U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 17 2008

WAC 07 025 53362

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 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 an associate pastor.

The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition or that the beneficiary was employed in a full-time salaried employment.

On appeal, counsel for the petitioning organization submits a brief along with copies of documents that were previously provided.

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 is whether the petitioner 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)(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 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 (Sept. 19, 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).

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.

The petition was filed on November 2, 2006. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a pastor throughout the two years immediately preceding that date.

Along with the Form I-360, the petitioner submitted documentation indicating that the proffered position requires 40 to 45 hours of service per week and that the hours of duties are 9 a.m. to 5 p.m. Tuesdays through Sundays. The petitioner described the responsibilities of the beneficiary as follows:

- Plan, administer, implement, and monitor missionary programs and activities of the church under the supervision of senior pastor.
- Provide administrative leadership for the missionary committee, the professional staff, and all volunteers within the church.
- Provide congregational direction for missionary and evangelism through the use of effective organizational leadership, communication, family and spiritual counseling, fellowship activities, group facilitation, and strategies designed for congregational revitalization.
- Set educational guidelines to provide a diverse curriculum of spiritual enrichment through evangelism and missionary work and expose the congregation to new experiences that provide life long learning opportunities through missionary and evangelism, and conduct Bible Study Classes and teach Bible to church members.
- Prepare, plan and arrange Sunday Worship Services, and performing the Sunday liturgy for adults.

The petitioner indicated, in pertinent part:

> [The beneficiary] has continuously been a pastor to the Presbyterian denomination for 40 years. After [the beneficiary] came to U.S. as his Sabbatical year, he was hired as a full time pastor by Mok Po San Jung Hyun Church in South Korea until his R-1 petition was approved on March 2, 2006. [The beneficiary] has been serving God, our Lord Jesus Christ, in several Korean churches belong to the Presbyterian. Before coming into the U.S.A., [the beneficiary] had been a senior pastor in the Mok Po San Jung Hyun Church in South Korea for 15 years.

As evidence of the beneficiary's employment in South Korea, the petitioner submitted a Certificate of Employment from The Korean Presbyterian General Assembly which outlined the beneficiary's "experiences of services" as "Chairman of Mok-Po Assembly" since October 5, 2002. The certificate was attested to by the chairman, Reverend [redacted] and the secretary, Reverend [redacted].

On December 11, 2006, the director issued a Request for Evidence (RFE), and instructed the petitioner to submit a detailed description of the beneficiary's work history for the two years prior to the filing date of the petition.

In response, counsel indicated that the beneficiary had served as a full-time pastor at Mok-Po San-Jung-Hyun Church in South Korea from October 5, 1980 to February 28, 2006, and provided an additional Certificate of Employment from The Mok-Po Presbyterian Church Assembly in South Korea, which outlined the beneficiary's "experiences of services" as "Elected of the Chairman of Mok-Po Presbyterian Church Assembly since October 5, 2002. The document was attested to by the chairman, Reverend [redacted], and the secretary, Reverend [redacted]

Counsel also indicated that the beneficiary has been employed as a full-time associate pastor by the petitioning organization since March 2, 2006. The petitioner indicated that the beneficiary is employed full-time at an annual salary of $24,000.00 and his hours of duties are from 6:00 a.m. to 4:00 p.m. Tuesdays through Sundays. The petitioner submitted the beneficiary's Form W-2, Wage and Tax Statement, and Form 1040A, Individual Income Tax Return, for 2006 and described the duties of the beneficiary as follows:

- Assume all pastoral duties in the absence of the Pastor including preaching and overall administrative duties.

Plan, administer, implement, and monitor missionary programs and activities of the church under the supervision of senior pastor.

- Provide administrative leadership for the missionary committee, the professional staff, and all volunteers within the church.
- Provide congregational direction for missionary and evangelism through the use of effective organizational leadership, communication, family and spiritual counseling, fellowship activities, group facilitation, and strategies designed for congregational revitalization.
- Set educational guidelines to provide a diverse curriculum of spiritual enrichment through evangelism and missionary work and expose the congregation to new experiences that provide life long learning opportunities through missionary and evangelism, and conduct Bible Study Classes and teach Bible to church members.
- Assist senior pastor in preparing, planning, arranging Sunday Worship Services, and performing the Sunday liturgy.

In denying the petition, the director noted that Citizenship and Immigration Services records reflect that the beneficiary entered the United States with a B-2 visitor visa on September 7, 2005. He remained in the United States as a B-2 nonimmigrant, a classification with does not permit the alien to engage in employment. *See* 8 C.F.R. § 214.1(e). On February 15, 2006, a Form I-129 was filed on his behalf by the petitioning organization. The Form I-129 was approved on March 2, 2006, and the beneficiary's status was changed to that of an R-1 nonimmigrant religious worker. In adjudicating the instant petition, the director determined that the beneficiary's presence in the United States from September 7, 2005 through February 28, 2006 as a B-2 nonimmigrant visitor undermines the petitioner's claim that the beneficiary was employed by an organization in Korea during the same time. The director concluded that there was an unexplained break in the continuity of the beneficiary's employment as a religious worker from September 7, 2005 through March 2, 2006.

