Services 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.

Rev. Garrido describes the position offered to the beneficiary:

> [The beneficiary] will be responsible for assisting the Pastor in the development of youth programs, such as "Royal Rangers," seasonal drama programs, as well as other church related activities. He will assist the Pastor in the preparation of Biblical studies for the young people, the coordination of youth meetings, conventions, street meetings, prison ministries, personal evangelism, radio and television programs etc.

Rev. Garrido states that the beneficiary "has studied many Biblical Courses," but the only documentation of such study is a certificate dated March 3, 1997, indicating that the beneficiary "has successfully completed a training course for Royal Ranger Commander" at the petitioning church.

In the notice of intent to revoke, the director acknowledged the certificates from the petitioning church, but stated that there is no indication of what the beneficiary undertook in order to earn those certificates.

In response, counsel has asserted "the beneficiary['s] scope and effect of work within our church is considered within the traditional work in any well-organized evangelical church & he has met the requirements." The response contained no evidence to support counsel's claim. The petitioner did, however, submit a copy of a letter dated March 23, 1997, in which Rev. discussed the position offered to This letter states that Mr. activities include "evangelistic team, prayer meetings, counselling families in crisis, sunday school teacher, choir member, and giving guidance to the newly converted through discipleship, etc." Counsel indicates that the petitioner filed a petition on Mr. behalf simultaneously with its petition for the beneficiary.

In revoking the approval of the petition, the director indicated that the petitioner had failed to demonstrate that the beneficiary's duties amount to a full-time occupation that relates to a traditional religious function. The director also stated that the petitioner appears to have offered essentially the same job to two aliens (the beneficiary and Rafael Jimenez).

On appeal, counsel offers no rebuttal except to assert that the director initially approved the petition, and therefore the director must, at that time, have considered the beneficiary's credentials to be sufficient. Given the very nature of a revocation, the prior approval of the petition is not *prima facie* evidence of eligibility.

When considering whether the petitioner has made a *bona fide* job offer to the petitioner, it is reasonable to consider the beneficiary's employment activities. Here, even after the beneficiary received legal employment authorization, the petitioning church never paid him for his work. As noted above, the beneficiary's only reported employment until 1997 was at a bakery. The beneficiary received Form W-2 Wage and Tax Statements from the bakery in 1995 and 1996. The beneficiary's 1998, 1999 and 2000 tax returns identify him, respectively, as "kitchen hel[p]," a "laborer" and a "cashier." The director, in the notice of intent to revoke, cited a February 2001 statement from another employer, indicating that the beneficiary has worked as a parking lot attendant since December 1999. Counsel's statements in response to the notice of intent to revoke, and later on appeal, make no mention of the beneficiary's outside employment.

There is no indication that the beneficiary has ever been paid to work at the petitioning church, even after he obtained authorization to work in the United States. Given that the beneficiary has provided his services to the petitioning church as a volunteer, even when allowed to work in the United States, it is not clear that the activities performed by the beneficiary typically constitute a paid occupation within the petitioner's denomination. In light of other inconsistencies in the record, the assertion that the petitioner has no intention to pay the beneficiary for his work until after his immigration proceedings are complete does not inspire

confidence that the job offer is valid in its own right, rather than simply a means to secure immigration benefits for the beneficiary.

The next issue concerns the petitioner's ability to pay the beneficiary's proffered salary of $13,500 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 initial submission contained no evidence to establish the petitioner's ability to pay the beneficiary's salary. In the notice of intent to revoke, the director noted this deficiency. The director also noted that the beneficiary has relied entirely on secular employment, and has not received any salary from the petitioner.

In response, counsel asserts that the petitioner has already explained that, under the terms of an agreement between the beneficiary and the petitioner, the beneficiary is to receive no salary until after he becomes a lawful permanent resident of the United States. Regardless of such terms, the regulations require the petitioner to demonstrate its ability to pay the proffered wage from the filing date onward. The petitioner's response to the notice of intent to revoke includes no financial documentation.

