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

U.S. Citizenship and Immigration Services

A1

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 16 2005

SRC 01 172 53696

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Interim Officer in Charge (IOIC), Oklahoma City, Oklahoma, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is described as 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 missionary. The IOIC determined that the petitioner had not established: (1) that the beneficiary had the requisite two years of continuous work experience as a missionary immediately preceding the filing date of the petition; (2) the petitioner's ability to pay the beneficiary's proffered salary; (3) the petitioner's status as a qualifying tax-exempt religious organization; or (4) that the beneficiary had entered the United States for the purpose of performing religious work.

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 first issue concerns the beneficiary's past employment. 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 experience in the religious vocation, professional religious work, or other religious work. The petition was filed on April 27, 2001. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a missionary throughout the two years immediately prior to that date.

[redacted] the petitioner's senior priest, states "since 1998, [the beneficiary] has served our congregation as a Church Missionary." In a separate affidavit [redacted] states that the beneficiary "is compensated on a full-time salaried basis at a rate of $800/mo."

On May 29, 2002, the Director, Texas Service Center, requested "a detailed description of the beneficiaries [sic] prior work experience," as well as "appropriate evidence" such as "pay stubs or checks" to establish that the beneficiary did, in fact, receive the compensation claimed in [redacted] affidavit. In response, the petitioner provides neither a detailed description, nor any new evidence of compensation. Instead, counsel asserts that the beneficiary "is compensated at the rate of $800.00 per month in cash and in-kind, as evidenced by the attached affidavits and letter of support. Please see affidavits and letter of support attached hereto as Exhibit 'A,' 'B' and 'C' respectively." Exhibits A, B and C are merely copies of previously submitted affidavits and letters from [redacted] dated April 26, 2001.[1] Only Exhibit A mentions the beneficiary's compensation at all; exhibits B and C merely assert that the beneficiary has worked as a missionary. Counsel does not explain how exhibit C qualifies as a "letter of support," when that document contains no claim that the petitioner has supported the beneficiary, nor any promise that the petitioner will support her in the future.

The director obviously considered these materials to be insufficient when first submitted in 2001; otherwise, the director would not have requested additional evidence. Counsel does not explain why these statements carry greater weight when submitted a second time. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Counsel does not explain why the petitioner submits no first-hand *documentary* evidence of the beneficiary's compensation, relying instead on after-the-fact claims. We note that [redacted] affidavit does not indicate that the beneficiary "is compensated . . . in cash and in-kind," as counsel claims. Rather [redacted] states that the beneficiary is employed "on a . . . salaried basis," with no indication that any part of the "salary" is non-monetary.

The IOIC determined that the petitioner has not sufficiently demonstrated that the beneficiary was continuously engaged in the religious occupation throughout the two-year qualifying period. In the decision, the IOIC stated:

> On May 21, 2003 the petitioner and the beneficiary appeared for an interview. The officer asked for check stubs or proof of payment from the petitioner to the [beneficiary]. At that time it was revealed that the beneficiary was not paid any monetary remuneration. The petitioner stated that the church purchases items for the beneficiary. One example, the church purchased a vehicle for the beneficiary.
>
> Therefore, the instant petition must be denied because it cannot be determined that the petitioner has proven that the beneficiary has been professionally employed and solely carrying on such vocation, professional work, or other work continuously for at least the 2-year period immediately preceding the filing of the instant petition.

[1] We note that the documents bear original signatures and, where applicable, original notary stamps, and thus they are not merely photocopies of previously submitted documents, but they are all dated April 26, 2001. Thus, they are either extra copies executed in 2001, or newly executed duplicates with the dates unchanged. Either way, the letters contain no new information; they merely repeat prior claims.

On appeal, the petitioner does not dispute the above account of the interview. Counsel states: "Because the Beneficiary has worked for 'in kind' payments, the CIS has determined erroneously that the Beneficiary has not worked for the Petitioner nor submitted a sufficient *job offer*" (counsel's emphasis). This is a misreading of the IOIC's decision. The petition was not denied because the beneficiary was paid "in kind." Rather, the IOIC denied the petition because of a lack of *evidence* to show that the beneficiary was ever compensated.

Counsel is correct that payment in kind is not inherently disqualifying. *See Matter of Hall*, 18 I&N Dec. 203 (BIA 1982), in which an alien religious worker who received room and board in lieu of salary was found to have been "employed" for immigration purposes. Payment in kind, however, does not relieve the petitioner of its burden of proof. Here, the petitioner has provided changing and inconsistent assertions regarding the nature of the beneficiary's compensation, and all of these contradictory assertions are equally lacking in corroboration.

At first, the petitioner indicated that the beneficiary "is compensated on a full-time salaried basis at a rate of $800/mo." There was no indication that the "salary" was in any form other than money. Indeed, the use of the term "salary" implies a fixed rate of payment. Later, counsel stated that the beneficiary "is compensated at the rate of $800.00 per month in cash and in-kind," claiming (incorrectly) that statements from [redacted] support this assertion. Finally, according to the undisputed account of the interview, the beneficiary "was not paid any monetary remuneration." The inconsistencies are obvious. For instance, if the beneficiary "was not paid *any* monetary remuneration," then he was not paid "in cash *and* in kind" as counsel had previously claimed.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988). When a petitioner or its attorney makes several inconsistent or contradictory claims, and can prove none of them, there is no clear reason to consider the petitioner's other equally unsubstantiated claims to be any more credible.

The beneficiary's assertion during an interview that the petitioner gave him a vehicle is not proof that the petitioner paid the beneficiary in kind. The record contains no documentation (such as canceled checks, financing agreements, registration documents or a copy of the certificate of title) to show that the petitioner did, indeed, purchase the undescribed vehicle for the beneficiary as claimed.

