U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

61

PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 03 2006

SRC 05 229 51515

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:

[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.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, 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 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 pastor. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a pastor immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established its ability to pay the beneficiary's proffered salary.

On appeal, the petitioner submits arguments from counsel, a financial statement, and other materials. Counsel states: "We need to request a two or three week time extension to bring other records here from [redacted] There has been much difficulty locating the former employment records." This request was dated January 26, 2006. To date, eight months later, the record contains no further submission. Also, we note that the grounds for dismissal of this appeal do not relate to the beneficiary's employment in the Cayman Islands, and therefore further records of that employment would not have affected the outcome of the present decision.

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).

Both stated grounds for denial concern payments to the beneficiary, and are therefore intertwined to some extent. Regarding 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 August 17, 2005. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a pastor throughout the two years immediately prior to that date.

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 beneficiary arrived in the United States on February 18, 2005 under a B-1 nonimmigrant visa. Prior to that time, the beneficiary resided in the Cayman Islands for the balance of the two-year qualifying period.

[redacted]Cayman Islands, states that the beneficiary "became Pastor o[redacted] in October 1997 and has held that position from time forward receiving an annual salary of $33,600CI ($42,000US)."

[redacted]tly signed letter addressed to the beneficiary and dated June 2, 200[redacted]and [redacted] respectively President and Vice President of the petitioning church, state: "we are very proud to invite you to become our first full-time pastor. . . . It is our feeling that you and [your spouse] have been happy leading us over the past few months."

The petitioner has offered the beneficiary $4,333 per month plus housing. The petitioner's initial submission included no financial documentation. Accordingly, the director instructed the petitioner to "submit evidence such as cop[ies] of bank letters, recent audits, church membership figures, payroll tax return copies, and other appropriate evidence." The director did not cite the evidentiary requirements at 8 C.F.R. § 204.5(g)(2). The director also requested "a detailed description of the beneficiary's prior work experience including duties, hours and compensations (especially compensations) accompanied by appropriate evidence (such as cop[ies] of pay stubs or checks, W-2's/foreign equivalent or other evidence as appropriate)."

In response to the director's request, the petitioner offers a breakdown of the beneficiary's proposed compensation package:

1.) A housing rental allowance of $15000.00 per year
2.) Medical Insurance - $7200.00 per year
3.) A salary to adequately provide for all other expenses - $52000.00 per year

This would provide a total package of $74200.00 per year

This would translate to $6183.33 per month - $1426.97 per week

The petitioner submits copies of paychecks that [redacted] had paid to the beneficiary. The most recent check is dated February 12, 2005, days before the beneficiary departed the Cayman Islands for the United States. Pastor Scott of that church states that the beneficiary worked for the church "from July 1998 until February 2005," consistent with his prior assertion to that effect.

A joint letter signed by three church officials indicates that the church invited the beneficiary "to come to Jacksonville on a voluntary basis for up to six months" beginning in February 2005. The petitioner did not, at that time, claim to have paid the beneficiary for his work, nor did the petitioner provide evidence of such payments. In a separate letter, [redacted] one of the three signatories of the letter just discussed) states: "No individuals are at present employed by the church. [The beneficiary] would, upon his appointment, be the sole employee of the [petitioning church] for the foreseeable future."

The beneficiary describes the compensation he received from [redacted] and states: "I have not during my tenure in the Cayman Islands received or relied upon any supplemental income." The beneficiary makes no comparable claim regarding his time outside the Cayman Islands, in the United States.

An "Income & Expense" statement for the first ten months of 2005 lists the following among the petitioner's expenses:

Pastoral expenses	
Auto expenses – Pastor	$16,000.00
Flights & Travel expenses	5,000.00
Parsonage expenses	14,948.87
Subsistence allowance	38,999.97
Total Pastoral expenses	74,948.84

Copies of canceled checks show a series of payments issued to the beneficiary, including monthly payments of $4,333.33, indicating that the beneficiary is the pastor to whom the above payments were made.

