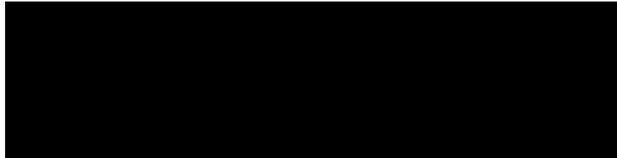


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BEI

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 16 2005
SRC 04 020 52055

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

S Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Acting Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) 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 minister of its music department. 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, that the position qualifies as that of a religious worker, that the petitioner has extended a qualifying job offer to the beneficiary, or that it has the ability to pay the proffered wage.

On appeal, counsel submits a brief and additional 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 presented on appeal 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) 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 October 27, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a minister of music throughout the two-year period immediately preceding that date.

In a letter of October 1, 2003 submitted with the petition, the petitioner’s founder and senior pastor, Dr. Carlyse Branker, stated that the beneficiary had been working with the petitioning organization in the proffered position since 1996.

He is responsible for providing music for all of our Worship, Outreach, Conference and Weekly services and other church events. He is also scheduled to minister the Word of God at services on Sundays, Tuesdays, and Thursdays. Another of his duties includes the training and developing [sic] the musical abilities of youth in the ministry.

Dr. Branker did not specify the terms of the beneficiary’s past work with the petitioner, but stated that he would be compensated at the rate of \$2,000 per month and would be expected to work a 40-hour workweek. The petitioner submitted no evidence with the petition to corroborate the beneficiary’s work 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).

In response to the director’s request for evidence (RFE), the petitioner submitted copies of 2001, 2003 and 2005 church bulletins and flyers on which the beneficiary was listed as a minister with responsibilities including bible study, participating on prayer teams, and in Thanksgiving celebrations. These documents alone do not, however, establish the terms and conditions of the beneficiary’s work. The petitioner also submitted copies of the beneficiary’s Forms 1040NR, U.S. Nonresident Alien Income Tax Returns, for the years 2001 and 2002, and copies of Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the same years. None of the tax forms contains the beneficiary’s social security number or individual tax identification number.¹ Further, both of the Forms 1040NR are dated April 28, 2005. The petitioner also submitted a copy of a Form W-7, Application for IRS Individual Taxpayer Identification Number, signed by

¹ IRS requires individuals to obtain a tax identification number if they must file federal income tax returns, but do not have and are not eligible to obtain a social security number. See *Individual Taxpayer Identification Number (ITIN)*, accessed on December 8, 2005, at <http://www.irs.gov/individuals/article/0,,id=96287,00.html>.

the beneficiary on April 28, 2005. In her decision, the acting director noted that the petitioner submitted no evidence that the beneficiary's tax returns were filed with the Internal Revenue Service (IRS).

On appeal, the petitioner resubmits copies of the beneficiary's Forms 1040NR, now stamp dated as received by the IRS on June 23, 2005.

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).

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.

Although the Forms 1040NR submitted on appeal reflect that they were received by the IRS, the validity of these documents is still in question as they do not contain a unique tax identification number, such as a social security number, for the IRS to process the returns. Additionally, as the returns were prepared and filed three to four years following the dates for which the beneficiary was allegedly paid, they do not provide contemporaneous evidence that the beneficiary was compensated for work performed for the petitioning organization during the two-year qualifying period. The evidence of record does not establish that the petitioner timely prepared the Forms 1099-MISC that it issued to the beneficiary, and the petitioner submitted no other evidence such as canceled checks, pay vouchers, authenticated work schedules, or other documentary

evidence to corroborate the beneficiary's employment during the qualifying period. *Matter of Soffici*, 22 I&N Dec. at 165.

As the petitioner has failed to submit competent evidence of the beneficiary's employment during the qualifying period, it has not established that the beneficiary was continuously engaged in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the visa petition.

