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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 10 2008**
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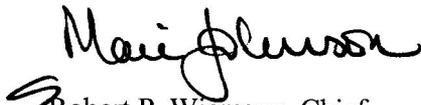
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 a pastor.

The director determined that the petitioner had not established that it has had the ability to pay the beneficiary the proffered wage and that the beneficiary has been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition.

On appeal, the petitioner submits a brief disputing the director's findings.

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 petition was filed on October 23, 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.

In a letter dated August 9, 2006, the petitioner asserted that the beneficiary is one of its denomination pastors who his exercises his pastoral responsibilities at its Brooklyn Hispanic Primitive Methodist Church. The petitioner, asserted, in pertinent part:

[The beneficiary] is currently in his second year of “Elder Transfer” status. This status is reserved for all pastors who have been ordained in another denomination and have transferred to our denomination. [The beneficiary] was ordained in the Free Methodist denomination and he transferred to us almost two years ago. All ordained men who transfer to our denomination are placed in a two year probationary status known as “Elder Transfer”. At the end of two years these pastors will have their credentials received and be considered full Elders among us.

In May of 2007, [the beneficiary] is scheduled to have his ordination credentials received at a formal service of our denomination’s pastors and delegates meeting at Sandy Cove Bible Conference in North East, Maryland. At that time he will be officially moved from Elder Transfer status to Elder status.

* * *

The Brooklyn Primitive Methodist Church is still considered a mission church under our National Mission Board, so is not yet subject to the routine assessments or financial of our other churches.

In a letter dated September 26, 2006, the petitioner asserted, in pertinent part:

[The beneficiary] has been a pastor of our Brooklyn National Mission church which was established June 2000. [The beneficiary] has been involved with this ministry since June 2004.

At the present time he is employed by our National Mission Board and is active in the Pastoral ministry working with the Hispanic congregation of the Brooklyn, New York, Primitive Methodist Church “Iglesia Evangelica Hispanic Metodista Primitiva.”

[The beneficiary] has completed his studies and educational requirement and we will be receiving his transfer of ordination at our Annual Conference in May, 2007.

He currently receives a salary of \$19,800.00 from our denominational National Mission Board. The Iglesia Evangelica Hispanic Metodista Primitiva Church pays his housing allowance.

The petitioner submitted a letter dated October 6, 2006, from [REDACTED] president of The [REDACTED] [REDACTED] at [REDACTED] Ridgewood, New York, who asserted, in pertinent part:

The [beneficiary] is employed as the principal pastor of our congregation which has a membership comprised of fifty nine (59) people. The [beneficiary] has twenty three years (23) of ministerial experience, of which two (2) he has been employed in our congregation in Brooklyn. His preparation, capacity and work development provides us with good work in our church, in virtue we guarantee permanent work for him in the United States. He is involved in the preaching of sermons, marriage conferences, bible studies, hospital visits, baptisms, matrimones, house visits, prayer, burials of the dead, etc. The [beneficiary] graduated from the seminary of the Free Methodist church and ordained ministry of the same, licensed in theology, agronomy engineer, and many other courses, he has also complied with the academic requirements of our church to be transferred with all his credentials.

He started working with us on July 2, 2004; and is earning a salary of \$19,800 per year, he is also receiving housing, telephone expenses, and insurance for his vehicle which means we are covering his expenses.

The petitioner submitted the following with English translations:

- Copies of the beneficiary's degrees in Theology from National Evangelical University issued on September 30, 2004, Agronomy Engineer from Autonomy University of Santo Domingo (Dominican Republic) issued on June 14, 2001.
- Church programs for the months of July 2005, October 2005, December 2005, January and February 2006, May 2006, and August, September and October 2006.

On December 11, 2006, the director issued a Request for Evidence (RFE) and instructed the petitioner to submit copies of the beneficiary's Form W-2's, wage and tax statements, along with corresponding income tax returns for 2005 and 2006 and:

Provide evidence of the beneficiary's work history for the years 2004, 2005 and 2006. Provide experience letters written by the previous and current employers that include a breakdown of duties performed in the religious occupation for an average week. Include the employer's name, specific dates of employment, specific job duties, number of hours worked per week, form and amount of compensation and level of responsibility/supervision. In addition, submit evidence that shows monetary payment, such as pay stubs, or other items showing the beneficiary received payment. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported himself during the two-year period or what other activity the beneficiary was involved in that would show support.

