

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

C1



FILE: LIN 03 189 50806 Office: NEBRASKA SERVICE CENTER Date **MAY 23 2005**

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:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 its Assistant Pastor of Education. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience in the position sought immediately preceding the filing date of the petition. Additionally, the director determined the petitioner had failed to establish it is a tax-exempt organization, that it has the ability to pay the beneficiary the proffered wage and that the beneficiary's position qualifies as a religious profession.

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 determined is whether the petitioner has the appropriate tax exemption. The regulation at 8 C.F.R. § 204.5(m)(2) defines a "bona fide nonprofit religious organization in the United States" as an organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations, or one that has never sought such exemption but establishes to the

satisfaction of Citizenship and Immigration Services it would be eligible if it had applied for tax-exempt status.

The regulation at 8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization 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 [the Code] 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 [IRS] establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

In support of the petition, the petitioner submitted a copy of its certificate of incorporation with the state of Washington and four letters related to the petitioner's tax-exempt status.

In the first letter, dated May 24, 1971, the IRS acknowledges the tax-exempt status of the Northwest Baptist Convention and indicates that "no subordinates were added to your group exemption roster." The letter does not indicate that the petitioner was ever listed as a subordinate of the [REDACTED] or added on the group exemption roster.

The remaining letters are signed by [REDACTED] of Missions for the [REDACTED] [REDACTED] dated March 26, 1997, September 17, 1997, March 17, 2000, respectively. [REDACTED] letter indicate that the petitioning church is "under the Watchcare of [REDACTED] and that it is also, "a Watchcare member in good standing of the [REDACTED]" While we do not dispute the fact that the petitioning church is a member of the [REDACTED] the record contained no evidence to establish that [REDACTED] is a member of the [REDACTED] [REDACTED] much less covered by the group-exemption granted to the [REDACTED] Given the petitioner's statement that the "church was first established in November 1995," the petitioner clearly could not have been covered in the original group exemption granted to the [REDACTED].

Given this information, and the lack of evidence regarding the petitioner's association with or listing in the [REDACTED] directory, we find the director justified in finding the petitioner failed to establish its tax-exempt status.

On appeal, the petitioner submits a letter from [REDACTED] Business Manager of the [REDACTED] [REDACTED] to [REDACTED] of the [REDACTED]. In the letter, [REDACTED] refers to the IRS ruling "granting the [REDACTED] of Oregon-Washington and its member churches and associations tax-exempt status under a 'blanket' ruling" and states:

Since the [REDACTED] is affiliated with the Northwest Baptist Convention, it is automatically covered under the group exemption ruling. We provide to the IRS a list of all churches and associations and their addresses which are members of our Convention. This is done annually.

This letter overcomes the previous finding of the director and sufficiently establishes that the petitioner's has the appropriate tax-exempt status.

The next issue to be determined is whether the beneficiary's proposed duties qualify him for classification as a special immigrant religious worker. The regulation makes clear that there are three distinct types of religious workers. The regulation at 8 C.F.R. § 204.5(m)(1) indicates that the beneficiary must be coming to the United States "solely for the purpose of carrying on the vocation of a minister . . . [or] working . . . in a professional capacity in a religious vocation or occupation. The regulation at 8 C.F.R. § 204.5(m)(2) offers the following pertinent definitions:

Minister means an 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.

Professional capacity means an activity in a religious vocation or occupation for which the minimum of a United States baccalaureate degree or a foreign equivalent degree is required.

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

In his decision, the director noted that the record does not establish the beneficiary's position requires him to be ordained or to have a bachelor's degree. These findings are not disputed on appeal. Thus, the specific issue is whether the beneficiary's position is a qualifying religious occupation. The statute is silent on what constitutes a "religious occupation" and the regulation at 8 C.F.R. § 204.5(m)(2) 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. The regulation reflects that nonqualifying positions, such as janitors, maintenance workers, and clerks, are those whose duties are primarily administrative or secular in nature.

Citizenship and Immigration Services 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.

[REDACTED] lists the beneficiary's past and proposed duties as the Assistant Pastor of Education:

Since 1997 [the beneficiary] has volunteered . . . as a Sunday school teacher. [The beneficiary] was born in a religious family and performed volunteer work for the church in Korea

[REDACTED] is offering the position of a teacher to serve the growing religious members of the church. The duties will require giving youth group teaching bible study, organization of church events, and setting up the Korean Language school at the church. In addition to these duties, the position requires a clear understanding of [the] needs of the particular members of the church and the community they live in. [The beneficiary] has achieved prominence in the church by conducting dedicated service to the student of religion and church elder.

