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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

DEC 16 2005

WAC 02 159 50105

IN RE:

Petitioner:

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:

SELF-REPRESENTED

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, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially denied by the Director, California Service Center for abandonment. The director granted a motion to reopen and again denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a church.¹ 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 assistant pastor. The director determined that the petitioner had not established that it qualified as a bona fide nonprofit religious organization. The director further 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 will be solely engaged in pastoral duties.

On appeal, the petitioner submits a letter and copies of previously submitted documentation.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The first issue on appeal is whether the petitioner established that it is a bona fide nonprofit religious organization. The regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

¹ 8 C.F.R. § 103.2(a)(3) specifies that a petitioner may be represented "by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter." In this case, the person listed on the G-28 is not an authorized representative.

(3) *Initial evidence.* Unless otherwise specified, each petition for a religious worker must be accompanied by:

(i) Evidence that the organization qualifies as a nonprofit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases, evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organization.

To meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(A), a copy of a letter of recognition of tax exemption issued by the Internal Revenue Service (IRS) is required. In the alternative, to meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B), a petitioner may submit such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code (IRC) of 1986 as it relates to religious organizations. This documentation includes, at a minimum, a completed IRS Form 1023, the Schedule A supplement, if applicable, and a copy of the organizing instrument of the organization, which contains a proper dissolution clause and which specifies the purposes of the organization.

The organization can establish eligibility under 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting documentation that establishes the religious nature and purpose of the organization, such as brochures or other literature describing the religious purpose and nature of the activities of the organization. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operation for CIS, *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003):

- (1) A properly completed IRS Form 1023,
- (2) A properly completed Schedule A supplement, if applicable,
- (3) A copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization, and
- (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

The above list is consistent with the regulatory requirement at 8 C.F.R. § 204.5(m)(3)(i)(B), cited above. The memorandum specifically states that the above materials are, collectively, the "minimum" documentation that can establish "the religious nature and purpose of the organization." Thus, for example, a petitioner cannot meet this burden by submitting only its articles of incorporation. Also, obviously, it is not enough merely for the petitioner to *submit* the documents listed above. The *content* of those documents must establish the religious purpose of the organization.

With the petition, the petitioner submitted a copy of a May 5, 1948 letter from the Franchise Tax Commissioner for the State of California. In a request for evidence (RFE) dated January 26, 2005, the director instructed the petitioner to submit evidence of its federal tax exemption in the form of either a letter from the

IRS or such documentation as is required by the IRS to establish eligibility under section 501(c)(3) of the IRC. The director also instructed the petitioner to submit a copy of its articles of incorporation.

In response, the petitioner submitted a copy of a September 28, 1992 letter from the IRS notifying the petitioner of its employer identification number. The petitioner also submitted a copy of a notification from the county tax assessor identifying the petitioner's property as tax exempt for religious purposes. The copy of the petitioner's articles of incorporation does not include a dissolution clause required by the IRS for purpose of granting tax-exempt status under section 501(c)(3) of the IRC.

The director did not provide the petitioner with an opportunity to submit the materials outlined in the Yates memorandum, and thereby demonstrate that it is eligible for tax-exempt status pursuant to 8 C.F.R. § 204.5(m)(3)(i)(B). This deficiency is not fatal to the director's decision, however, because (as discussed below) we have affirmed the other stated grounds for denial, which clearer evidence of qualifying tax-exempt status would not overcome.

The second issue on appeal is whether the petitioner established that the beneficiary was continuously engaged in a qualifying religious occupation or vocation for two full years preceding the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file a Form I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States." The regulation indicates that the "religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition."

The regulation at 8 C.F.R. § 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

(ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:

(A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

The petition was filed on April 11, 2002. Therefore, the petitioner must establish that the beneficiary was continuously working as an assistant pastor throughout the two-year period immediately preceding that date. The petitioner submitted no evidence of the beneficiary's qualifying experience with the petition. In his January 26, 2005 RFE, the director instructed the petitioner to:

Provide evidence of the beneficiary's work history beginning April 11, 2000 and ending April 11, 2002. 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, the 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 director also instructed the petitioner to submit copies of the beneficiary's tax documents (Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income) if the beneficiary worked in the United States during the qualifying period.

