

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



CI

FILE:



Office: NEBRASKA SERVICE CENTER

Date: JUN 21 2005

IN RE:

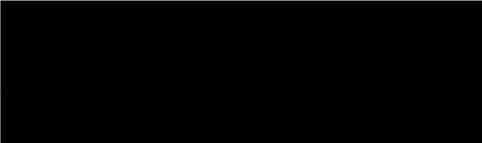
Petitioner:

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:



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 denied by the Acting Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a school. 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 minister. The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition or that the beneficiary was qualified for the position within the organization.

On appeal, counsel submits 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 to be addressed in this proceeding 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 August 18, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a minister throughout the two-year period immediately preceding that date.

In its letter of July 28, 2003, the petitioner stated that the beneficiary had been working with the petitioning organization as a minister since March 2001 “on practical training and R1 status.” The petitioner submitted a copy of a certificate from the Cincinnati Bible College and Seminary indicating that it awarded a Master of Ministry degree to the beneficiary on May 12, 2001, and a copy of a March 11, 2001 “certificate of License” from Temple Baptist, authorizing the beneficiary to “exercise gifts in the work of the Ministry.” In a July 28, 2003 letter, the petitioner’s vice president of administration “confirmed” that the beneficiary was employed as a minister on a permanent basis, and “will be” paid a salary of \$26,000 per year. The petitioner submitted no evidence to corroborate any employment by the beneficiary during the two years immediately preceding the filing of the visa petition. 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 a request for evidence (RFE) dated March 26, 2004, the director instructed the petitioner to:

Submit a letter from an authorized official of the religious organization in the United States which establishes that the alien has authorization to conduct religious worship and to perform other duties usually performed by authorized members of the clergy including a detailed description of the authorized duties. In addition, submit a copy of the alien’s certificate of ordination or authorization as a minister of the religious denomination.

Submit evidence that for at least the two-year period immediately preceding the filing of this petition the alien has been performing the vocation, professional work or other work continuously. The evidence must outline the specific duties, the date(s) these duties were performed, the time spent performing these duties and the remuneration received.

In response, the petitioner submitted an April 26, 2004 letter signed by [REDACTED] its vice president of administration [REDACTED] stated that the beneficiary was engaged in full-time employment as a minister, and that his duties consisted of the “normal duties of a minister including preaching, teaching, religious worship, counseling, evangelism and discipleship.” The petitioner resubmitted a copy of the beneficiary’s “Certificate of License” to minister. The petitioner also submitted a letter from the senior pastor of the Temple Baptist Church, who “confirmed” that the beneficiary is licensed to function as a regular minister in

the Baptist denomination, and that he is "authorized to conduct religious worship and perform duties usually performed by authorized members of the clergy," including "preaching, teaching religious worship, counseling, evangelism and discipleship."

The petitioner stated that the beneficiary "is being paid \$26,000 per year from the College ministry." However, the petitioner submitted no evidence such as canceled paychecks, pay vouchers, verified work schedules or other documentary evidence to corroborate the work performed by the beneficiary. *Id.*

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.

On appeal, the petitioner states that it submitted the evidence requested by the director to establish that the beneficiary worked for the two years immediately preceding the filing of the visa petition. However, the petitioner's statement alone is not sufficient evidence to verify that the beneficiary performed the claimed work. The petitioner must establish by competent documentary evidence that the beneficiary actually performed the work during the time frame alleged. *Matter of Soffici*, 22 I&N Dec. at 165.

The evidence does not establish that the beneficiary was continuously engaged in a qualifying religious vocation or occupation for two full years prior to the filing of the visa petition.

The second issue to be addressed in this proceeding is whether the petitioner established that the beneficiary was qualified for the position within the organization.

The director stated that the petitioner failed to submit a copy of the beneficiary's certificate of ordination when requested to do so by the RFE. The director determined that the petitioner's failure to submit a certificate of ordination constituted a failure to establish that the beneficiary was qualified for the position. We withdraw this determination by the director.

As discussed above, the petitioner submitted a copy of the beneficiary's certificate of license authorizing him to work as a minister. The petitioner also submitted letters from the petitioner and the senior pastor of Temple Baptist Church, the institution that granted the beneficiary his minister's license. The letters indicated that the beneficiary is authorized to perform all of the normal duties of the clergy.

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.

In his RFE, the director directed the petitioner to submit a copy of the beneficiary's certificate of ordination *or* authorization as a minister. The petitioner responded with a copy of the beneficiary's license to minister, which complied with the director's RFE.

The evidence sufficiently establishes that the beneficiary is qualified for the position within the petitioning organization.

Beyond the decision of the director, the petitioner has not established that it is a bona fide nonprofit tax-exempt religious organization. This deficiency constitutes an additional ground for denial of the petition and dismissal of the appeal.

The regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

(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 petitioner submitted a copy of a December 19, 1972 letter from the IRS granting it tax-exempt status under section 501(c)(3) of the IRC as an organization described in section 170(b)(1)(A)(ii) of the IRC. This indicates that the petitioner received tax exemption as a school.

An organization that qualifies for tax exemption as a publicly supported organization under section 170(b)(1)(A)(ii) of the IRC can be either religious or non-religious. The burden of proof is on the petitioner to establish that its classification under section 170(b)(1)(A)(ii) derives primarily from its religious character, rather than from its status as a publicly supported charitable and/or educational institution.

Because the IRS determination letter that classifies an entity under section 170(b)(1)(A)(ii) of the IRC cannot, by itself, establish that the entity is a religious organization, that determination letter cannot satisfy 8 C.F.R. § 204.5(m)(3)(i)(A). The other option, at that point, is to comply with 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting the documentation that the IRS would require to determine that the entity is a religious organization.

The organization can establish this 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 [REDACTED] 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.

The petitioner submitted a copy of its articles of incorporation and a single flyer for the school. The copy of the articles of incorporation submitted does not contain the dissolution required by the IRS to grant tax-exempt status to an organization. The evidence submitted does not include a copy of an IRS Form 1023.

The director, prior to denying the petition, made no effort to ascertain whether the petitioner's federal tax exemption derives from its religious character. This deficiency is not fatal to the director's decision, however, because (as discussed above) we have affirmed one of the other stated grounds for denial, which clearer evidence of qualifying tax-exempt status would not overcome.

Further, beyond the decision of the director, the petitioner has not established that it had 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^A 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 petitioner stated that it would pay the beneficiary \$26,000 per year. As evidence of its ability to pay this wage, the petitioner submitted a copy of its audited financial statement for the period ending August 31, 2002. The petitioner submitted no similar evidence for the period ending August 2003, the year the petition was filed.

The 2002 financial statement precedes the filing date of the petition by a year and therefore is not sufficiently probative evidence of the petitioner's ability to pay the proffered wage as of the date the petition was filed. Additionally, we note that the financial statement reflects current assets of \$59,669 and current liabilities of \$55,754, which would not indicate an ability of the petitioner to pay the proffered wage.

Although the petitioner stated that it had paid the beneficiary in the past, it submitted no evidence of having done so.

The evidence does not establish that the petitioner had the continuing ability to pay the proffered wage as of the date the petition was filed. This deficiency constitutes an additional ground for denial of the petition and dismissal of the appeal.

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 sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.