On appeal, counsel asserts that the beneficiary visited the United States with a visitor visa during his sabbatical year, and that the beneficiary continued to receive his salary as a pastor of Mok-Po San-Jung-Hyun Church in South Korea. However, the petitioner has not provided any evidence that the beneficiary received any salary from the Korean Church from 2004 to 2006, either while the beneficiary was in Korea or while he was in the United States on sabbatical.

The only evidence submitted to establish the beneficiary's employment in Korea is a "Certificate of Employment." The certificate, however, does not 1) indicate whether the beneficiary worked full-time or part-time; 2) outline the duties and responsibilities of the beneficiary; and 3) establish that the position of "Chairman" is a traditional religious function within its particular denomination. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As the petitioner has not established that the beneficiary was continuously employed in a qualifying religious occupation or vocation for two full years preceding the filing of the visa, the petition may not be approved.

The second issue is whether the beneficiary received remuneration in the proffered position for the two year preceding the filing of the petition.

In the RFE, the director instructed the petitioner to submit evidence detailing the amount of compensation the beneficiary received during the two year period. In response, counsel provided the beneficiary's wage and tax statement and Form 1040 for 2006.

The director, in denying the petition, noted that the petitioner had not submitted any evidence of remuneration for the period of the beneficiary's employment in South Korea during the requisite two-year period. The director concluded that the petitioner had, therefore, not established that the beneficiary was employed in a full-time paid employment in the proffered position.

On appeal, counsel asserts that the petitioning organization did not submit any formal tax report from the church in South Korea because "[t]he Office of the National Taxation in Korea does not furnish any tax report to Church members including Pastors because the Church is a non-profit organization. While we could not produce [the beneficiary's] tax report in Korea for the above reasons, we submitted the Certificate of Employment."

Counsel's assertion is not supported by any evidence. The Certificate of Employment is silent on whether or not the beneficiary received remuneration. The record contains no documentary evidence, such as earnings statements, canceled checks, or other materials, to establish that the beneficiary was remunerated prior to March 2, 2006. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. at 3; *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

As the record does not demonstrate the beneficiary received remuneration for his services from November 2004 to February 2006, the petitioner has not established that the beneficiary had the requisite two years experience in the proffer position immediately preceding the filing date of the petition. Therefore, the petition must also be denied for this reason.

Beyond the decision of the director, it is noted that the petitioner has submitted several documents with different addresses for its church, thereby raising questions to its authenticity. Along with the Form I-360, the petitioner submitted the following conflicting information regarding its location and the year it was established:

Location of Church

- An incomplete lease agreement which shows that the agreement was made "on April [ ] 1998;" however, the day that the agreement was made has been omitted and the term of the lease indicates that it commenced on December 1, 2002 and ran through November 30, 2008. Based on the conflicting dates, it appears that the lease agreement is an altered copy of a 1998 agreement.
- The Certificate of Incorporation of the petitioning organization dated August 29, 1999, indicates that the principal place of worship is to be located in Queens County, at 150-16 10th Avenue, Whitestone, New York 11357. In addition, in a letter dated October 18, 2006, the senior pastor of the petitioning entity confirmed that the church was "established at 150-16 10th Avenue Whitestone, New York" and referenced the altered 1998 lease agreement as evidence of the church's existence. However, the lease agreement indicates that the premises that the church leased are to be used and occupied only as "an executive office."

- The petitioning organization lists its address in its bylaws at Flushing, New York.
- The petitioning organization provided its weekly schedule and lists its address as [redacted] Flushing, New York. Three weekly service pamphlets dated September 10, 2006, October 1, 2006, and October 15, 2006, state that the church is located at this same address.
- With the petition and in response to a request for evidence, the petitioner submitted an undated "letter of job offer," which indicated that its address is [redacted] in Flushing, NY.

Date Established

- The petitioner's Certificate of Incorporation is dated August 29, 1999.
- The petitioner provided three weekly service pamphlets dated September 10, 2006, October 1, 2006, and October 15, 2006, all of which state that the church was established on June 25, 2000.
- In a letter dated October 18, 2006, the senior pastor of the petitioning entity stated that the church was "established at [redacted] Whitestone, New York in 2003."

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Based on the repeated, contradictory information provided by the church, it is not possible to determine where the church is now, where it has been located since its establishment, or even what year the church was established. Accordingly, the petitioner has not established that it is bona fide nonprofit religious organization within the meaning of 8 C.F.R. § 204.5(m)(2), and that it has extended a qualifying offer of employment to the beneficiary pursuant to 8 C.F.R. § 204.5(m)(4).

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.