Counsel then argues at length that the beneficiary need not have been paid for her experience to qualify. We need not address this argument, given the petitioner's repeated claims that the beneficiary *did* receive some form of compensation for her work. To assert that the petitioner need not have compensated the beneficiary at all does not, in any way, mitigate the credibility issues that arise from the petitioner's contradictory and wholly unsubstantiated claims about the beneficiary's compensation.

We note that the petitioner's articles of incorporation, contained in the record, are dated August 27, 1999. Thus, the petitioner did not exist as a legal entity two years before the April 2001 filing date [redacted] has claimed that the church employed the beneficiary since 1998, but he has not described what formal entity existed at that time that was able to employ and compensate the beneficiary as claimed. The record contains first-hand, contemporaneous evidence that the church, as a legal entity, did not exist when the qualifying period commenced in April 1999. Given this evidence, the petitioner's failure or refusal to submit persuasive

evidence of the beneficiary's past experience, even when specifically asked to do so by the authority from whom the petitioner has requested a benefit, raises serious questions and merits careful attention.

The next issue concerns the petitioner's ability to pay the beneficiary's salary of $800 per month. 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 director instructed the petitioner to submit "conclusive evidence" of the petitioner's ability to pay the beneficiary's salary. The director did not cite the list of acceptable evidence found in the above regulation. Instead, the director requested "bank letters, recent audits, church membership figures, payroll tax return copies, and other appropriate evidence." This list derives, in part, from 8 C.F.R. § 204.5(m)(4), which does not replace 8 C.F.R. § 204.5(g)(2).

In response, the petitioner submits a letter from accountant [redacted] listing the petitioner's "deposit records" for 2000, 2001, and the first half of 2002, as well as the total value from an "inventory of assets." The letter did not even mention the petitioner's expenses, let alone compare the petitioner's income to those expenses. This letter is neither a bank letter, nor a recent audit, nor does it otherwise conform to the types of evidence requested by the director. Thus, even though the list of requested evidence is deficient with regard to the regulations, the petitioner was either unwilling or unable to meet even the requirements of the deficient list.

The IOIC, in denying the petition, quoted 8 C.F.R. § 204.5(g)(2) and stated that the above letter does meet the requirements therein. Therefore, the IOIC concluded, the letter from the accountant is not sufficient evidence to establish the petitioner's ability to pay the beneficiary's proffered wage. On appeal, counsel does not mention the regulatory requirements at all; counsel simply contends that the accountant's letter shows sufficient assets to cover the beneficiary's salary.

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, nor has counsel explained why these regulatory requirements do not or should not apply to this petitioner.

The next basis for denial 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.

The petitioner's initial submission contained no documentation pertinent to the petitioner's tax status. Following the director's request for evidence, counsel cites the petitioner's "State of Oklahoma Certificate of Not for Profit Incorporation and Articles of Incorporation filed in August of 1999, which detail the organization as a non-profit organization which is organized and operated exclusively for religious purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986."

The IOIC found that the certificate of incorporation and articles of incorporation cannot suffice to meet the above regulatory requirements, because they do not address the issue of *federal* tax exemption. On appeal, counsel correctly argues that the petitioner need not have obtained Internal Revenue Service recognition of tax-exempt status; the petitioner must only establish that it is eligible for such recognition. Counsel then contends that the petitioner has met this latter requirement because: "The Petitioner has obtained tax exempt status as indicated by the Articles of Incorporation . . . as well as the statement from the accountant mentioned above."

The necessary documentation to satisfy 8 C.F.R. § 204.5(m)(3)(i)(B) is described in a memorandum from William R. Yates, Associate Director of Operations, *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003):

(1) A properly completed IRS Form 1023;
(2) A properly completed Schedule A supplement, if applicable;
(3) A copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization;
(4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

Here, the petitioner has submitted a copy of the organizing instrument of the organization (the articles of incorporation), which addresses only one of the four factors listed above. Even then, the petitioner's articles of incorporation does not contain the required dissolution clause. The articles are essentially a "form" document with identifying information typed into blank spaces; there is no clause that deals with the disposition of the petitioner's assets in the event of dissolution. Whether the articles are sufficient to exempt the petitioner from Oklahoma *state* taxation is beside the point, because the pertinent regulations deal with *federal* taxation.

We concur with the IOIC's finding that the petitioner's documentation is not sufficient to establish that the petitioner is a qualifying tax-exempt church or religious organization. Even if the petitioner were, in the future, to remedy this deficiency by amending its articles of incorporation, it remains that the petitioner was not a qualifying entity at the time of filing. No future remedial action by the petitioner could retroactively restore eligibility with respect to the present petition. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998).

The final issue raised in the director's decision concerns the beneficiary's entry into the United States. Section 101(a)(27)(C)(ii) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii), requires that the alien seeking classification

"seeks to enter the United States" for the purpose of carrying on qualifying religious work. In this instance, the beneficiary entered the United States as a B-2 visitor for pleasure. Thus, the IOIC concluded, the beneficiary did not enter the United States for the purpose of performing qualifying religious work.

This finding is not defensible. The AAO interprets the language of the statute, when it refers to "entry" into the United States, to refer to the alien's intended *future* entry *as an immigrant*, either by crossing the border with an immigrant visa, or by adjusting status within the United States. This is consistent with the phrase "*seeks* to enter," which describes the entry as a future act. We therefore withdraw this particular finding by the director. The other stated grounds for denial, however, remain as sufficient grounds for denial of the petition and dismissal of the appeal.

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.