The petitioner, in response, asserted that Brooklyn Hispanic Mission is affiliated with its organization, and that the church "has what we call 'Mission Status,' meaning it is not yet self-supporting, and is under 5 years old." The petitioner stated that the Primitive Methodist National Mission Board currently overseas this church and financially supports its ministry. The petitioner asserted that the beneficiary is a pastor of its denomination and is assigned to its church in Brooklyn, New York. The petitioner listed the church's weekly schedule as follows:

TUESDAY

7:00 a.m. - 9:00 a.m. Prayer, meditation and preparation for the Bible study
1:00 p.m. - 3:00 p.m. Personal evangelism and distribution of Christian literature
7:30 p.m. - 9:00 p.m. Small Group Bible Study

WEDNESDAY

6:00a.m. - 7:00 a.m. Prayer and intercession for the peace of our nation, our authorities and our families.
10:00 a.m. - 12:00 p.m. Children's Program Planning
7:30 p.m. - 9: 00 p.m. Small Group Bible Study

THURSDAY

6:00 a.m. - 7:00 a.m. Prayer and intercession for the sick, for the country and churches
10:00 a.m. - 12:00 p.m. Telephone ministry to those with personal needs
3:00 p.m. - 5:00 p.m. Personal evangelism and distribution of Christian literature

FRIDAY

6:00 a.m. - 7:000 a.m. Prayer and intercession for the sick, for the country and churches
9:00 a.m. - 12:00 p.m. Preparation of Sunday's sermon.
2:00 p.m. - 5:00 p.m. Home visitation
7:00 p.m. - 9:00 p.m. Church school in the temple

SATURDAY

6:00 a.m. - 7:00 a.m. Prayer and intercession for all the countries in the world
10:00 a.m. - 1:00 p.m. Fasting and prayer in the temple
2:00 p.m. - 4:00 p.m. Volunteered to visit in the hospital
4:00 p.m. - 6:00 p.m. Telephone counseling

SUNDAY

6:00 a.m. - 7:00 a.m. Prayer and intercession
9:00 a.m. - 11 AM Worship through music and arts
2:00 p.m. - 4:00 p.m. Transport the elderly to the temple
4:00 p.m. - 6:00 p.m. Worship and sermon
6:00 p.m. - 8:00 p.m. Delivery of food

The petitioner also submitted:

- Copies of Form 1040, Individual Income Tax Return, for 2004 and 2005 signed by the beneficiary on February 6, 2007. The income tax returns were stamped as received by the Internal Revenue Service (IRS) on February 6, 2007.
- The beneficiary's 2006 Form 1099-MISC reflecting other income as \$19,988.00 from the petitioning organization.
- A letter written in the Spanish language with the English translation from [REDACTED] of Evangelist Church, Dominican Free Methodist, Inc., in Santo Domingo, Dominican Republic. [REDACTED] indicated that the beneficiary began his pastoral functions at the Dominican Free Methodist Church in 1983, was ordained as a pastor in 1989 and had performed ministerial duties at four churches in the Dominican Republic through 2004.

The director issued an additional RFE dated April 12, 2007, which instructed the petitioner to submit evidence of the beneficiary's two-year membership in its denomination. The director noted that it was not clear whether the beneficiary will be working in a vocational or ministerial capacity and, therefore, requested that the petitioner clarify the duties of the beneficiary. The petitioner was also requested to submit evidence of the beneficiary's ordination along with a list of the requirements for ordination/authorization.

Counsel, in response, submitted a letter dated July 2, 2007, from the petitioner who indicated that the proffered position is that of a pastor at Brooklyn Hispanic Church, and that the beneficiary's responsibilities are the same as they were at the time he was officially hired in October 2004. The petitioner indicated that the beneficiary's work history and education "are specifically for Pastoral service in a church like ours." The petitioner asserted, in pertinent part:

[The beneficiary's] general duties in the position encompass responsibilities for all aspects of leadership within this congregation. He is responsible for preaching, teaching, counseling, directing all educational ministries of the church, and reporting converts, financial data, and all youth ministries. Because this is a new church, he is responsible to establish a self-sustaining congregation and locating a building in which to worship.

