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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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DATE: **MAY 04 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a local organization of the Seventh-day Adventist (SDA) 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 missionary literature evangelist. *The director determined that the petitioner had not established that the beneficiary will work in a qualifying religious occupation.*

On appeal, the petitioner submits legal arguments and excerpts from church publications.

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 September 30, 2012, 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 September 30, 2012, 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 appeal concerns the question of whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The regulation at 8 C.F.R. § 204.5(m)(5) defines "religious occupation" as an occupation that meets all of the following requirements:

(A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination.

(B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.

(C) The duties do not include positions that are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible.

(D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

The petitioner filed the Form I-360 petition on July 27, 2009. In an accompanying attestation, the petitioner provided the following information:

Detailed description of the alien's proposed daily duties.

1. Visits house to house presenting religious literature;
2. Visits to schools and other educational institutions to present literature.
3. Taking of sales training seminars.
4. Organizing, participating and cooperating in public Gospel crusades, meetings in tents, and other public places;
5. Visits to the elderly and sick people of the community, house to house, to pray and to distribute our literature.
6. Preaching of the Word of God in our local churches, and presenting our religious books and magazines.
7. Preparing inventory of books, and magazines, and taking orders.
8. Activities with young people about the use of drug, alcohol, and tobacco.
9. Attending the annual colporteurs assembly.
10. Visiting public library and presenting the religious literature.

Description of the alien's qualifications for position offered.

1. Baptized member of the Seventh Day Adventist Church
2. Life governed by the high Biblical standard held by the Seventh Day Adventist Church
3. Demonstrate by attitude and conduct the call of God
4. Cooperate with the churches in the preaching of the Gospel
5. Teach biblical studies

In 2007, USCIS proposed a revised definition of "religious occupation" at 8 C.F.R. § 204.5(m)(4) that stated, in part: "Examples of non-qualifying administrative and support positions include . . . those who sell literature." 72 Fed. Reg. 20442, 20452 (April 25, 2007). When USCIS later published the final rule, and addressed comments on the proposed rule, USCIS stated:

One commenter was concerned that the proposed regulation excludes "those who sell literature" as a qualifying religious occupation because distribution of literature can be an inherently religious activity. The notion of canvassing, including selling literature, has a long history in the United States and USCIS acknowledges that

history. USCIS does not agree, however, that selling literature alone is a basis for admission of an alien to the United States as a religious worker, but has removed “those who sell literature” from the list of excluded occupations as well as the other non-qualifying examples. Fundraising is prohibited from qualifying as a religious occupation, but whether a position that involves selling literature may qualify as a religious occupation will depend on the evidence submitted.

73 Fed. Reg. 72276, 72281 (November 26, 2008). It is clear from the above discussion that the removal of the phrase “those who sell literature” from the final regulation is not a concession that the sale of literature is a qualifying religious occupation.

On October 22, 2009, the director instructed the petitioner to submit evidence to show that the beneficiary’s intended occupation meets the regulatory definition of a religious occupation. In response, the petitioner submitted a “Description of Literature Ministry” attributed to the petitioner’s publishing department and signed by [REDACTED], secretary of the petitioning organization. The document reads, in part:

The [REDACTED] was established right from the very beginning of the church, namely in the 1840s. It was established as an effective means to spread the beliefs of the [REDACTED] by individuals.

The [REDACTED] work is a full-time outreach of the Church and is designed to persuade other people to join, and also to promote good reading material for the home. While the greatest emphasis is on Bible-related books . . . , it also includes books on health, such as medical books and other books to promote healthful living. Other topics treated in our publications are: A Five-Day Stop Smoking Plan, a monthly magazine for teenagers to help prevent them from using drugs and other harmful substances, as well as books on marriage and child raising.

Thus, [REDACTED] visit mainly non-Seventh-Day Adventist homes. . . . Thus, even though he sells books and magazines, the Literature Evangelist is much more than a salesperson. They are evangelists who preach through literature. The Church believes that book selling is missionary work of the highest order.

The Tenth Circuit Court of Appeals in Denver, Colorado, in *Tate vs. Akers*, said: “The Literature Evangelist’s work is primarily evangelistic and the sales of literature in the homes is incidental to their visits.”

The passage in quotation marks does not appear in the *Tate v. Akers* decision. The portion of that decision that most closely resembles that passage is: “We agree with the trial court that the dominant and primary mission of the colporteur is to spread the gospel, and the sale of church literature is incidental thereto and does not convert a minister into a peddler.” *Tate v. Akers*, 565 F.2d 1166, 1170 (10th Cir. 1977). That case concerned an anti-peddling law that prohibited door-to-door literature

sales without a permit; the Tenth Circuit found that the literature sales were only incidental to the literature evangelist's primary goal of spreading SDA's understanding of the Gospel.

