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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 02 2005
WAC 03 078 50073

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant 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:
[Redacted]

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.

Mac Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office 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 a pastor. The director determined that the petitioner had not established: (1) that the beneficiary had the requisite two years of continuous, qualifying work experience immediately preceding the filing date of the petition; (2) the petitioner's ability to pay the beneficiary's proffered wage; or (3) that the petitioner is affiliated with a tax-exempt religious organization.

On appeal, the petitioner submits a brief from counsel as well as further documents concerning the beneficiary's employment arrangements.

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 terms of the beneficiary's employment figure, in some way, in each of the grounds for denial, and therefore we begin with a discussion of those terms. In a joint letter, the petitioner's vice president, [REDACTED], and church secretary, [REDACTED], state that the petitioning church "has contracted [REDACTED], an Employee Leasing Company, to provide employee leasing services since 5/01/1999. . . . As a client we currently have all our staff, including [the beneficiary] . . . employed by them." Ms. [REDACTED] and Ms. [REDACTED] do not specify how many church staffers are employed in this fashion, but the wording of the letter indicates that the beneficiary is not the only employee engaged in this manner.

[REDACTED] president of PBS, states: "We are the administrative employer while the client is the constructive employer." In another letter, Mr. [REDACTED] states: "The church has contracted with our firm to provide employee leasing services." Mr. [REDACTED] also states: "A copy of our contract is attached to this memo," but the record does not contain that document. Counsel refers to the employment arrangement between the petitioner and

PBS as “a normal business practice,” but offers no evidence that such an arrangement is normal or common for members of the clergy. It remains that the beneficiary is neither an independent contractor nor a church employee, but rather a PBS employee “leased” to the petitioner by PBS. PBS, not the petitioner, directly pays the beneficiary’s salary.

On appeal, counsel states “[b]oth TRMC and Professional Business Services, Inc. are businesses established to take care of time-consuming and non-productive tasks associated with personnel administration, including payroll and benefits administration.” Counsel repeatedly refers to TRMC and Professional Business Services (PBS) as though they were two different companies, but Thomas Revelle states the two companies are one and the same, having “changed [its] name in 2002.” Form W-2 Wage and Tax Statements issued under both company names show the same Employer Identification Number.

The first issue concerns the beneficiary’s past employment. The regulation at 8 C.F.R. § 204.5(m)(1) 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.” 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate that, immediately prior to the filing of the petition, the alien has the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on January 24, 2003. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a pastor throughout the two years immediately prior to that date.

The petitioner submits a statement from the beneficiary, who asserts that he has served as the petitioner’s “Full Time Senior Pastor” since January 15, 2000. The beneficiary also claims extensive prior experience that falls outside the qualifying period. The petitioner also submits copies of internal documents from late 1999, discussing the petitioner’s intention to utilize the beneficiary’s services as a pastor. Because these documents date from 1999, they cannot show that the beneficiary worked in 2000 or later.

A Form W-2 Wage and Tax Statement shows that PBS paid the beneficiary \$24,000 in 2002. Subsequently, the petitioner has submitted copies of the beneficiary’s tax returns for 2000, 2001 and 2002, showing the beneficiary’s occupation as “minister” and that he earned \$18,500 in 2000 and \$24,000 in each of the two subsequent years. All of these tax returns were prepared on the same day, December 11, 2003, several weeks after the director issued a request for evidence on November 18, 2003. Thus, the tax returns have no weight as *contemporaneous* evidence of payment or employment; the forms did not exist until the director asked for them. The petitioner submitted Forms W-2 showing that TRMC Corporation paid the beneficiary the amounts reported on the tax returns. Forms W-2 are typically issued shortly after the end of the calendar year. Because the beneficiary was not responsible for preparing the Forms W-2, there is no reason to presume that these forms were prepared late.

The director denied the petition on April 28, 2004. Because all of the beneficiary’s reported income was from sources other than the church, the director concluded “the evidence is insufficient to establish that the beneficiary has been working continuously in the same type of work as the proffered position for the two-year period immediately preceding the filing of the petition.” Elsewhere in the denial notice, the director stated that the petitioner had failed to demonstrate “the beneficiary’s direct employment with the petitioning organization.”