* * *

Because this church in Brooklyn is not yet self-sustaining, his salary is paid by our National Mission Board. This board has established the understanding that [the beneficiary] will not be seeking employment outside his church, though other pastors are sometimes allowed to supplement their salaries with other employment, especially if their churches are self-sustaining and the pastor's salary is not subsidized.

* * *

The minimum education for our denomination requires ordination as a Pastor is a bachelor's degree, the completion of all required classes in our Summer School of Theology and Correspondence School of Theology, and a two to four-year Student Pastor status in one of our churches. [The beneficiary] has received his Bachelor's degree and has finished all required courses in our Summer and Correspondence Schools, and he has just finished his second year of probationary status. In addition, [the beneficiary] has also completed his master's degree in an accepted seminary. Because [the beneficiary] was previously ordained in the Free Methodist Church, we considered him ordained during the 2 years of probationary status. He was ordained and his credentials from the Free Methodist Church were received on Thursday, May 17, 2007, at a Service of Ordination during our Annual Conference Sessions. [The beneficiary] is now considered a fully ordained Elder among us, with all the rights and duties that entails. Even though much of his experience and education was gained while a member of a sister denomination, because the responsibilities are almost identical, all his education and experience transfers from the Free Methodist denomination to our Primitive Methodist denomination. Though he is now ordained in our denomination, because he was ordained previously, his duties now are no different from his duties before he was ordained by us in May of 2007.

* * *

[The beneficiary] receives the minimum salary of our denomination for this year which is \$21,200, plus a housing allowance and any other benefits our National Mission Board makes

available. His salary arrangements have been changed as we learn about the requirements of INS for non-citizens residing in the US and working in this country.

Counsel submitted an affidavit from the beneficiary which listed his departures from and entries into the United States. Counsel also submitted an affidavit notarized July 2, 2007, from the beneficiary who asserted, in pertinent part:

I began working for Principal Installation SE around February - March of 2006. My work consisted of helping to install reserve power systems in case of emergency.

I subsequently learned that religious workers are not allowed to work outside their petitioning church. I became aware of this from friends and other people I knew who were also foreign religious workers.

As soon as I realized that I was not permitted to work outside the church, I ended my employment with Principal Installation SE. This happened around May or June of 2006.

* * *

For the brief time I worked there, I was unaware that I was not allowed to, especially because my lawyer had told me that it was legal.¹

Counsel submitted copies of documents that were previously provided along with:

- The beneficiary's 2006 income tax return.
- A 2006 Form W-2, wage and tax statement, reflecting wages of \$6041.60 from Principal Installation SE in New York, New York.
- A copy of the beneficiary's passport with Form I-94.
- A Certificate of Ordination dated May 17, 2007 issued by the petitioning organization.
- The petitioner's 2006 yearbook directory, which lists the beneficiary's name under Ordained Elders.

The director, in denying the application, determined that the untimely filing of the beneficiary's 2005 income tax return did not establish that the petitioner remunerated the beneficiary for services rendered in 2005, and that the petitioner had not submitted evidence of remuneration for 2004. The director noted that the total income the beneficiary received in 2006 was \$26,030.00, of which one-fourth of the income was received from working at Principal Installation SE. The director concluded that the petitioner had not established that the beneficiary had been working continuously in a religious position in a full-time position for the two years immediately preceding the filing of the petition.

While the director only mentioned the untimely filing of the 2005 income tax return in her decision to deny the petition, it must be noted that the beneficiary also filed an untimely 2004 income tax return. 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

¹ The beneficiary's counsel represented him in a Form I-360 petition that was filed on December 5, 2005. Said petition was denied on July 13, 2006.

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) of the Act 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.

On appeal, counsel submits a letter dated August 8, 2007, from [REDACTED], general secretary of the petitioning organization who indicates that the beneficiary’s employment commenced in October 2004 and that he was paid monthly in October, November and December. [REDACTED] further indicates, in pertinent part:

Our policy was to pay the local church treasury, then the local church treasurer would pay the pastor – this is why the checks are not made out to [the beneficiary].”