The director revoked the approval of the petition, in part because the petitioner had never submitted any documentation to establish its ability to pay the beneficiary. The petitioner's response to the notice of intent to revoke, in fact, demonstrated that the petitioner had filed a second petition on behalf of another alien, Rafael Jimenez, who was offered $350 per week (or $18,500 per year). To justify the approval of both petitions, the petitioner must establish its ability to pay $32,000 in salaries.

On appeal, counsel asserts "the church owns real estate with the value of a few million dollars or more, has no outstanding debt, has several vans paid, has supported missionaries and many underprivileged refugees from different countries . . . and has been under the umbrella of the [petitioner's denominational headquarters]." The petitioner submits no evidence to support any of these claims. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (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).

The above-cited 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 has not submitted any of the required types of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Counsel's uncorroborated claims regarding the petitioner's real estate holdings cannot, and do not, supersede the regulations or satisfy the documentary requirements set forth therein. The petitioner has apparently never submitted any documentation of its financial status, and therefore we cannot find that it has established its ability to pay the beneficiary's proffered salary. The petitioner's apparent refusal to pay that salary even after the beneficiary obtained legal employment authorization does not suggest the petitioner's

good faith intention to pay that salary. We see no reason to disturb the director's finding that the petitioner has failed to establish ability to pay as required by 8 C.F.R. § 204.5(g)(2).

The final issue concerns the petitioner's tax-exempt status. 8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization qualifies as a non-profit organization in the form of either:

> (A) Documentation showing that it is exempt from taxation in accordance with section 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 section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

Prior to the approval of the petition, the petitioner provided no documentation of its tax-exempt status. Instead, the petitioner cited Internal Revenue Service (IRS) Publication 557, which indicates that churches are not required to file a Form 1023 exemption application. That publication, however, also states "such an organization may find it advantageous to obtain recognition of exemption."

The regulations require the above documentation in order to prove that the petitioner is, in fact, the tax-exempt religious organization that it claims to be. It is circular reasoning to argue that the petitioner need not prove it is a church, because it is a church. This argument presumes the very thing that the petitioner is obligated to demonstrate, i.e., that it is a tax-exempt church. We note that IRS Publication 557, referenced and submitted by the petitioner, states "the Internal Revenue Service does not accept any and every assertion that [a given] organization is a church."

The regulations do not require the petitioner to demonstrate that the IRS considers churches to be tax-exempt. Rather, the regulations require to submit documentary evidence that it is what it purports to be: a church that is recognized (or qualifies for recognition) by the IRS as a tax-exempt religious organization.

In the notice of intent to revoke, the director noted the petitioner's failure to establish its tax-exempt status. In response, counsel has repeated the assertion that churches do not have to file Form 1023 (which is not the issue), and the petitioner has submitted a copy of a 1984 "Certificate of Affiliation" indicating that the petitioning church "is hereby officially recognized as a Local Assembly of the General Council of the Assemblies of God."

The director, in revoking the approval of the petition, found that the petitioner has not submitted evidence to show that the General Council of the Assemblies of God holds a group exemption that applies to all affiliated local assemblies, and that the 1984 certificate submitted by the petitioner lacks even such basic information as an address for the parent entity. Thus, the director found that the petitioner still has not met the evidentiary requirements set forth at 8 C.F.R. § 204.5(m)(3)(i).

On appeal, the petitioner submits copies of previously submitted documents, but offers no rebuttal to the director's finding that those same documents are not sufficient to satisfy the pertinent regulatory requirements.

Most of counsel's appellate brief consists of references to the earlier response to the notice of intent to revoke. Even though the subsequent revocation demonstrates that the response was not adequate, counsel fails to address many points except to claim that the previous notice already rebutted those points. In sum, the director presented a defensible claim that the petition should never have been approved in the first place, and the petitioner has failed to overcome the cited grounds for revocation. We therefore affirm the director's decision.

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.