The petitioner’s appellate submission includes payroll documents dated 2000, showing that TRMC paid the beneficiary on behalf of the petitioning church. There are no such documents for the relevant years of 2001-2003, but other materials in the record link the petitioner, the beneficiary and TRMC/PBS in other ways.

These documents do not, in themselves, establish that the beneficiary worked *as a minister*, but the record contains nothing to suggest that the beneficiary had actually worked in some other capacity. We find, therefore, that the petitioner has established, by a preponderance of evidence, that the beneficiary worked as a minister during the qualifying period. Because the statute and regulations place no other conditions on the alien's past work, this experience is sufficient to meet the experience component of the statutory and regulatory requirements. The terms of the beneficiary's requirement are, however, highly relevant with regard to other requirements, as we shall discuss.

The next issue concerns the prospective employer's ability to pay the beneficiary's salary of \$15,600 per year, plus a housing allowance of equal value, for a total compensation package worth \$31,200 per year. 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.

We emphasize that the above regulation requires evidence that the prospective employer, not the petitioner (unless both are one and the same), is able to pay the proffered wage.

The petitioner has submitted its unaudited profit and loss statement for calendar year 2002. The director informed the petitioner that this document is unacceptable, because it did not result from an audit. In response, the petitioner submitted the same type of report for 2003, with no explanation as to why the 2003 document was more acceptable under the regulations than the 2002 statement was. The statements contain the following information:

	2002	2003
Income	\$62,143.90	\$107,986.17
Expenses	77,896.83	98,870.04
Net Income (Loss)	(15,752.93)	9,116.13
Payroll Cost – TRMC	24,581.32	33,955.46

Neither of the two statements shows the \$15,600 annual housing allowance that the petitioner has identified as part of its offer to the beneficiary, nor do the statements show sufficient surplus to cover that allowance. Also, neither statement indicates how many TRMC employees shared the amount reported under "Payroll Cost – TRMC."

The director denied the petition, stating that the petitioner had failed to establish the prospective employer's ability to pay the beneficiary's full compensation. On appeal, counsel asserts that the evidence submitted "clearly shows that the Petitioner paid the Beneficiary the proffered wage and that the net income was after the proffered wage already had been paid" (counsel's emphasis). The evidence does not establish what counsel claims; it shows, at most, that the petitioner made payments to TRMC to cover an unspecified number of employees.

The petitioner submits copies of "Payroll Data Transmittal" forms showing that the beneficiary received semimonthly payments of \$1,000 in "Gross Pay" from TRMC for most of 2000. As noted elsewhere in this

decision, the beneficiary claims to have earned no more than \$24,000 per year, considerably less than the beneficiary's total proffered compensation package worth \$31,200 per year. The record contains no evidence that the beneficiary has been receiving the proffered \$1,300 monthly housing allowance. The petitioner must show that the employer is able to pay the full amount of the beneficiary's proffered remuneration; the petitioner does not diminish or eliminate this burden by offering some or all of the compensation as a housing allowance rather than direct cash payments. The record contains no payroll transmittal forms from 2003, and therefore the record does not show how much the beneficiary has earned following the filing date.

Photocopies of the petitioner's bank statements do not provide a complete picture of the petitioner's finances. The statements from 2003 (the year of filing and thus the first year in which the petitioner must show ability to pay) show transfers of between \$3,000 and \$3,300 per month for "payroll." The statements show only aggregate totals, without revealing how much of each monthly payment went to the beneficiary or how many workers divided the semimonthly payroll disbursements. The statements do not show monthly checks for \$1,300, and therefore there is no evidence that the petitioner has provided the beneficiary with the housing allowance that constitutes half of the beneficiary's proffered compensation.

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 has not submitted any of the required types of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). On appeal, counsel maintains that the petitioner is able to pay the beneficiary's wage but does not address the petitioner's failure to submit the required evidence.

Also, the record contains information that tends to indicate that the prospective employer is not the petitioning church, but rather PBS. The actual employer is the entity that directly pays the alien. *See Matter of Smith*, 12 I&N Dec. 772, 773 (DD 1968). This is consistent with the assertion by Dannette Lee and Lisa Ramelb that "we currently have all our staff, including [the beneficiary] . . . employed by" PBS, and statements by various parties that the beneficiary's services are "leased" from PBS.

