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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
EAC 02 167 50797

Office: VERMONT SERVICE CENTER

Date: JUN 24 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center on May 20, 2003. The petitioner appealed the director's decision on June 23, 2003. The director rejected the appeal on October 23, 2003 as untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The regulation at 8 C.F.R. § 1.1(h) states:

The term *day* when computing the period of time for taking any action provided in this chapter including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, nor a legal holiday.

The petitioner's appeal was received by the service center on Monday, June 23, 2003, 34 days after the director issued his decision. As the 33rd day following the director's decision was on Sunday, the director incorrectly rejected the appeal as untimely filed.

The petitioner submitted a motion to reconsider and reopen the director's October 23, 2003 decision on November 20, 2003. The acting director rejected the petitioner's motion as untimely filed, erroneously applying the date of the director's initial decision in computing the time in which the motion was filed. The matter is now before the Administrative Appeals Office (AAO).

As the director erroneously rejected the petitioner's appeal of June 23, 2003 and the petitioner's subsequent motion of November 20, 2003, the AAO will consider all of the evidence of record. The decisions of the director will be withdrawn and the petition will be remanded for further action and consideration.

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 a minister. The director determined that the petitioner had not established that it qualified as a bona fide nonprofit religious organization.

On appeal, the petitioner submitted 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 single issue presented on appeal is whether the petitioner established that it qualified as 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 a "certificate of dismissal" issued by the United Presbyterian Church, and reestablishing the church under its current name, Church of the Living Christ (United Presbyterian Church, U.S.A.). However, the petitioner submitted no evidence that it was included under a group tax exemption granted to the United Presbyterian Church.

The petitioner must either provide verification of individual exemption from the Internal Revenue Service (IRS), proof of coverage under a group exemption granted by the IRS to the denomination, or such documentation as is required by the IRS to establish eligibility as a tax-exempt nonprofit religious organization. Such documentation to establish eligibility for exemption under section 501(c)(3) includes: a completed Form 1023, a completed Schedule A attachment, if applicable, and a copy of the articles of organization showing, *inter alia*, the disposition of assets in the event of dissolution.

In a request for evidence (RFE) dated November 19, 2002, the director instructed the petitioner to submit documentation that the organization is exempt from taxation under section 501(c)(3) or such documentation as is required by the IRS to establish eligibility under section 501(c)(3) as it applies to religious organizations.

In response, the petitioner submitted a copy of an exempt organization certificate issued to the petitioning organization by the state of New York. The record also contains copies of two programs of worship for the petitioning organization.

An organization without a certificate of exemption from the IRS granting it tax exemption pursuant to section 501(c)(3) of the IRC as an organization described under section 170(b)(1)(A)(i) may establish its tax-exempt eligibility under 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 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.

The director, prior to denying the petition, did not provide the petitioner with an opportunity to submit the materials outlined in the Yates Memorandum, and thereby demonstrate that it may qualify as a tax-exempt organization pursuant to 8 C.F.R. § 204.5(m)(3)(i)(B).

On appeal, the petitioner submitted a copy of an April 2003 letter from the IRS to the Presbyterian Church USA verifying the group tax-exemption status granted to that organization. The petitioner also submitted letters from the Presbyterian Church (USA) and the New York City Presbytery indicating that the petitioner was covered under the group tax-exemption granted to the Presbyterian Church (USA).

Therefore, the evidence sufficiently establishes that the petitioner is a bona fide nonprofit religious organization under 501(c)(3) of the IRC.

Nevertheless, the case may not be approved as the record now stands, and it will be remanded to the director to enter a new decision.

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(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 10, 2002. Therefore, the petitioner must establish that the beneficiary was continuously working as a minister throughout the two-year period immediately preceding that date.

The petitioner submitted a copy of what appears to be excerpts from the beneficiary's curriculum vitae, in which he indicates that he served as chaplain with the National Evangelical University from January 1998 to February 2001. The petitioner also submitted a letter indicating that the beneficiary had served as pastor of the petitioning organization since July 8, 2001. A February 4, 2004 letter from the Presbytery of New York City stated that the beneficiary had been a member of the Presbytery of New York City since June 19, 2001, and as pastor "fulfills a vital position."

The record contains a copy of a June 1, 2001 letter from the petitioning organization to the Presbytery of New York City requesting that the beneficiary's appointment to work with the church "as a part time Temporary supply [pastor]." A July 3, 2001 letter from the Presbytery of New York City indicates that in a meeting on June 19, the Presbytery accepted the beneficiary for membership within the Presbytery and approved him to serve as temporary supply pastor with the petitioner for a period of six months. Further, a June 29, 2001 report of the "Committee on Ministry" indicates that the beneficiary was to serve as a temporary supply pastor with the petitioning organization until December 31, 2001, "at terms of call meeting current half-time minimum compensation standards."

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.

The petitioner submitted no evidence to substantiate any work performed by the beneficiary during the qualifying two-year period. Additionally, the petitioner does not allege and the evidence does not establish that the beneficiary performed any work as a minister from February 2001 to July 8, 2001, when he assumed the role of pastor with the petitioner. The evidence reflects that the beneficiary was authorized by the Presbytery of New

York City to work part-time with the petitioner through the end of 2001. Part-time employment is not qualifying employment for the purpose of this employment-based visa petition.

On remand, the director should address whether the petitioner has established that the beneficiary was continuously employed as a minister for two full years preceding the filing of the visa petition.

Additionally, 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 petitioner submitted no evidence to establish that it meets this regulatory criterion. The evidence submitted by the petitioner reflects that the minimum salary for a part-time pastor in the Presbytery of New York City in 2001 was \$15,9270.50, housing and utilities of \$4,770.00, plus other compensation such as pension, social security offset and "study leave." A full-time pastor's salary was \$31,855.00 with housing and utilities of \$9,554.00.

On remand, the director should address whether the petitioner has established that it has the ability to pay the beneficiary the proffered wage.

Further, 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 evidence indicates that the petitioner was authorized to hire the beneficiary on a part-time basis through the end of 2001 at the rate of pay set by the Presbytery of New York City. However, the petitioner submitted no evidence that the beneficiary will be employed in a full-time capacity. The evidence does not establish that the beneficiary will be solely carrying on the vocation of minister.

On remand, the director should address whether the petitioner has extended a qualifying job offer to the beneficiary.

This matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.



ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.