In response, the petitioner submitted an April 7, 2003 statement purportedly by the beneficiary but signed by his unauthorized representative, [REDACTED]. The letter indicated that the beneficiary's duties consisted of giving sermons, visiting homes and hospitals and marriage counseling. The work schedule provided indicated that the beneficiary managed a photography business in which, from 9:00 a.m. to 3:00 p.m., his "duties include selling portraits where needed and going door to door offering my services to the community in which they can take pictures for their families, children, and couples." The schedule indicated that the beneficiary's religious activities were conducted during the weekdays after 4:00 p.m., and on Saturdays and Sundays, and included preaching, accounting, assisting in organizing classes at the church's Biblical institute, organizing visiting hours, working with the church musical groups, home visitations, and visiting other churches. The petitioner provided no documentary evidence to corroborate this schedule or any work performed by the beneficiary during the qualifying period. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner stated in a letter dated March 29, 2005 that the beneficiary supported himself and his family with money received from the sale of a business in Mexico. The petitioner submitted copies of a July 1, 2000 sales contract indicating that the beneficiary sold a furniture store in Mexico for "\$700,000.00 (in Mexican currency)." The petitioner also submitted copies of the beneficiary's monthly bank statements for April through July 2001, and September 2001 through December 2002. The statements reflect that the beneficiary opened the account in April 2001 with \$1,000 and deposited \$50,000 into the account on May 17, 2001.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." See H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Comm. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 1963).

The term "continuously" also is discussed in a 1980 decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

In line with these past decisions and the intent of Congress, it is clear, therefore, that to be continuously carrying on the religious work means to do so on a full-time basis. That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is not paid, the assumption is that he/she is engaged in other, secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who in accordance with their vocation live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and generally salaried. To hold otherwise would be contrary to the intent of Congress.

In the rare case where volunteer work might constitute prior qualifying experience, the petitioner must establish that the beneficiary, while continuously and primarily engaged in the traditional religious occupation, was self-sufficient or that his or her financial well being was clearly maintained by means other than secular employment.

The copies of the bank statements indicate, that while the beneficiary appeared to have a substantial sum in his checking account beginning in May 2001, the record is unclear as to whether the beneficiary relied upon this money for his financial support. Withdrawals and checks written on the account do not reveal a consistent pattern of using the funds to meet the beneficiary's living expenses. Additionally, the account often reflected additional deposits to the account, some in excess of \$2,500. The record indicates that the beneficiary worked at least 30 hours per week "managing" a photography business, and was therefore also engaged in secular employment during the qualifying two-year period.

The evidence is insufficient to establish that the beneficiary did not rely on secular income for his support. Additionally, the petitioner submitted no documentary evidence of the beneficiary's work with the religious organization during the qualifying period. *Matter of Soffici*, 22 I&N Dec. at 165.

The record does not establish that the beneficiary was continuously engaged as a minister for two full years immediately preceding the filing of the visa petition.

The third issue on appeal is whether the petitioner established that the beneficiary will be engaged solely in the vocation of minister.

The director determined that, as the beneficiary has been engaged in a secular occupation, the evidence does not establish that he will be solely engaged as a minister. Although the decision is unclear, this determination appears to question whether the petitioner has established that it has extended a qualifying job offer to the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(4) states, in pertinent part, that:

Job offer. The letter from the authorized official of the religious organization in the United States must state how the alien will be solely carrying on the vocation of a minister, or how the alien will be paid or remunerated if the alien will work in a professional capacity or in other

religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support.

The petitioner states that the beneficiary will receive a weekly salary of \$300. In a letter of February 16, 2005, the petitioner's pastor, [REDACTED] stated that the beneficiary will "assist our congregation in the church education." Other than an unsigned and undated "work schedule" that appears to have been written by the beneficiary, the petitioner provided no other evidence of the duties required in the position or the hours that the beneficiary will be expected to work. On appeal, the petitioner states that, although the beneficiary works at another job site, he will work 40 hours for the petitioning organization.

Although the petitioning organization may authorize the beneficiary to pursue outside employment and arrange his work schedule to accommodate other employment, pursuant to 8 C.F.R. § 204.5(m)(4) cited above, the petitioner must establish that the beneficiary will be "solely carrying on the vocation of minister."

The evidence is insufficient to establish that the beneficiary will not be engaged in secular employment or that the petitioner has extended a qualifying job offer to the beneficiary.

Beyond the decision of the director, the petitioner has not established that it has the ability to pay the beneficiary the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

With the petition, the petitioner submitted a copy of its February/March 2002 checking account statement.

In his RFE, the director instructed the petitioner to submit evidence of its ability to pay the proffered wage in the form of audited financial statements or IRS computer tax records of the petitioner's federal tax returns. In response, the petitioner submitted a copy of its March 2005 checking account statement.

The above-cited regulation states that evidence of ability to pay "shall be" in the form of tax returns, audited financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only in addition to, rather than in place of, the types of documentation required by the regulation. In this instance, the petitioner did not submitted any of the required types of primary evidence.

The record does not establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage as of the date the petition was filed. This deficiency constitutes an additional ground for which the petition may not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit

sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.