

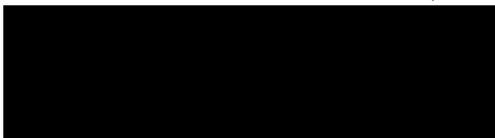
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

DEC 26 2006

IN RE:

Petitioner:

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a member church of Full Gospel World Missions, a Pentecostal Christian denomination. 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: (1) that the beneficiary had the requisite two years of continuous work experience as a minister immediately preceding the filing date of the petition; (2) that the beneficiary qualifies for classification as a minister; (3) the petitioner's status as a qualifying tax-exempt religious organization; or (4) its ability to pay the beneficiary's proffered salary.

On appeal, the petitioner submits a brief from counsel and several exhibits, some of which were submitted previously.

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).

First, we shall consider whether the petitioning entity qualifies as a church for the purposes of this proceeding. Pursuant to 8 C.F.R. § 204.5(m)(3)(i)(A), the petitioner can meet this burden by submitting 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.

[REDACTED], Deacon of the petitioning church, states:

[The petitioner] is a newly established and functioning church. It was established as a non-profit incorporation [*sic*] in the State of Hawaii on January 27, 2004. . . . Because the Church was so recently established, it did not have an opportunity to obtain a tax-exempt status under 501(c)(3) of the IRC. Although the Church is not currently certified as a tax-exempted religious organization, we submit that the Church would qualify as a bona fide nonprofit religious organization. . . .

The Church . . . is a nonprofit corporation which is organized and operated exclusively for religious purposes. . . .

In addition, the Church submitted an application to the IRS [Internal Revenue Service] to be qualified as a 501(c)(3) tax exempted religious organization [on] March 10, 2004.

The petitioner submits a copy of the petitioner's January 27, 2004 Articles of Incorporation. The beneficiary and his spouse are identified as the incorporators. These Articles amount to a "fill-in-the-blanks" template, apparently furnished by www.businessregistrations.com (the logo for which appears on the document). Article VI of this document reads, in full:

The corporation is nonprofit in nature and shall not authorize or issue shares of stock. No dividends shall be paid and no part of the income or profit of the corporation shall be distributed to its members, directors, or officers, except for services actually rendered to the corporation, and except upon liquidation of its property in case of corporate dissolution.

The petitioner submits a copy of IRS Form 1023, Application for Recognition of Exemption, accompanied by Schedule A (which pertains to churches), which the petitioner had filed with the IRS in March 2004. The Schedule A identifies the beneficiary as the petitioner's "Pastor/President/Secretary/Treasury/Director." Other named directors include [REDACTED] and the beneficiary's spouse.

On June 8, 2004, the IRS notified the petitioner that the Form 1023 application "did not include the information needed to make [a] determination" on the petitioner's eligibility for exemption, and that "the Internal Revenue Service will treat your organization as a taxable entity" unless the deficiencies were remedied. The record contains only the cover page of this notice, and therefore we cannot determine exactly what the IRS requested. We can infer, however, that the IRS informed the petitioner that its Articles of Incorporation lacked a qualifying dissolution clause and other required elements. We can support this inference by observing that, on October 12, 2004, the petitioner adopted amendments to its Articles of Incorporation. The amendments contain a substantially expanded "Purposes" section, as well as the following passage:

Upon the dissolution or winding up of the corporation, its assets . . . shall be distributed to a nonprofit fund, foundation, or corporation which is organized and operated exclusively for religious, charitable, or educational purposes and which has established its tax-exempt status

under Section 501(c)(3) of the Internal Revenue Code of 1986. . . . No director, officer, member, or employee of the corporation, or any private individual, shall be entitled to share in the distribution of any of the corporation's assets on dissolution of the corporation.

The record, therefore, demonstrates that the petitioner did not have a qualifying dissolution clause between January 2004, when it first incorporated, and October 2004, when it amended its Articles of Incorporation to include such a clause.

On April 21, 2005, the director issued a request for evidence (RFE), informing the beneficiary of various evidentiary deficiencies in the petitioner's initial filing. Among other things, the director stated: "The IRS letter dated June 8, 2004 is not sufficient evidence that your organization is tax-exempt. Provide a determination letter from IRS that your organization qualifies as a nonprofit religious organization." In response, the petitioner has submitted a copy of a March 31, 2005 IRS determination letter, indicating that the petitioner is a tax-exempt church. The effective date of the exemption is January 27, 2004.

The director denied the petition on January 20, 2006. In the decision, the director stated: "the Service questions that . . . the petitioner was recognized as a religious denomination at the time of the filing of the I-360," because the IRS then had yet to issue a recognition letter. On appeal, counsel states that the petitioner should not be penalized for the time that elapsed between the petitioner's incorporation and its recognition as a tax-exempt, non-profit religious organization.

