U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: LIN 04 149 52533 Office: NEBRASKA SERVICE CENTER Date: JUL 22 2005

IN RE: Petitioner:
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:

[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

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska 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 a church planter and pastor. The director 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 or that the beneficiary possessed the required two years membership in the denomination.

On appeal, counsel submits a brief.

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 on appeal is whether the petitioner established that the beneficiary had been continuously employed in a qualifying religious vocation or occupation for two full years prior to the filing of the visa petition.

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 28, 2004. Therefore, the petitioner must establish that the beneficiary was continuously working as a church planter and pastor throughout the two-year period immediately preceding that date.

In its letter of April 24, 2004, the petitioner's senior pastor, Reverend [redacted] stated that the beneficiary worked for its "church plant," Comunidad Cristiana de Austin, and "has been performing the work as a church planter and Pastor satisfactorily for our Church since April 2001 and is a licensed minister with the International Pentecostal Holiness Church." Reverend [redacted] stated that the beneficiary received financial support from the petitioner at the rate of $500 per month, supplemented by tithes and offerings from the Comunidad Cristiana de Austin. The petitioner submitted no documentary evidence of any financial compensation paid to the beneficiary by either organization. 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)).

The petitioner submitted an undated newspaper article from the *Austin Daily Herald*, and copies of unidentified and undated photographs, which apparently show the beneficiary in the pulpit of a church. The newspaper article identifies the beneficiary as a minister serving with the petitioning organization, but provides no corroborative evidence that the beneficiary worked full time in a compensated position with the petitioning organization.

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.

In his decision, the director stated that the record reflects that, prior to the filing of the petition, the beneficiary served in a voluntary capacity with the petitioner. However, the petitioner stated in its letter of April 14, 2004 that the beneficiary was compensated for his services. We withdraw this statement by the director.

On appeal, counsel states that the petitioner submitted evidence that the beneficiary was compensated at the rate of $400 per week. However, no such evidence appears in the record. The petitioner's letter indicated that the beneficiary received $500 per month from the petitioner, which was supplemented by tithes and offerings from the church at which the beneficiary was working. The petitioner did not identify the value of the compensation received by the petitioner from its "church plant," Comunidad Cristiana de Austin. The petitioner submitted no evidence, such as canceled checks, pay vouchers, pay receipts, verified work schedules, and other documentary evidence to corroborate the beneficiary's employment during the qualifying two-year period. *Matter of Soffici*, 22 I&N Dec. at 165.

Counsel also states on appeal that the court in *Soltane v. U.S. Department of Justice*, 381 F.3d 143 (3rd Cir. 2004), questioned the Citizenship and Immigration Services (CIS) requirement that salaried employment is required by the statute and regulation. However, the *Soltane* holding did not turn on the issue of salaried employment and the court's comments are not binding on CIS. Further, as noted above, prior case law holds that qualifying employment must be full-time and generally salaried. The evidence submitted by the petitioner does not indicate that the position held by the beneficiary is other than a generally salaried position.

The evidence does not establish that the beneficiary was continuously employed as a church planter and pastor for two full years preceding the filing of the visa petition.

The second issue is whether the petitioner established that the beneficiary possessed the required two years membership in the denomination.

The petition was filed on April 28, 2004. Therefore, the petitioner must establish that the beneficiary was a member of the prospective U.S. employer's denomination throughout the two-year period immediately preceding that date.

Reverend [redacted] stated in his letter of April 14, 2004, that the beneficiary was licensed with the International Pentecostal Holiness Church, but that his credentials were recognized and accepted by the petitioning organization. The petitioner submitted a copy of the beneficiary's ministerial license issued on August 16, 2001 by the International Pentecostal Holiness Church, and a copy of a ministerial identification card from the International Pentecostal Holiness Church, which was valid until January 31, 2002.

In a request for evidence (RFE) dated August 20, 2004, the director instructed the petitioner to explain the affiliation between the International Pentecostal Holiness Church and the petitioning organization. An unsigned letter dated September 8, 2004 submitted in response contains no additional information than that previously submitted by the petitioner. In his letter accompanying the response to the RFE, counsel stated that, even though the beneficiary is not ordained through the petitioning organization, "he has been part of their congregation and religious denomination in excess of two years."

However, other evidence in the record does not support counsel's statement. The petitioner does not state that the beneficiary is a member of its denomination, and the petitioner does not indicate that it is a multi-denominational church. The newspaper article submitted by the petitioner quotes a member of the church, Mrs[redacted] who stated that the beneficiary was "sent to Austin by the International Pentecostal Church of Oklahoma. Theirs is a different denomination than our church."

On appeal, counsel stated that the beneficiary severed his ties with the International Pentecostal Holiness Church in 2004, and is now sponsored by the petitioner. Counsel submitted no evidence to support his statement. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, assuming counsel's statement is competent evidence, it supports the fact that the beneficiary was a member of the International Pentecostal Church at the time the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); 8 C.F.R. § 103.2(b)(12).

Beyond the decision of the director, the petitioner has not established that it has the ability to pay the beneficiary the proffered wage. This deficiency constitutes an additional ground for which the petition may not be approved.

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 $500 per month. As evidence of its ability to pay this wage, the petitioner submitted a copy of its March 2004 monthly bank statement. The petitioner submitted no additional evidence on appeal.

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.

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 fourth issue on appeal is whether the petitioner established that it had extended a qualifying job offer to the beneficiary.

The director determined that, as the petitioner had not previous compensated the beneficiary for his work in the position, the evidence did not establish that the petitioner had extended a qualifying job offer to the beneficiary. We withdraw this statement by the director.

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 petitioner stated that it would pay the beneficiary $500 per month, supplemented by "regular tithes and offerings" from the church where the beneficiary works. The petitioner does not indicate the amount of compensation received by the beneficiary from Comunidad Cristiana de Austin, the petitioner's "church plant." The evidence does not establish that the beneficiary will be compensated at rate that is at least equal to the minimum wage. As such, the evidence does not establish that the beneficiary will not be required to engage in supplemental employment for his support and therefore does not establish that the beneficiary will be "solely carrying on the vocation of minister."

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

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.