A counterargument can be made in that "possession of either power to employ or the power to discharge is very strong evidence of the existence of the master and servant relationship, whereas the payment of wages is the least important factor" (53 Am. Jur.2d, Master and Servant, S. 2, quoted in *Matter of Pozzoli*, 14 I&N Dec. 569 (Reg. Comm. 1974)), but here we cannot determine who has the power to employ and to discharge the beneficiary. Presumably the beneficiary's employment contract with PBS might shed some light on this issue, but that document is absent from the record, notwithstanding Thomas Revelle's reference to that document as an attachment to one of his letters. Thus, we cannot determine whether the beneficiary's employment relationship with PBS is entirely contingent on his work for the petitioner, such that if the petitioner ceased to utilize the beneficiary's services, the beneficiary's employment with PBS would automatically cease. If the beneficiary would remain under contract to PBS, even if the petitioning church ceased to require his services, such that PBS could reassign the beneficiary to a new church, then it would appear that PBS has the power to employ and to discharge the beneficiary.

The record contains no financial documentation to establish PBS' ability to pay the beneficiary's full compensation from the January 2003 filing date onward. The beneficiary's employment arrangement has additional implications, as we shall discuss presently.

8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization seeking to employ the beneficiary qualifies as a non-profit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with section 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 section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

An August 31, 1964 determination letter from the IRS confirms a group exemption for churches under the General Council of the Assemblies of God, Springfield, Missouri. Other letters and certificates, from various levels of church leadership, link the General Council to the Hawaii Assemblies of God, and, in turn, link the latter body to the petitioning church.

In a letter dated April 10, 1996, [REDACTED], then district superintendent of the Hawaii Assemblies of God, states that the petitioner "is an integral part of the Hawaii Assemblies of God," which in turn is "affiliated with the General Council of the Assemblies of God headquarters in Springfield, Missouri." A "Certificate of Affiliation," dated April 9, 1992, indicates that the petitioning church is part of the Hawaii Assemblies of God.

The director, in denying the petition, stated "public records show that . . . the petitioner was incorporated in the State of Hawaii on November 24, 1997." The director found that the petitioner's documentation lacks credibility because the purported certificate of affiliation predates the petitioner's incorporation by over five years. The director, in the decision, did not identify the "public records," but the source appears to be the Hawaii Department of Commerce and Consumer Affairs, Business Registration Division.

On appeal, the petitioner offers no explanation for this discrepancy. Instead, counsel contends: "The dates mentioned by the Director are not really pertinent in this matter." On the contrary, the credibility of the petitioner's documentation is highly relevant. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988). Section 204(b) of the Act permits approval only if the facts set forth in the petition are found to be true.

If the petitioner did not incorporate until late 1997, then it is not clear how a qualifying affiliation could have existed with the denomination in 1996 or 1992. This necessarily casts some degree of doubt on the photocopies of pre-1997 letters and certificates. It is possible that a reasonable explanation exists that could resolve this discrepancy (for example, a reorganization of an existing church), but it remains that, when confronted with the discrepancy, counsel offered no attempt at an explanation; counsel simply dismissed it as irrelevant. The burden is on the petitioner to resolve any discrepancies, not on the AAO or any other government entity to assume that there must be an innocent explanation to resolve such discrepancies.

Furthermore, when considering the question of whether the prospective employer is a qualifying tax-exempt religious organization, we cannot forget that the employer, in this instance, is not any church or denomination,

but rather an “employee leasing company.” The petitioning church does not appear to employ the beneficiary, but simply hires his services through PBS, pursuant to the terms of a contract that is absent from the record. There is no evidence, nor any claim, that PBS is, itself, a tax-exempt religious organization.

The materials in the record create some confusion about the identity of the beneficiary’s true employer. Case law, in the form of *Matter of Smith*, suggests that PBS is the employer by virtue of its responsibility for paying the beneficiary’s salary. The record contains insufficient evidence to show that *Matter of Pozzoli* would override *Matter of Smith* in this instance. The petitioner has not submitted acceptable evidence to show the employer’s ability to pay the beneficiary’s full proffered wage. Review of the record as a whole does not support approval 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.