It is beyond dispute that the IRS now recognizes the petitioner as a church. We note the following passage from chapter 1 of IRS Publication 557, *Tax-Exempt Status for Your Organization*:¹

Effective Date of Exemption

A ruling or determination letter recognizing exemption is usually effective as of the date of formation of an organization if, during the period before the date of the ruling or determination letter, its purposes and activities were those required by the law. . . .

If an organization is required to alter its activities or substantially amend its charter to qualify, the ruling or determination letter recognizing exemption will be effective as of the date specified in the letter. If a nonsubstantive amendment is made, such as correction of a clerical error in the enabling instrument or the addition of a dissolution clause, exemption will ordinarily be recognized as of the date of formation if the activities of the organization before the ruling or determination are consistent with the exemption requirements.

In the present instance, the March 31, 2005 determination letter shows that the petitioner's effective date of exemption was retroactive to its January 27, 2004 incorporation date. The retroactive date of exemption indicates that the IRS found that the petitioner had made no substantive changes to its activities or organizing instrument. Absent persuasive evidence that would compel another course of action, we defer to the IRS'

¹ The text of this chapter is available at <http://www.irs.gov/publications/p557/ch01.html> (visited November 17, 2006).

determination in this matter, and find that the petitioner's qualifying tax-exempt status was, for all practical purposes, in effect throughout the relevant portion of the qualifying period. We therefore withdraw the director's finding that the petitioner was not yet a recognized non-profit religious organization as of the petition's filing date.

The next issue we shall consider is whether the petitioner seeks to employ the beneficiary in a qualifying ministerial position. The regulation at 8 C.F.R. § 204.5(m)(2) defines the term "minister" as an 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.

8 C.F.R. § 204.5(m)(3)(ii)(B) requires the petitioner to show that the beneficiary has authorization to conduct religious worship and to perform other duties usually performed by authorized members of the clergy, including a detailed description of such authorized duties. [REDACTED] states:

We have established the following responsibilities for our Pastor:

1. Plan and lead Sunday Service for our congregation;
2. Implement and lead Sunday School programs through Bible teaching;
3. Conduct special religious worship services and spiritual duties;
4. Represent the [petitioning] Church in visits to other [REDACTED] functions;
5. Plan wedding and funeral services and make visits to Church members experiencing spiritual and emotional difficulties;
6. Carry out administrative and spiritual duties in accordance with the mission of the Church; and
7. Make periodic visits to Church members' residences for prayer and Bible studies.

The petitioner submits copies of the beneficiary's 1982 Master of Divinity degree and his 1996 certificate of ordination, establishing his credentials as a minister.

In denying the petition, the director stated:

[S]ince the beneficiary is the pastor/president/secretary/treasurer/director, it would appear that he must perform all administrative duties relating to the operation of the church. These duties are not classified as a religious vocation as enumerated in the regulations governing religious workers. . . . Since the beneficiary is the only paid staff of the church, it must be assumed that he is responsible for the operation of the church.

On appeal, counsel argues that the "administrative components" of the beneficiary's work is not disqualifying, because "there is a reasonable connection between the performed activities and the duties as the minister."

While it is likely that the routine operation of the church involves some administrative duties, it does not follow that an individual performing those duties cannot be solely engaged in the vocation of a minister. Such duties are arguably inherent to the work of the clergy. While a minister at a small church may have a greater share of administrative duties than a minister at a "megachurch" with dozens of subordinate employees, this is a problem only when these tasks occupy so large a proportion of the minister's duties as to make him or her a secretary first and foremost with only ancillary religious duties. Here, the director has not shown that the beneficiary works an outside secular job, or that he is a church custodian or secretary who fills in as a lay preacher at Sunday services. Rather, the director has simply presumed that the beneficiary must perform secular functions that the petitioner failed to list on its detailed breakdown of the beneficiary's duties. The stated basis for denial is not sufficient. Unless the director is able to produce evidence to contradict the petitioner's description of the beneficiary's job duties, we consider the petitioner to have satisfactorily demonstrated that the beneficiary is an ordained minister who continues to perform ministerial duties.

We now turn to the issue of 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 experience in the religious vocation, professional religious work, or other religious work. The petition was filed on November 15, 2004. Therefore, the petitioner must establish that the beneficiary was continuously carrying on the vocation of a minister throughout the two years immediately prior to that date.

[The beneficiary] started to attend Full [redacted] from 2001 and later became Pastor for the church from January, 2002 to April, 2004. . . . He has been serving as our pastor since April, 2004. . . . He has served more than [the] requisite two years as a full-time pastor prior to submitting this petition.

Documents reproduced in the record show that the beneficiary held an R-1 nonimmigrant religious worker visa authorizing him to work for [redacted], Honolulu, Hawaii, and later received an R-1 visa to work at the petitioning church. The petitioner submits copies of canceled checks from both churches. Checks from the petitioning church show that the petitioner began paying the beneficiary \$1,500 per month in late April 2004, increasing to \$2,000 per month in November 2004 (with the exception of the April 2005 payment, which was \$1,500).

Unlike the R-1 documents, the checks state the address of [redacted]. Most of the checks from the petitioner state the present petitioner's address as [redacted] Honolulu, placing the two churches on the same floor of the same building. A different address is printed on the petitioner's October 2004 check to the beneficiary, but the [redacted] Blvd. address is handwritten underneath that printed address.

The director, in the RFE, also called for a detailed history of the beneficiary's employment during the 2002-2004 qualifying period. The petitioner submitted copies of additional canceled checks.

On December 8, 2005, the director issued a notice of intent to deny (NOID). In that notice, the director observed that the beneficiary left [REDACTED] and founded the petitioning church. The director did not clearly state why this amounted to a potential ground for denial. The director also observed the variant addresses used by the petitioner and by [REDACTED]. The director further noted that the petitioner's church bulletins "have a picture of a church with a steeple, but in reality, the church is located on the second floor of a shopping center."

In response to the NOID, [REDACTED] states that the [REDACTED] address listed for [REDACTED] Church was actually that of the church's accountant, used on some tax documents. (For instance, the 2000 IRS determination letter issued to [REDACTED] was sent in care of the accountant at the [REDACTED] Blvd. address.) [REDACTED] asserts: "The [REDACTED] was indeed located at [REDACTED] and our Church took over the space when the [REDACTED] moved out." We note that a number of documents, such as paychecks and the Articles of Incorporation, identify the suite number for [REDACTED] rather than 210. Some church programs show the suite number as "201, 210," suggesting that the suites may be adjacent.

With regard to the pictures on the church bulletins, [REDACTED] states "we normally use religiously symbolic designs for our bulletin cover pages, and one of the designs used is a picture of a church with a steeple, not the actual picture of our Church."

The director denied the petition, repeating the passage from the NOID regarding the photograph on the church bulletins. The director also stated: "there is a five month lapse from the time the beneficiary terminated his employment [at [REDACTED] in April 2004 until the time the petitioner began operation in October 2004." The director asserted that this "five month lapse" was an unacceptable lapse in the continuity of the beneficiary's ministerial work.

Regarding the photographs on the petitioner's church bulletins, counsel observes that the bulletins use mass-produced templates, manufactured in Korea and then overprinted locally with information about the specific church. The petitioner submits a blank template on appeal. The photograph of the church appears to be a generic representation of a church, rather than a specific depiction of the petitioning church. This is fully consistent with the petitioner's earlier explanation. We agree with counsel that the petitioner's use of "pre-printed stationery . . . with a steeple, a religiously symbolic design" raises no legitimate issues of misrepresentation.

The director has repeatedly stated that the petitioning church "began operation in October 2004," but the record contains no evidence to substantiate that assertion. We sympathize with counsel's claim to be "perplexed as to how the Service came up with the October 2004 date as the start of the Petitioner Church's operation." The record amply demonstrates that the petitioning church incorporated in January 2004, and photocopied paychecks show that the petitioner paid the beneficiary as early as April 26, 2004. There is no

evidentiary support for the alleged "five-month lapse" in the beneficiary's employment during 2004, and we therefore withdraw the director's finding in that regard.

Review of the record, nevertheless, reveals a different gap for which the petitioner must persuasively account before we can find that the petitioner has met its burden of proof. As noted above, the petitioner has submitted photocopies of canceled checks that Hawaii Rainbow Church issued to the beneficiary. These checks show the following check numbers, dates and amounts:

1166	4/21/02	\$1,400.00	1201	11/17/02	\$1,500.00	112	10/28/03	\$2,729.16
1171	5/19/02	1,400.00	1206	12/15/02	1,500.00	[no #]	11/26/03	729.16
1175	6/9/02	1,650.00	1211	1/19/03	1,500.00	114	12/1/03	3,000.00
1178	6/16/02	1,400.00	1215	2/16/03	1,500.00	115	1/5/04	1,500.00
1184	7/1/02	1,500.00	1222	3/16/03	1,500.00	117	2/2/04	2,000.00
1186	8/18/02	1,500.00	1226	4/20/03	1,000.00	118	3/1/04	1,800.00
1191	9/15/02	1,500.00	1231	9/2/03	3,000.00	119	4/5/04	2,000.00
1197	10/20/02	1,500.00	105	10/6/03	1,500.00			

An annotation on check 1175 indicates that this check covered "Rent (for July) + Deposit." The remaining checks from [REDACTED] show no annotations. The change in check numbering after September 2003 coincides with a change in the church's bank account number (apparently indicating a new account at the same bank).

