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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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File: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 19 2007

SRC 03 236 50361

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)

IN 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

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification of 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). The director denied the petition based upon the four following grounds: 1) the petitioner failed to establish that the beneficiary had the requisite two years continuous experience, 2) the petitioner failed to establish that the proffered position is a qualifying religious occupation, 3) the petitioner failed to demonstrate its ability to pay the proffered wage and 4) the petitioner failed to establish that it is a qualifying tax-exempt organization.

On appeal, counsel for the petitioner provides a brief which addresses the director's findings regarding whether the beneficiary has the requisite two-years of work experience, whether the position is a qualifying religious occupation and whether the petitioner is tax-exempt but does not address the director's findings related to whether the petitioner has the ability to pay the proffered wage. Upon review, we concur with the director's determination. The petitioner does not overcome these findings on appeal.

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 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 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 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 August 29, 2003. Therefore,

the petitioner must establish that the beneficiary was continuously performing the duties of the proffered position throughout the two-year period immediately prior to that date, from August 29, 2001 through August 29, 2003. The record reflects that the petitioner entered the United States as a B-2 nonimmigrant on December 12, 2001 and that she did not begin to work for the petitioner until August 2002, when her status was changed to that of an R-1 nonimmigrant.

In the letter submitted by [redacted], reverend of the petitioning church, [redacted] describes the petitioner's previous experience. He states:

> [The beneficiary] is a member of the Presbyterian faith and has been since birth. She previously was a chantreuse [sic] with the Korean Presbyterian Church in Seoul from 1984 to 1986, where she lead the children's class. From 1987 to 1988, she was the leader of the High School class and was a soloist during church services. From January 1991 to December 1996, [the beneficiary] was the Vice Conductor and the Chanter of the Hosannah Choir at Chonan, Chungnam, Korea. The Hosannah Choir was the name of one of the Church's choir and she would oftentimes perform as a soloist. In January 1997, she was the Vice Conductor and Chanter for the Zion Choir for the same church.

Although the petitioner indicates that the beneficiary's was a singer, a soloist, the lead of the children's and high school class, and the vice conductor, he does not indicate that the beneficiary has had any prior experience as a director of choir, the position for which she will be hired at the petitioning church.

Not only has the petitioner failed to establish that the beneficiary had been performing the duties of a choir director during the two-year period preceding the filing of the petition, but the petitioner has failed to establish that the beneficiary was even continuously employed during the entire two-year period. As previously indicated, the petitioner entered the United States in December 2001 and did not begin work for the petitioner until August 2002, leaving a gap of nearly eight months in her employment.

Moreover, despite the submission of evidence which indicates that the beneficiary has received remuneration from the petitioner prior to the date the petition was filed, the record does not demonstrate consistent payments or payments according to the terms stated by the petitioner such that those payments establish the petitioner's ability to pay. The letter from [redacted], dated May 15, 2003, states that although the beneficiary is "currently working as the Director of the Choir," she "will be receiving a salary of $200.00 in a week" and that her "proposed salary" is $200.00 per week . . . ." The record contains copies of the following checks issued by the petitioner to the beneficiary during the two-year qualifying period:

Check number	Date	Amount
4253	September 15, 2002	$200.00
4260	September 22, 2002	$200.00
4349	December 15, 2002	$400.00
4370	December 22, 2002	$200.00
4389	December 29, 2002	$200.00
5092	April 6, 2003	$847.00
5129	May 25, 2003	$677.60
5285	August 4, 2003	$677.60

5293	September 7, 2003	$677.60[1]

Despite the petitioner's indication that the beneficiary would be paid $200 per week, the checks submitted by the petitioner do not indicate consistent weekly payments. For instance, for 2002, the petitioner has not submitted evidence of payment to the beneficiary for two weeks in September and for the entire month of October and November. Further, in 2003 the petitioner failed to show any payments to the beneficiary in January, February or March, and only two payments for all of April and May. Moreover, at least half of the checks are written for the amount of either $677.60 or $847.00, sums for which we can find no explanation given the petitioner's claim of an even monthly salary of $200. Based on this irregular schedule of payments, it is unclear whether the beneficiary was working on a continuous basis from September 2002 through August 2003.

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. Com. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Com 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,

[1] It is unclear whether the September 2003 check is for work performed during August of 2003, which is still within the qualifying period.

monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and salaried. To hold otherwise would be contrary to the intent of Congress.

Based upon the evidence discussed above, the petitioner has failed to establish that the beneficiary, throughout the two-year qualifying period, has been performing the same duties that the petitioner intends for the beneficiary to perform in the United States and that the beneficiary was continuously employed in the proffered position on a full-time basis for the entire two-year period preceding the filing of the petition. Accordingly, we uphold the director's finding that the petitioner has not satisfied the two-year experience requirement.

The next issue is whether the position that is being offered to the beneficiary qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a "religious occupation" and the regulation at 8 C.F.R. § 204.5(m)(2) states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The list reveals that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as cantor, missionary, or religious instructor are examples of qualifying religious occupations. The regulation reflects that nonqualifying positions, such as janitors, maintenance workers, and clerks, are those whose duties are primarily administrative or secular in nature.

Citizenship and Immigration Services has interpreted the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

The petitioner repeatedly describes the proffered position as a "part-time position" which will require the beneficiary to work for approximately 22 hours per week. While the petitioner submitted copies of job openings for positions similar to that of the beneficiary's position, presumably as evidence that the occupation is defined and recognized by the denomination,[2] none of the job descriptions indicate that the position is a full-time position. Rather, the descriptions indicate that the position is a part-time position which requires anywhere from 4 hours per week to 20 hours work per week.

