

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services

CL

FILE:

[REDACTED]
SRC 04 201 52494

Office: TEXAS SERVICE CENTER

Date: NOV 08 2005

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:

SELF-REPRESENTED

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

Robert P. Wiemann, Director
Administrative Appeals Office

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 is 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 minister. The director determined that the petitioner had not established that it was a bona fide nonprofit religious organization or that it had the ability to pay the beneficiary the proffered wage.

On appeal, the petitioner submits additional information.

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 it is a bona fide nonprofit religious organization.

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, which contains a proper dissolution clause and which specifies the purposes of the organization.

The organization can establish eligibility under 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting documentation that establishes the religious nature and purpose of the organization, such as brochures or other literature describing the religious purpose and nature of the activities of the organization. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operation for CIS, *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, and
- (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

The above list is consistent with the regulatory requirement at 8 C.F.R. § 204.5(m)(3)(i)(B), cited above. The memorandum specifically states that the above materials are, collectively, the "minimum" documentation that can establish "the religious nature and purpose of the organization." Thus, for example, a petitioner cannot meet this burden by submitting only its articles of incorporation. Also, obviously, it is not enough merely for the petitioner to *submit* the documents listed above. The *content* of those documents must establish the religious purpose of the organization.

The petitioner submitted no evidence with the petition.

In a request for evidence (RFE) dated March 14, 2005, the director instructed the petitioner to submit evidence to establish its tax-exempt status and quoted the specific provisions of the regulation and the Yates Memorandum.

In response, the petitioner submitted a copy of an April 20, 1992 letter from the State of Oklahoma Tax Commission, advising the petitioner that it was exempt from state sales tax, but did not provide any of the information requested and outlined in the RFE.

On appeal, the petitioner submits copies of an August 10, 1998 letter and a December 20, 2004 letter to the Southern Baptist Convention, advising that organization that it had a group tax exemption covering it and its subordinate units. The petitioner also submits a copy of a May 19, 2005 letter from the Executive Committee of the Southern Baptist Convention, indicating that the petitioner was covered under the group exemption granted to the Southern Baptist Convention.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The record before the director does not establish that the petitioner was a bona fide nonprofit religious organization.

The second 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 petition was filed on July 16, 2004. Therefore, the petitioner must establish that it had the continuing ability to pay the beneficiary the proffered wage as of that date.

The petitioner stated that the beneficiary would receive a compensation package of \$27,600 per year, to include a housing allowance of \$6,000 and salary of \$2,400 from the First Baptist Church of Muldrow, salary of \$3,600 from the First Baptist Church of Stilwell, and salary of \$15,600 from the Baptist General Convention of Oklahoma. The beneficiary's duties will include serving as pastor of both the church in Muldrow and the one in Stilwell. The petition was filed on July 16, 2004, therefore the petitioner must establish that the beneficiary's prospective U.S. employers had the continuing ability to pay the proffered wage as of that date.

In response to the RFE, the petitioner submitted copies of a document reflecting the sources of its income from its various churches and the Baptist General Convention of Oklahoma, its proposed budget for 2004-2005, and the budget for the First Baptist Church of Stilwell.

The petitioner also submitted copies of the beneficiary's Forms W-2 for 2004, which reflect that the beneficiary received approximately \$15,292 in wages (reported on two Forms W-2) from the First Baptist Church of Muldrow, and approximately \$4,392 in a parsonage allowance. The petitioner submitted no evidence to explain why the beneficiary's reported wages from the First Baptist Church of Muldrow exceeded the amount the church would pay as its share of the beneficiary's salary. The evidence is unclear as to whether the First Baptist Church of Muldrow reported wages from all sources and does not explain why the church issued the beneficiary two Forms W-2 in 2004. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The evidence submitted with the RFE did not reflect when the beneficiary began working for the Oklahoma churches; however, mission reports to the Baptist General Convention of Oklahoma, apparently attributable to the beneficiary, began for the reporting month ending January 2004. The beneficiary also reported wages and received a Form W-2 from his previous employer, [REDACTED] in Van Buren, Arkansas, during 2004.

On appeal, the petitioner submits copies of unaudited financial reports for the First Baptist Church of Muldrow for the years 2003 and 2004. The 2003 financial report indicates that the beneficiary began working with the First Baptist Church of Muldrow in March 2003, and states that the church is an extension of the beneficiary's previous employer in Arkansas. The report also indicates that the Muldrow church paid the beneficiary approximately \$10,893, and that he received another \$1,800 from the petitioner. The petitioner did not submit a copy of a 2003 Form W-2 that it issued to the beneficiary, or one that was issued by the Muldrow church. However, the record contains a copy of the beneficiary's 2003 Form W-2 from the [REDACTED] Van Buren, Arkansas, reporting wages of \$19,000. The beneficiary's year 2003 Form 1040A, U.S. Individual Income Tax Return, reflects wages of \$21,280. The record contains copies of a year 2003 State of Arkansas income tax return reporting wages of \$19,000 and a 2003 State of Oklahoma nonresident or part-year resident income tax return, reporting wages of \$21,280. The petitioner submits no evidence to explain these inconsistencies. *Id.*¹

The 2004 report contains copies of checks made payable to the beneficiary beginning in January 2004 and ranging in amount from \$100 to \$461.54. According to the report, the beneficiary was paid a salary from the First Baptist Church of Muldrow in the amount of \$14,288.50 (the salary checks reflect net salary after payroll deductions), and that he received a salary supplement paid through the petitioning organization of \$13,775.75. The document also indicates that the beneficiary received a housing allowance of \$4,392.26 and

¹ Assuming *arguendo*, that the beneficiary's Arkansas income tax return reports only income earned in Arkansas, and that the Oklahoma returns reports only income earned in Oklahoma, the amounts reported are still inconsistent with the amounts reported on his Forms W-2 and the amounts indicated in the financial statements submitted by the petitioner.

social security contributions of \$248.60. The amounts indicated on the financial report are not consistent with the amounts reported on the beneficiary's 2004 Form W-2 from the First Baptist Church of Muldrow. The petitioner submitted no evidence to explain these inconsistencies. *Id.*

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 petitioner has not established that the beneficiary's prospective U.S. employers paid him the proffered wage in the past and the inconsistencies in the record challenge the credibility of the evidence submitted. Additionally, as the petitioner has not submitted any of the required types of primary evidence, the record does not establish that the beneficiary's prospective employers have the continuing ability to pay him 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.