We find insufficient evidence to establish that the beneficiary's position as assistant pastor of education 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. It is not clear how the petitioner's duties, which involve "teaching bible study, organization of church events, and setting up the Korean Language school at the church," are duties which require a full-time worker. The petitioner fails to identify what duties, if any, will be required of the beneficiary once the Korean Language school has been set up. Further, a religious occupation must, by regulation, involve the performance of traditional religious duties rather than pervasively secular duties that happen to be motivated by religious beliefs. Much of the beneficiary's duties, as described by the petitioner, seem to involve secular duties rather than religious duties.

In sum, the evidence does not support the argument that the beneficiary works in a qualifying religious occupation. While the determination of an individual's status or duties within a religious organization is not under the purview of CIS, the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests within CIS. Authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States. *Matter of Hall*, 18 I&N, Dec. 203 (BIA 1982); *Matter of Rhee*, 16 I&N Dec. 607 (BIA 1978).

Regarding the beneficiary's *past* work, 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 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 May 23, 2003. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of an assistant pastor of education throughout the two years immediately prior to that date.

On appeal, [REDACTED] states:

[The beneficiary] started volunteering at [REDACTED] in 1997-2000. Upon receiving his R-1 visa he started working part-time in 2000-2001 because of school. In 2002-2003

he worked full time because he was about to graduate soon and did not have a lot of classes to attend. Although [the beneficiary] was a full-time student from December 8, 1997 to his graduation on May 17, 2003, he has been working full-time since 2002-2003 at [REDACTED] Church. Upon his graduation he has been working full-time at [REDACTED] from 2003-current. Looking at the records, he has been working full-time at [REDACTED] for more than 2 years.

The petitioner's statements confirm the director's findings that the beneficiary was a part-time volunteer and a full-time student during the requisite period.

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 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 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. Com. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Com 1963).

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 salaried. To hold otherwise would be contrary to the intent of Congress.

Although there may be other limited circumstances in which unpaid volunteer work may constitute qualifying experience, the burden of proof remains on the petitioner to establish that the claimed work took place continuously. Because the beneficiary was a student during much of the requisite period, such continuous work cannot be shown in this instance. Section 101(a)(27)(C)(iii) of the Act requires that the beneficiary "has been carrying on such vocation" throughout the two-year qualifying period. Here, the beneficiary has not been carrying on "such vocation." Rather, he has been undergoing training and continuing his studies. Part-

time ministerial work by a student is not continuous experience as a minister. *See Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

The underlying statute, at section 101(a)(27)(C)(iii), as well as the regulations at 8 C.F.R. § 204.5(m)(1) and (3)(ii)(A) require that the beneficiary must have carried on *the* vocation or occupation, rather than *a* vocation or occupation, indicating that the work performed during the qualifying period should be substantially similar to the intended future religious work. An alien who seeks to work as an assistant pastor of education has not been carrying on "such work" if the alien has been a student and not carrying on the duties of a pastor for much of the preceding two years.

Moreover, the record reflects that the duties performed by the beneficiary (albeit as a part-time volunteer and full-time student) were performed in the position of a Sunday school teacher. The duties of a Sunday school teacher are not the same as the intended position which involve "organizing church events and setting up the Korean Language school." The beneficiary also cannot be considered to be carrying on "such work" if his duties for the preceding two years were not the same as the duties of the proposed position.

The remaining two issues are somewhat interconnected. Pursuant to 8 C.F.R. § 204.5(m)(4), the petitioner must state how the alien will be performing the duties of assistant pastor of education (including any terms of payment for services or other remuneration). 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.

Pastor [REDACTED] states, "the employment salary offered is \$2,200 per month." The petitioner's initial submission included a "Budget Proposal for Year 2003."

The petitioner also submitted a letter from its treasurer, [REDACTED] indicating that the church is "supporting [the beneficiary's] school tuition fee until he graduates from Seminary school," and that they paid the beneficiary \$2,200 per month during the year 2002-2003. A salary of \$2,200 per month as claimed by the petitioner, equates to a yearly salary of \$26,400.

On appeal, the petitioner submits copies of the beneficiary's W-2 Wage and Tax Statements which demonstrate the beneficiary received \$18,000 from the petitioner in 2002 and 2003. Given the inconsistency between the petitioner's claim of a salary of \$26,400 and the documented pay of \$18,000 per year, the beneficiary's past pay is not indicative of the petitioner's ability to pay the proffered wage of \$26,400. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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). What evidence the petitioner *has* submitted is either inconsistent or irrelevant.

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.