On appeal, counsel cites to *Perez v. Ashcroft,* 236 F. Supp 2d 899 (N.D. Ill. 2002) and states that the beneficiary's position falls within a religious occupation as "the federal court found that a music director was a religious occupation." Counsel submits no other arguments on appeal regarding this issue. In *Perez v. Ashcroft*, contrary to counsel's characterization, the judge did not state that "*a* music position 'qualifies as a religious occupation,'" rather, the judge reviewed the evidence submitted with respect to that petition and stated "it is really beyond dispute that *his* position as music director qualifies as a religious occupation," referring to the specific facts of that particular case. The decision is not a blanket ruling that *every* church music director works in a qualifying religious occupation. Traditional religious functions vary from denomination to denomination. The employer and alien in *Perez v. Ashcroft* belonged to the Southern Baptist denomination, whereas the matter now at hand concerns the Presbyterian Church.

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[2] It is noted that most of the job descriptions do not reference the Presbyterian church, but rather the Catholic and Lutheran churches.

In this instance, the petitioner has failed to establish that the beneficiary's position is a defined and recognized by the governing body of the petitioner's denomination. Further, as noted by the petitioner itself, the proffered position is not a full-time, salaried occupation. Accordingly, we uphold the director's determination on this issue.

The next issue is whether the petitioner has established its 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.*

[Emphasis added].

As cited above, the regulation requires the petitioner to establish the ability to pay at the time of filing the petition; in this instance, August 29, 2003. With the initial submission, the petitioner submitted bank statements and a letter. As the bank statements are dated November 2002, December 2002, and February 2003, they are not sufficient to demonstrate that the petitioner had the ability to pay the beneficiary from the time of filing in August 2003. More importantly, 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. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The petitioner also submitted financial statements from November 2000 through November 2001 and copies of bank statements dated January 1999 through March 1999, November 2002 through December 2002, and February 2003 through March 2003. As previously noted, in accordance with 8 C.F.R. §204.5(g)(2), the petitioner must establish the ability to pay from the date of filing until the beneficiary obtains lawful permanent residence. In this instance, all of the statements provided by the petitioner precede the date of filing by at least five months. It is noted that even if the financial statements covered the appropriate period of time, there is no indication that the statements have been audited.

Accordingly, such evidence is not sufficient to establish that petitioner's ability to pay the beneficiary from the time of filing. We, therefore, concur with the finding of the director that the petitioner failed to establish its ability to pay the beneficiary the proffered wage.

The remaining issue is whether the petitioner is considered a qualifying tax-exempt religious organization. The regulation at 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.

Counsel contends that the petitioner is "a corporation operated exclusively for religious purposes and therefore falls squarely within the 501(c)(3) taxation exemption" and refers to the petitioner's Articles of Incorporation and a document from the Secretary of State in Texas designating the United Korean Church of Houston as a non-profit and tax exempt organization. It appears that counsel is confusing what is required of the petitioner by the IRS versus what is required by the Act and regulations to establish eligibility for this classification. It is true that pursuant to 8 C.F.R. § 204.5(m)(3)(i)(B), an organization need not establish that the IRS *has* recognized it as tax-exempt, only that it *qualifies* for such exemption. To show that it qualifies for exemption, the regulation requires the petitioner to submit "[s]uch documentation as is required by the Internal Revenue Service to establish eligibility for exemption." In determining whether the petitioner has demonstrated *it would be* eligible for tax-exemption, it is not enough for the petitioner to simply show that it would qualify for tax-exempt status under section 501(c)(3) of the Code. Instead, the regulation makes clear that a petitioner's tax-exempt status or qualification for such status must be *related* to the fact that the petitioner is a religious organization.

The necessary documentation 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[3] 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.

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. That being said, it is important to note that item (2), Schedule A of Form 1023, is only required "if applicable." The Yates Memorandum does not state that the petitioner must provide one item from the list. Rather, *all* the listed documents, "at a minimum," are necessary to establish that the entity has represented itself to the IRS as being primarily a religious

[3] An organization may be granted an exemption if the purposes stated in the articles of organization are limited in some way by reference to 501(c)(3). The assets of an organization must be permanently dedicated to an exempt purpose. This means that should an organization dissolve, its assets must be distributed for an exempt purpose described in this chapter, or to the federal government or to a state or local government for a public purpose. *See IRS Publication 557.*

organization, in instances where the religious nature of the exemption is not readily apparent from the IRS exemption letter.

The documents listed in the memorandum are, taken together, "such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations." 8 C.F.R. § 204.5(m)(3)(i)(B).

In this instance, the petitioner has not submitted a Form 1023 but has submitted its Articles of Incorporation, which contain the appropriate dissolution clause. We find also find that the record contains sufficient evidence to establish that religious activities are undertaken at the petitioning church. However, the issue here is not whether religious activities take place. Rather, what must be established and, thus far, has not been established, is whether the petitioner would be eligible for tax-exemption based upon the fact that it is a religious organization. The petitioner's approval by the state of Texas as a non-profit, tax-exempt organization is not evidence that the Internal Revenue Service (IRS) has, in fact, recognized the petitioner as a tax-exempt religious organization. The petitioner has also failed to submit "[s]uch documentation as is required by the Internal Revenue Service to establish eligibility for exemption."

The petition will be denied for the above-stated reasons, with each considered as an independent and alternative basis for denial. 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.