The director denied the petition, in part because: "No documentation was submitted to substantiate a salary received after February of 2005. The petitioner's letter clearly states that the beneficiary was not paid a salary during part of the two years required preceding the filing of this petition."

On appeal, counsel states: "the Beneficiary has been paid every month since his arrival an amount exactly equal to the proffered salary for his position." The canceled checks reproduced in the record support this assertion. Church officials, in a new letter, refer to these payments as an "allowance" rather than as a salary. Nevertheless, by whatever terms used to describe it, it is clear that the petitioner financially supported the beneficiary during the relevant period. The provision of such support in return for the beneficiary's efforts

constitutes "employment" for immigration purposes. *Cf. Matter of Hall*, 18 I&N Dec. 203 (BIA 1982), which indicated that even when an alien works for non-monetary support, such as room and board, this arrangement amounts to employment for immigration purposes. Using alternative terminology such as "offering" or "allowance" in lieu of "salary" or "wage" does not insulate the petitioner or the beneficiary from the immigration consequences of this employment, whether positive (*e.g.*, establishing continuous experience) or negative (*e.g.*, violation of nonimmigrant status through accepting unauthorized employment). Statements by the petitioner to the effect that the petitioner did not yet "employ" the beneficiary have doubtless contributed to confusion on the issue of past compensation, but the documentary evidence in the record outweighs ambiguous statements by church officials.

Because the director, in the decision, never mentioned the canceled checks to the beneficiary, we can only assume that the director overlooked this evidence when arriving at the conclusion that there is no evidence of compensation. We withdraw the director's finding in this regard.

The petitioner must show, nevertheless, not only that it has paid the beneficiary in the past, but also that it will continue to be able to pay the beneficiary the proffered wage into the foreseeable future. Past payments do not, by themselves, establish an income stream or cash reserves sufficient to continue those payments.

In denying the petition, the director quoted the evidentiary requirements at 8 C.F.R. § 204.5(g)(2) and stated: "Unaudited financial reports are unacceptable" as evidence of ability to pay.

On appeal, the petitioner submits a document entitled "Financial Statements and Accountants' Review Report as of November 30, 2005." Counsel's only comment on this issue is: "Petitioner believes [the church] has demonstrated their ability to pay the Beneficiary's proffered salary as they have been doing so far the most recent twelve months." The document includes this disclaimer: "A review . . . is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion."

The regulation at 8 C.F.R. § 103.2(b)(2)(i) states, in pertinent part:

> The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document . . . does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence . . . pertinent to the facts at issue. . . . Secondary evidence must overcome the unavailability of primary evidence.

8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." The listed types of documents constitute the required primary evidence. The unaudited financial statement amounts to secondary evidence. The petitioner has not demonstrated that primary evidence does not exist and/or cannot be obtained. We acknowledge that churches are not generally required to file income tax returns, but this still leaves two alternative forms of primary evidence of ability to pay.

The director's request for evidence should have included the regulatory requirements at 8 C.F.R. § 204.5(g)(2), but it did not. Therefore, we cannot fault the petitioner for failing to include such evidence in its response to the request for evidence. Nevertheless, the director's notice of decision did cite those requirements, and therefore the appeal was the petitioner's opportunity to provide the required documents. Had the petitioner provided such documents on appeal, we would have given them due consideration.

In the denial notice, the director specifically informed the petitioner: "Unaudited financial reports are unacceptable." The petitioner responded by submitting an unaudited financial report, with no explanation as to why this was the best available evidence. We must conclude that the petitioner has failed to meet its burden of proof with respect to its ongoing ability to pay the beneficiary's proffered compensation.

Beyond the decision of the director, we note that the record does not appear to establish that the beneficiary belonged to the same religious denomination throughout the two-year qualifying period, as required by section 101(a)(27)(C)(i) of the Act and 8 C.F.R. §§ 204.5(m)(1) and (3)(ii)(A). There is, for instance, no evidence of denominational affiliation between the petitioning church and the church in the Cayman Islands where the beneficiary had worked previously. Because the AAO is already dismissing this appeal, and the director has not previously indicated with any clarity that this issue is problematic, we will not discuss it further here.

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.