The AAO notes that the present proceeding did not arise within the jurisdiction of the Tenth Circuit (which encompasses Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming), and therefore *Tate v. Akers* would not constitute a binding precedent even if it related to immigration matters, rather than a local anti-peddling ordinance. A circuit court decision is binding only within that circuit. See *Matter of J. [REDACTED]*, 24 I&N Dec 768 (BIA 2009); *Matter of K-S-*, 20 I&N Dec 715 (BIA 1993); *Matter of Anselmo*, 20 I&N Dec. 25, 30-32 (BIA 1989).

If the petitioner intends to rely on [REDACTED] as a definitive finding that literature evangelism is first and foremost religious work, it is instructive to compare the beneficiary's intended duties to those described in the court decision. The court stated:

The literature evangelist goes from door-to-door attempting to engage residents in conversations about contemporary problems and proposing to offer a religious solution to them. If the householder shows no interest or does not invite them into the house, the literature evangelist politely leaves. If the householder invites the literature evangelist into his home, the evangelist discusses these world problems, offers his religious solution to them, and in the course of it, may offer to sell the individual any one or more of a series of publications produced by the church.

. . . If the individual is not interested in purchasing any of the sets offered for sale, the literature evangelist offers to pray with the individual or the family and also offers to leave with them at no cost a 32-lesson home-study Bible course. The evangelist also endeavors to make an appointment for a return visit in order to continue the ministry which has begun with this first visit.

Id. at 1169. With respect to the beneficiary's duties, the petitioner submitted a translated "Breakdown of Duties Performed by [the beneficiary] for an Average Week," specifically the week of November 24, 2009:

Sunday:

- 10:00 AM to 12:00 PM. Lecture at a community center in [REDACTED] Rico, titled: "How to Replace the Carbonate[d] Beverages."
- 2:00 PM to 5:00 PM. Visits to the [REDACTED] in San Juan, Puerto Rico: 5 families visited, 3 prayers. Day income: \$30.00.

Monday:

- 8:00 AM to 3:00 PM. Visit to public school [REDACTED] giving a health lecture on "How to avoid obesity." Then a presentation and sale of Christian books to the teachers in their classrooms.
- 8:00 PM [to] 9:30 PM. Health lecture on "How to avoid dehydration" at a local church. Then presentation and sale of health books. Day income: \$125.00.

Tuesday:

- 9:00 AM to 5:00 PM. Visits to people in their homes. Prayers with 5 people and sale of religious and health books. Day Income: \$75.00.

Wednesday:

- 9:30 AM to 5:00 PM. Lecture on "How to avoid the Stress" at a Police Station in San Juan, Puerto Rico. Presentation and sale of religious and health literature to the policemen and personnel. Day income: \$80.00.

Thursday:

- 9:00 AM to 4:30 PM. Lecture at a private company on the benefits of vegetarianism, how to replace the animal products and foo[d] using vegetarian products. Presentation and sale of religious and health literature. Day income: \$108.00.

Friday:

- 8:00 AM to 4:00 PM. Visit to the Cupey Alto Community in San Juan, PR. 10 families visits with presentation and sale of religious and health literature. Prayers with the people. Day income: \$80.00.

The breakdown repeatedly combines lectures and literature sales within the same time period, without specifying how much time the beneficiary devoted to lectures as opposed to sales. Given that these combined blocks of time are up to eight hours long, it appears likely that the beneficiary devoted considerably more time to sales than to lectures. As described, all of the lectures concerned health issues rather than religious matters. The petitioner has not explained how lecturing on a secular topic to an audience of non-Adventists constitutes a traditional religious function of the SDA Church. Selling religious literature after a secular lecture does not cause the lecture to be religious, and selling secular literature (such as books about health) after a secular lecture does not appear to bring religion into the picture at all.

If the beneficiary's health-related lectures are not secular, then presenting a religious lecture at a public school during school hours would appear to run afoul of the Supreme Court's holding that "utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith . . . falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504." *People of State of Ill. ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 210, 68 S. Ct. 461, 464, 92 L. Ed. 649 (1948).

The director denied the petition on December 22, 2009, stating that the petitioner had not submitted any primary evidence to establish that the SDA Church recognizes the beneficiary's activities as a religious occupation that relates to a traditional religious function. On appeal, [REDACTED] again cites *Tate v. Akers* and maintains that "[a] literature evangelist, or colporteur, is a credentialed representative of the Church and is considered to be engaged in a form of ministry." Given the differences between the beneficiary's stated duties, and those listed in *Tate v. Akers*, this argument is not persuasive in the proceeding at hand.