The checks show a significant drop in the beneficiary's compensation for April 2003, a gap from May to August 2003, and then wide variations in the amounts on the subsequent checks from [REDACTED] Church. We further note that the check numbers indicate that [REDACTED] typically issued roughly four to seven checks each month until April 2003, and then issued only four checks between April 20 and September 2, 2003. This is consistent with a marked slowing, or outright cessation, of [REDACTED] Church's activities during the late spring and summer of 2003. This is not the only possible explanation, of course, but to date the record contains no explanation at all for the erratic pattern of payments to the beneficiary during most of 2003.

The director must give the petitioner an opportunity to provide persuasive evidence from [REDACTED] Church to show that the beneficiary continuously performed the duties of a minister throughout mid-2003. This evidence must, wherever possible, take the form of first-hand, verifiable documentary evidence that originates from the period in question. After-the-fact witness statements, executed in furtherance of the present petition, will not carry the same weight as contemporaneous documentation.

The remaining issue also concerns the beneficiary's remuneration. The next issue concerns the petitioner's ability to pay the beneficiary's salary of \$2,000 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 petitioner's initial submission includes a list of church members, showing 33 members as of October 10, 2004. The initial submission also includes copies of bank statements and, as noted previously, canceled checks. The petitioner's first six checks to the beneficiary have been in the amount of \$1,500, rather than the proffered salary of \$2,000. On December 25, 2004, the petitioner issued a \$3,000 check to the beneficiary, with the annotation "unpaid salary (May-Oct.)." This check makes up for the earlier shortfall in the petitioner's compensation of the beneficiary. Subsequent checks have generally been for the full \$2,000 per month. The bank statements indicate that the petitioner routinely carries a balance of around \$20,000.

In the April 21, 2005 RFE, the director instructed the petitioner to "[s]ubmit bank letters, recent audits, church membership figures, and/or the number of individuals currently receiving compensation." The petitioner's RFE response includes an unaudited balance sheet for the period from May 1, 2004 to December 31, 2004, containing the following figures:

Ordinary Receipts	\$28,636.05
Special Collections (Wire from Korea)	9,985.00
Minister's Salary	13,000.00
Total Expenditures	26,993.36
Excess of Receipts over Expenditures	11,627.69

In the NOID issued in December 2005, the director stated:

With a congregation [of only] 33 individuals, the Service questions that this would entail a full-time forty (40) hour[s] per week for the beneficiary to administer to the spiritual needs of his parishioners. In addition, it appears that the congregation is unable to support the operating expenses of the church without receiving a supplement from, in this case, Korea.

In response to the NOID, [REDACTED] states:

Guided by the Lord, our church membership [has] now increased to fifty-five, which was a big jump from thirty-three at the time we submitted our I-360 petition. . . . Although our Church is not a big and rich church, we have a [congregation] full of devout members gathered to worship God and are able to pay for our Church expenses, including a compensation for [the beneficiary]. . . . As shown in [recent] bank statements, the average account balance per month is almost \$6,000.00. This balance is the excess of receipts after covering all of our Church expenses. Although our Church received one occasion of outside donation in the amount of \$9,985 from Korea when our Church was just established, our Church has improved financially and membership wise through God's blessing.

We note that the petitioner must establish its ability to pay the proffered wage as of the petition's filing date, and any subsequent growth cannot retroactively establish that ability.

██████████ refers to an "annual report" included with the NOID response, but this document, a Domestic Nonprofit Corporation Annual Report filed with the State of Hawaii, contains no financial information. It simply describes the petitioner's activities and lists its address its officers.

In denying the petition, the director did not cite the regulatory requirements at 8 C.F.R. § 204.5(g)(2). Rather, the director merely stated that the available evidence "fails to establish that the thirty-three members of the congregation have the monetary ability to sustain the operating expenses for the petitioner."

On appeal, counsel cites bank statements and asserts that the balances thereon are "excess after covering all of the Petitioner Church's expenses including [the beneficiary's] salary." Counsel argues that, given the petitioner's demonstrated ability to pay the beneficiary and meet other expenses, the petitioner's reliance on a "one-time outside donation of \$9,985.00" and the small size of its congregation do not prove that the petitioner is unable to pay the beneficiary.

The director never specified the regulatory requirements regarding evidence of the petitioner's ability to pay the beneficiary's proffered salary. It is, therefore, difficult to fault the petitioner for failing to meet those requirements. The director must afford the petitioner a final opportunity to meet this evidentiary burden. When evaluating this evidence, the director should take into account the petitioner's past payments to the beneficiary.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.