The second issue is whether the petitioner established that the position qualifies as that of a religious worker. According to the regulation at 8 C.F.R. § 204.5(m)(1), the alien must be coming to the United States at the request of the religious organization to work as a religious worker. To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a "religious occupation" and the regulation states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The list reveals that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as cantor, missionary, or religious instructor are examples of qualifying religious occupations. Persons in such positions would reasonably be expected to perform services directly related to the creed and practice of the religion. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature. The lists of qualifying and nonqualifying occupations derive from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

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

The proffered position is that of minister of the music department. As noted above, the petitioner stated that the duties of the position would include providing music for all worship services and church events, "ministering" at Sunday, Tuesday, and Thursday services, and training and developing the musical abilities of youth in the ministry.

The regulation at 8 C.F.R. § 204.5(m)(2) defines minister as:

[A]n individual duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion. In all cases, there must be a reasonable connection between the activities performed and the religious calling of the minister. The term does not include a lay preacher not authorized to perform such duties.

The position description of the proffered position submitted with the RFE listed the duties and responsibilities as: ministering the Word of God at church services, assisting with the pastoral care of church members, conducting bible studies and home prayer group meetings, preparing music for all church services or activities, instructing music theory, coaching singers, coordinating and directing worship teams, hosting music workshops, leading the

congregation in worship services, and “participating in leading prayer services.” The petitioner stated that the salary range for the position is between \$18,000 and \$25,000 annually and involves a 40-hour workweek.

The record sufficiently establishes that the proffered position qualifies as that of a religious worker.

The third issue on appeal is whether the petitioner established that it had 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 director determined that, as the petitioner had not established that the position qualified as that of a religious worker, the petitioner had not established that it had extended a qualifying job offer to the beneficiary. As we have determined that the position qualifies as a religious worker, we withdraw this determination by the director.

The fourth issue on appeal is whether the petitioner 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.

The petition was filed on October 27, 2003. As discussed previously, the petitioner submitted copies of Forms 1099-MISC indicating that it paid the beneficiary \$24,000 in 2001 and 2002, but submitted nothing to establish that it had paid the proffered wage at the time the priority date was established in 2003. Counsel asserts on appeal that, as the petitioner paid the beneficiary the proffered wage prior to filing the petition, it has met one of the requirements set forth in a May 4, 2004 memorandum by William R. Yates, Associate Director of Operation for CIS, *Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)*. However, the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its continuing ability to pay the proffered wage beginning on the priority date, not prior to that.

Even if CIS could consider evidence relating to payments before the priority date, the documentation does not actually establish that the petitioner paid the proffered wage in 2001 or 2002. There is no evidence that the Forms 1099-MISC were prepared in 2001 and 2002 or that they were filed with the IRS. The petitioner did not submit copies of canceled checks or pay vouchers to provide corroborating evidence that it paid the

beneficiary at any time during 2001 and 2002, or beginning on the priority date. Further, as discussed above, the Forms 1099-MISC and the beneficiary's Form 1040NR tax returns do not contain the requisite tax identification number for the beneficiary and thus are of questionable value in any proceeding. Finally, the 2001 and 2002 Forms 1040NR were completed and submitted to the IRS in 2005 and are not evidence that the beneficiary actually received any compensation in the years claimed.

In response to the RFE, the petitioner submitted a copy of its unaudited financial report for 2004.² On appeal, the petitioner submits copies of unaudited financial reports for 2003, accompanied by a certified public accountant's compilation report.

As the compilation is based primarily on the representations of management, the accountant expressed no opinion as to whether they fairly present the financial position of the petitioning organization. In light of this, limited reliance can be placed on the validity of the facts presented in the financial statements that have been submitted. No further supporting documentation is included in the record to reflect the assertions made by the accountant in the financial documentation, or contained within the unaudited financial statements.

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 has not submitted any of the required types of primary evidence.

Accordingly, as the petitioner has failed to establish that it paid the beneficiary the proffered wage as of the filing date of the petition and failed to submit any of the required types of primary evidence, it has not established that the petitioner had the continuing ability to pay the proffered wage as of the date the petition was filed.

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.

² With the petition, the petitioner also submitted a copy of its unaudited financial report for 2001. However, as this precedes the filing date of the petition, it has no probative value as to the petitioner's ability to pay the proffered wage in 2003.