The record amply establishes that the SDA Church recognizes the occupation of the literature evangelist. This recognition, however, relates only to part of subparagraph (A) of the regulatory definition of a "religious occupation." Another clause of that same subparagraph requires the petitioner to show that the position relates to a traditional religious function. Subparagraph (B) of the definition requires that "[t]he duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination." If denominational recognition were sufficient to meet all of these requirements, then their inclusion in the regulation would be redundant. Therefore, given the structure of the regulatory definition, the SDA church's recognition of the literature evangelist does not prove, demonstrate, or imply that the duties of a literature evangelist relate to a traditional religious function and also are primarily related to, and clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.

The petitioner quotes SDA Church founder [REDACTED] on the subject of "canvassing work," but the breakdown of "an average week" indicates that the beneficiary devoted only one day of that week to canvassing. The beneficiary devoted the rest of the week to health lectures, often at government sites such as a public school and a police station, where the establishment clause of the First Amendment curtails religious activity. The choice of subject matter, combined with constitutional restrictions on religious activity in a governmental context, tend strongly toward the conclusion that the beneficiary's activities were basically secular. The AAO acknowledges that [REDACTED] writings touched often on issues of health and diet, but an anti-obesity lecture at a public school does not become a religious observance merely because the speaker belongs to the SDA Church.

If the beneficiary rarely devotes so much time to lectures and presentations on health-based matters, then the breakdown does not represent an "average week" as the petitioner has claimed. If that is the case, then the petition rests in part on a false claim.

For the reasons discussed above, the AAO agrees with the director's finding that the petitioner has not established that the beneficiary's intended position qualifies as a religious occupation.

Review of the record reveals another issue of concern. The AAO may identify additional grounds for denial beyond what the Service Center identified 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The USCIS regulation at 8 C.F.R. § 204.5(m)(10) reads:

Evidence relating to compensation. Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. If IRS [Internal Revenue Service]

documentation, such as IRS Form W-2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

The USCIS regulation at 8 C.F.R. § 204.5(m)(11) reads, in pertinent part:

Evidence relating to the alien's prior employment. Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:

- (i) Received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns.
- (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.
- (iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.

In the attestation accompanying Form I-360, under “[d]escription of the proposed salaried and/or non-salaried compensation,” the petitioner stated: “\$1,200 monthly salary. Other compensations include financial aid for rent of \$300.00 monthly, and \$100.00 for gasoline expenses.” The petitioner did not submit documentation, from the IRS or any other source, showing that the petitioner has paid or will pay the beneficiary at the stated rate.

The initial submission included an uncertified copy of an IRS Form 1040-PR income tax return, on which the beneficiary appears to have reported \$11,000 in income for 2008. The petitioner also submitted copies of unprocessed paychecks payable to the beneficiary, with receipts, dated at irregular intervals from 2007 to 2009. Most of these checks are marked “ACCOUNTS RECEIVABLE.” The checks are in widely varying amounts, from \$30 to more than \$9,500. One \$150 check is marked “COST OF GOODS SOLD.”

In the October 2009 request for evidence, the director instructed the petitioner to submit copies of IRS Form W-2 Wage and Tax Statements, to show the petitioner's salary payments to the beneficiary in 2007 and 2008. The petitioner's response to the notice did not include those documents or any explanation for their absence.

The petitioner submitted a letter from [REDACTED], who stated that the beneficiary “works around forty hours per week. He is a . . . full-time self-support worker.” [REDACTED] added:

His average income per years [*sic*] is:

- 2005 \$9,255.50
- 2006 4,144.67
- 2007 10,318.70
- 2008 6,283.52
- 2009 17,624.17

[REDACTED] letter shows major variations in the beneficiary’s annual compensation, with his 2009 income being more than four times his 2006 income. This is consistent with the unpredictable nature of a salesperson’s commission-based earnings, but it is not consistent with payment of a regular monthly salary. The petitioner did not submit IRS evidence of the listed earnings, or explain the absence of that evidence.

The petitioner did not submit any evidence of either its ability or its intention to provide the beneficiary with a regular \$1,200 monthly salary plus benefits worth another \$400 per month. That compensation package would be worth \$19,200 per year, which is more than the beneficiary appears ever to have received.

The petitioner has not met the regulatory requirements at 8 C.F.R. §§ 204.5(m)(10) or (11) relating the beneficiary’s past and intended future compensation. USCIS cannot properly approve the petition without this required evidence.

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 met that burden. Accordingly, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed.