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

U.S. Citizenship and Immigration Services

C1

[redacted]

FILE: WAC 05 041 53449 Office: CALIFORNIA SERVICE CENTER Date: SEP 01 2006

IN RE: Petitioner: [redacted]
Beneficiary:

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, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California 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 pastor. The director determined that the petitioner had not established that it qualifies as a bona fide nonprofit religious organization, that it has the ability to pay the beneficiary the proffered wage, or that it has extended a qualifying job offer to the beneficiary.

On appeal, counsel submits a brief and additional documentation.

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 qualifies as 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 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.

With the petition, the petitioner submitted a copy of its articles of incorporation containing the dissolution clause required by the IRS in determining whether an organization qualifies as a tax-exempt organization under section 501(c)(3) of the IRC.

In a request for evidence dated May 2, 2005, the director instructed the petitioner to:

> Provide evidence that the U.S. religious organization qualifies as a nonprofit religious organization in the form of either:
>
> (a) The Internal Revenue Service – IRS 501(c)(3) Tax Exempt Certification; 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.
>
> If you choose option (b), the documentation should include, at a minimum, a completed IRS Form 1023, the Schedule A supplement that applies to churches, and a copy of the organizing instrument of the church that contains a proper dissolution clause and that specifies the purpose of the organization.

In response, the petitioner resubmitted a copy of its articles of incorporation and submitted a June 2004 church program.

Counsel states on appeal that the petitioner did not submit a copy of an IRS tax-exempt certification or a copy of IRS Form 1023 "because it did not have [them] in its possession." Counsel further states:

> According to IRS, to receive Tax Exemption Certificate, one should submit Form 1023. [The petitioner] did not file Form 1023 with IRS because it relied on IRS Form 1023 Instruction which does not require Churches to file the form. IRS automatically treats churches as tax exempt . . . Further, the same document stresses the requirements for tax exempt qualification.

> It requires the organization to be [a] corporation. [The petitioner] has already submitted its Articles of Incorporation previously to meet the standard. The second requirement by IRS concerns [an] organization's operation. [The petitioner] already proved that it is operating exclusively for religious purposes . . ..
>
> Additionally, [the petitioner] submits 2005 Church Exemption from County of Los Angles Assessor . . . Filing of this document exempts [the petitioner] from property tax.

We note that the IRS advises churches that they are not required to file a Form 1023 "to be exempt from income tax," but that they may choose to do so to receive a determination letter. Citizenship and Immigration Services (CIS) does not require the petitioner to file a Form 1023 with the IRS. However, if the organization does not have a letter from the IRS granting it tax-exempt status as a religious organization, it must submit to CIS the documentation that it would have provided to the IRS to obtain such a determination. Further, although the statute and regulation do not require the petitioner to establish that it is a *church* to qualify as a bona fide nonprofit religious organization, it must establish that its tax-exemption is based on its religious nature. The regulation at 8 C.F.R. § 204.5(m)(3)(i)(B) contains provisions for establishing tax-exemption as a nonprofit religious organization when the petitioner does not have a letter from IRS specifically granting tax-exemption as a religious organization.

According to regulation, the petitioner must either provide verification of individual exemption from the IRS, proof of coverage under a group exemption granted by the IRS to the denomination, or such documentation as is required by the IRS to establish eligibility as a tax-exempt nonprofit religious organization. Such documentation to establish eligibility for exemption under section 501(c)(3) *includes*: a completed IRS Form 1023, a completed Schedule A attachment, if applicable, and a copy of the articles of organization showing, *inter alia*, the disposition of assets in the event of dissolution.

Absent a letter from the IRS granting the employing organization tax-exempt status as a religious 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's evidence consisted of only a copy of its articles of incorporation and a single church program. Therefore, as the petitioner has not submitted an IRS tax-exempt certification or evidence in accordance with 8 C.F.R. § 204.5(m)(3)(i)(B), it has not established that it is 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 November 29, 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 indicated that it will pay the beneficiary $1,000 per month plus $250 for his medical and dental insurance. As evidence of its ability to pay this wage, the petitioner submitted an unaudited copy of its balance sheet for the period December 1, 2003 through November 30, 2004 and an unaudited copy of its operating statement for the same time period. The petitioner also submitted a copy of a check reflecting that it paid the beneficiary $1,250 on May 8, 2005.

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.

On appeal, the petitioner submits copies of canceled checks indicating that it paid the beneficiary $1,000 per month beginning in April 2004, and $1,250 beginning in February 2005. The petitioner submitted no evidence that the $250 for medical and dental insurance that it stated it would provide to the beneficiary was "in-kind" compensation or provided as part of a group coverage. However, as the petitioner paid the beneficiary $1,250 beginning in February 2005, the evidence suggests that the $250 was an additional sum to be provided to the beneficiary in cash. As such, the petitioner has failed to establish that it has provided the beneficiary with the proffered compensation as of the date the petition was filed.

Accordingly, as the petitioner has not established that it has paid the beneficiary the proffered compensation in the past and has not submitted any of the required types of primary evidence, it has not established that it has the ability to pay the beneficiary the proffered wage.

The third issue on appeal is whether the petitioner established that it has extended a qualifying job offer to the beneficiary.

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 did not indicate the terms and conditions of the proposed employment with its petition. In response to the RFE, the petitioner stated that the beneficiary's salary is "fixed at $1.0000 [$1,000] per month also $250 for his medical and dental insurance." The petitioner indicated that it expected the beneficiary to work 40 hours per week.

In his decision, the director indicated that as the petitioner has not established that it paid the beneficiary the proffered salary in the past, it has not established that the beneficiary was not dependent upon secular employment for his support.

We withdraw this statement by the director. This is an offer of prospective employment, and there is no requirement in the statute or regulation that the petitioner established that it has employed the beneficiary at a stated rate of pay at any time prior to the filing of the visa petition.

We find that the evidence sufficiently establishes that the petitioner has extended a qualifying job offer to the beneficiary.

Beyond the decision of the director, the petitioner has not 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 November 29, 2004. Therefore, the petitioner must establish that the beneficiary was continuously working as a pastor throughout the two-year period immediately preceding that date.

In its letter of November 15, 2004 accompanying the petition, the petitioner stated that the beneficiary was "an active member" of Iglesia Cristiana Evangelica in Buenos Aires, Argentina for seven years. The petitioner did not

allege and submitted no evidence that the beneficiary was employed in any capacity during the qualifying two-year period.

In a his RFE, the director instructed the petitioner to:

> Provide evidence of the beneficiary's work history beginning November 29, 2002 and ending November 29, 2004 only. Provide a breakdown of duties performed in the religious occupation for an average week. Include the employer's name, specific job duties, the number of hours worked, [and] remuneration . . . Ideally, this evidence should come in a way that shows monetary payment, such as W-2 forms, pay stubs, or other items showing the beneficiary received payment. Documentation showing the withholding of taxes is good evidence. However, you may also show payment through other forms of remuneration. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported him or herself (and family members, if any) during the two-year period or what other activity the beneficiary was involved in that would show support. *Note: The petitioner must provide clear evidence that the beneficiary has been a minister of a religious denomination continuously for at least two years immediately preceding the filing of the petition.* [Emphasis in original.]

In its letter of July 12, 2005 submitted in response to the RFE, the petitioner stated:

> [The beneficiary] has been a member of [the] Armenian Pentecostal Church since 1968, he moved to Argentina and since 1997 has been [a] member of the same church in Argentina until he came to [the] United State[s] with his family in May of 2003. In Argentina he and his family were active members of the church. [The beneficiary] had the responsibility of the Armenian part of the service and did volunteer work for the church. Also, he had a part time job at a local factory as a supervisor. He includes his pay stubs from his earnings in [the] factory . . .
>
> His salary is fixed $1.0000 [sic] per month also $250 for his medical and dental insurance.
>
> [The beneficiary] is working in [the petitioning church] 40 hours per week. His duties and responsibilities include preaching in every service, visit all the members, help in [sic] them with spiritual needs. He also covers our 30-minute Saturday's evening program on TV . . . providing spiritual help and informing people about the salvation of Jesus Christ. [He] is responsible for administrative work, such as distribution of the Bibles in the community, taking care of the building and organizing church activities.

The petitioner submitted an undated letter from Ruben Kassabian, the senior pastor of Jesús 100% Vida, who stated:

> I know [the beneficiary] since 1997, and since then he has been a member of our congregation. He has served God in different areas of the church. [the beneficiary] served as a sunday [sic] school teacher for Armenian Immigrants, participated in the ministery [sic] of worship, and did evangelism in the community reaching out the [sic] needy families.

The petitioner submitted what it stated were "paystubs schedule received in Argentina in factory." The document is not accompanied by an English translation as required by the regulation, which requires that documents submitted in a foreign language "shall be accompanied by a full English translation which the translator has

certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." 8 C.F.R. § 103.2(b)(3). Therefore, the document is not probative and will not be given any weight in this proceeding.

The petitioner also submitted a copy of its June 2005 church program, which lists the beneficiary as the pastor's "helper" and a copy of a May 8, 2005 check made payable to the beneficiary in the amount of $1,250. The petitioner submitted no other evidence, such as canceled pay checks, pay vouchers, authenticated work schedules, or other documentary evidence to establish that the beneficiary worked as a pastor during the two years immediately preceding the filing of the visa petition. 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 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 the rare case where volunteer work might constitute prior qualifying experience, the petitioner must establish that the beneficiary, while continuously and primarily engaged in the traditional religious

occupation, was self-sufficient or that his or her financial well being was clearly maintained by means other than secular employment.

On appeal, the petitioner submitted evidence that it had paid the beneficiary beginning in May 2004. However, the evidence does not establish that the beneficiary has served as a pastor at any time during the qualifying two-year period. Further, the petitioner submitted no evidence to corroborate that the beneficiary worked in any religious occupation prior to May 2004. This deficiency constitutes an additional ground for which the petition may not be approved.

Accordingly, the petitioner has not established that the beneficiary was continuously engaged in a qualifying religious vocation or occupation for two full years preceding the filing of the visa petition. This deficiency constitutes an additional ground for which the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.