[The beneficiary] is currently searching his personal bank records for proof that he did receive this money.

After learning that INS requires that we pay our pastors directly, we adjusted our policy and began sending the check to [the beneficiary] directly.

Counsel submits copies of documents that were previously provided along with the following:

- Two processed checks dated October 15, 2004 and November 15, 2004 from National Mission Board made payable to the petitioning organization.
- Several *unprocessed* checks dated December 20, 2004 through December 29, 2006 made payable to the beneficiary.
- The beneficiary’s Form W-2 for 2004

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence in response to the RFE. On that basis alone, the petition may not be approved. 8 C.F.R. § 103.2(b)(14). The petitioner now submits some of the requested evidence on appeal. The AAO will not consider this untimely submission for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Regarding the untimely filing of the income tax returns, counsel, on appeal, asserts that the beneficiary did not file his 2005 income tax timely “due to confusion of the tax requirement for pastors.” Counsel submits an affidavit dated August 14, 2007 from the beneficiary stating that his income tax returns were filed late because in early 2005, he was told by two tax preparers “that because I was a Pastor, I was exempt from paying my taxes.”

Like a delayed birth certificate, the late filing of the individual income tax returns years after the claimed transaction raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings).

The beneficiary, in his affidavit of August 14, 2007, indicated that he believes that the denial of the petition was partially based on the untimely filing of his taxes. This assertion, however, is not supported by the record. Once it was apparent that the income tax returns were filed untimely, the director found that the returns could not serve as contemporaneous evidence that the petitioner remunerated the beneficiary in 2004 and 2005. The petitioner could have submitted other documentation to establish remuneration for 2004 and 2005, but failed to do so in response to the RFE issued on April 12, 2007.

On appeal, the petitioner submits additional checks, but none of them appear to have been processed and, therefore, they also do not establish the beneficiary’s employment.

Regarding the secular employment, counsel asserts that during this four-month period the “beneficiary worked at Principal Installation during his free time, continuing full time employment at the church.” As evidence, counsel refers to the beneficiary affidavit of July 2, 2007 and the unprocessed checks dated February 15, 2006 through May 30, 2006.

The petitioner has asserted that it paid the beneficiary for his services in 2004 and 2005; however, its claim has not been credibly substantiated. In addition, the evidence reflects that the beneficiary was engaged in secular employment and, therefore, was not “solely carrying on the vocation of a minister,” as required in the regulations, and supported by case law cited above. The petitioner has not established that the beneficiary had been continuously engaged in a full-time salaried religious vocation or occupation during the two-year period immediately preceding the filing date of the petition. For this reason, the petition may not be approved.

The second issue on appeal is whether the petitioner has established its ability to pay 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 initial filing contained no evidence of the petitioner's ability to pay the beneficiary the proffered wage. The director, in issuing the RFE dated December 12, 2006, instructed the petitioner to submit evidence of its ability to pay the proffered wage in the form of annual reports, federal tax returns or audited financial statements.

Counsel, in response, submitted a "copy of Annual Yearbook or 2006 from The Primitive Methodist Church," which counsel asserted confirms the petitioner's ability to pay the beneficiary.

In issuing the additional RFE dated April 12, 2007, the director, once again instructed the petitioner to provide evidence of its ability to pay the beneficiary's wages. The RFE specifically indicated:

Evidence of this ability shall be either in the form of copies of annual reports, signed copies of federal tax returns, or audited financial statement. If the petitioner's company has one hundred (100) or more workers the petitioner may instead provide a statement from a financial officer of the organization that establishes the prospective employer's ability to pay the proffered wage.

Counsel, in response, submitted an unaudited 2006 financial statement from the National Mission Board.

The above-cited regulation at 8 C.F.R. § 204.5(g)(2) 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 evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Accordingly, as the petitioner has not established that it has paid the beneficiary the proffered salary in the past and failed to submit any of the primary types of evidence, it has failed to establish that it has the continuing ability to pay the beneficiary the proffered wage as of the filing date of the petition. This decision constitutes an additional ground for dismissal of the appeal.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. The burden of proof in these proceedings rests solely 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.