

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: VERMONT SERVICE CENTER

Date: JUN 24 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:

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.

RW Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The Form I-360, Petition for Amerasian, Widow or Special Immigrant, filed with Citizenship and Immigration Services (CIS) indicates that All Nations Gospel Outreach is the petitioner. The petition, however, is signed by [REDACTED]. Therefore, All Nations Gospel Outreach cannot be considered as having filed the petition on behalf of [REDACTED] and [REDACTED] shall be considered as the self-petitioner.

The self-petitioner seeks classification 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 failed to establish that the organization with which he will be associated has the ability to pay the petitioner the proffered wage.

On appeal, the petitioner 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 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.

According to the employment contract, dated September 9, 2002, All Nations Gospel Outreach proposes to pay the petitioner an annual salary of \$36,000. As evidence of the organization's ability to pay this wage, the petitioner submitted copies of an undated "balance sheet" for All Nations Gospel Outreach and a copy of a document labeled as "Trial Balance Sept. 30, 2002."

In response to the director's request for evidence (RFE) dated April 30, 2003, the petitioner submitted a copy of a letter from the customer service department of Provident Bank indicating that, as of May 15, 2003, All Nations Gospel Outreach had a balance of approximately \$56,986 in its checking account. The petitioner also submitted a copy of a year 2002 Form 990-EZ, Return of Organization Exempt From Income Tax, for All Nations Gospel Outreach. The Form 990-EZ is dated September 30, 2002; however, it does not reflect that the tax year for All Nations Gospel Outreach is on other than a calendar year basis. Further, there is no evidence that the return was ever filed with the Internal Revenue Service (IRS). Therefore, the return lacks any evidentiary value for the purpose of this petition. We note, however, that the Form 990-EZ reflects that the petitioner did not receive a salary for his services with All Nations Gospel Outreach.

On appeal, the petitioner submitted copies of unaudited financial statements for All Nations Gospel Outreach for the years 2002 and 2003.

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 submitted a Form 990-EZ for the year 2002; however, as discussed above, that tax form lacks evidentiary value. The petitioner submitted none of the other required types of evidence.

The evidence does not establish that All Nations Gospel Outreach, the petitioner's prospective U.S. employer, has the ability to pay the petitioner the proffered wage.

Beyond the decision of the director, the petitioner has not established that he had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition. 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)(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 November 29, 2002. Therefore, the petitioner must establish that he was continuously working as a minister throughout the two-year period immediately preceding that date.

According to the petitioner, he founded All Nations Gospel Outreach in 1999, and has served as its pastor since that time. In his response to the RFE, the petitioner stated, "While ministering as a pastor with All Nations Gospel Outreach ministries, on voluntary bases [sic], the beneficiary supported himself working as a non skilled worker, (Certified Nursing Assistance)." The petitioner submitted copies of his year 2001 and year 2002 Forms W-2, Wage and Tax Statements, reflecting that he received wages of approximately \$20,020 and \$1,379 respectively, from Helix Health, Inc. The petitioner's 2002 Form 1040, U.S. Individual Income Tax Return, also reports \$13,000 in "unreported tip income." The petitioner does not identify the source of the tips. The petitioner provided no evidence of any income for the year 2000.

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 record reflects that the petitioner was dependent upon secular employment for his financial support during the qualifying two-year period, and thus was not continuously employed in a religious occupation or vocation for two full years prior to the filing of the visa petition.

Additionally, beyond the decision of the director, the petitioner has not established that his prospective U.S. employer is a bona fide nonprofit religious organization.

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.

With the petition, the petitioner submitted a copy of an August 28, 2002 letter from the IRS, notifying All Nations Gospel Outreach, Inc. of an advance ruling by the IRS. The ruling determined that All Nations Gospel Outreach, Inc. was exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code (IRC) as an organization described in sections 509(a)(1) and 170(b)(1)(A)(vi). Section 170(b)(1)(A)(vi) pertains to publicly supported organizations that may be operated for religious or nonreligious purposes.

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 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 IRC 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 that contains a proper dissolution clause and which specifies the purposes of the organization.

In response to the director's RFE, the petitioner submitted no additional documentation, stating:

As a religious ministry, as stated in the Articles of Incorporation filed with IRS, All Nations Gospel Outreach seeks to further more than one of the exempt purposes specified in IRC Section 501(c)(3) and therefore has been granted exempt [sic] under [REDACTED] **170(b)(1)(A)(vi)**. Having established to the satisfaction of the IRS and being eligible as a religious non-profit organization and hence qualifies as a religious ministry to file the application. [Emphasis in original.]

According to documentation from the IRS, the petitioner's tax-exempt status derives from classification under section 170(b)(1)(A)(vi) of the IRC, which pertains to publicly-supported organizations as described in section 170(c)(2) of the IRC, "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes," or for other specified purposes. This section refers in part to religious organization, but to many types of secular organizations as well.

An organization that qualifies for tax exemption as a publicly supported organization under section 170(b)(1)(A)(vi) 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)(vi) 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)(vi) 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 director did not provide the petitioner with an opportunity to submit the materials outlined in the Yates memorandum, and thereby demonstrate that its tax-exempt status derives primarily from its religious character. The director's failure to provide the petitioner with the opportunity to establish the religious purpose of his prospective employer's organization is not fatal to the director's decision, however, because (as discussed above) we have affirmed the stated grounds for denial, which clearer evidence of qualifying tax-exempt status would not overcome.

The record does not establish that the petitioner's prospective U.S. employer is a bona fide nonprofit religious organization and forms an additional ground for denial of the petition.

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.