

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



**U.S. Citizenship
and Immigration
Services**

C1

PUBLIC COPY



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **JUN 21 2008**
WAC 00 161 50451

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.

Σ Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. Following an appeal, the Administrative Appeals Office (AAO) remanded the record for further action and consideration. The director again denied the petition and certified his decision to the AAO; however, the record did not reflect that the petitioner had been advised, pursuant to 8 C.F.R. § 103.2(b)(16)(i), of derogatory information contained in the decision. The record was again remanded to the director for further consideration. The director denied the petition for the third time and again certified his decision to the AAO. 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 religious education director. On remand, 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.

The petitioner did not respond to the director's request for additional evidence on remand and submitted no additional documentation on certification.

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 issue presented on appeal 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 May 2, 2000. Therefore, the petitioner must establish that the beneficiary was continuously working as a religious education director throughout the two-year period immediately preceding that date.

In an April 17, 2000 letter accompanying the petition, the petitioner’s pastor, [REDACTED] stated that in the proffered position:

[The beneficiary] will be conduct[ing] Bible Study Sessions, discussion groups and retreats. Also plan religious mission studies and activities. Responsible to develop, organize and [sic] religious program and promote religious education to church members. Creates religious study courses and program, provide spiritual counseling and guidance and assistance to church members. Also make Bible Study Book on text and other material for Sunday School and Academy After School Program. Also teaching and educating all the religious instructors with Bible, New project program and Spiritual Activities.

However, he has at least two years work experience as a religious worker and certain similarities at a bonafide [sic] non-profit organization such as at Wang Sung Church and [the petitioning organization] from Jan. 1984 to present.

The petitioner did not specify the nature of the beneficiary’s religious duties as a religious worker during the qualifying period and submitted no evidence to corroborate any work performed by the beneficiary during that time. 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 dated August 17, 2000, the director instructed the petitioner to:

Provide evidence of the beneficiary’s work history beginning May 02, 1998, and ending May 02, 2000 only. Provide a weekly breakdown for this two-year period of the time spent performing the religious occupation. Include the name of the employer, specific job duties, number of hours worked, [and] remuneration . . . Ideally, this evidence should come in a way

that shows monetary payment, such as W-2 forms, pay stubs, or other items showing the beneficiary received payment. Documentation showing the withholding of taxes is good evidence. However, you may also show payment through other forms of remuneration. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported him or herself (and family members, if any) during the two-year period or what other activity the beneficiary was involved in that would show support.

In response, the petitioner submitted an October 24, 2000 "certificate of employment" in which its pastor certified that the beneficiary worked as the petitioner's religious education director since May 1998 until "the present." The petitioner stated that the beneficiary "began" on a volunteer basis but was "now receiving \$1,500.00 per month." The petitioner submitted copies of checks made payable to the beneficiary for the months of August through October 2000; however, it submitted no evidence of any remuneration to the beneficiary during the qualifying period. Further, the petitioner submitted no evidence such as authenticated work schedules or similar documentary evidence to corroborate the beneficiary's work during the qualifying period. *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).

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.

On appeal, the petitioner submitted a "petition" from church members, who state that the beneficiary "has been assuming his duties as an operator of the education department, as well as teaching the teenagers;" however, the petitioner failed to submit documentary evidence to corroborate this employment. *See Matter of Soffici*, 22 I&N Dec. at 165. The director noted in her RFE dated June 24, 2005, that "public records" did not reflect that the petitioning organization did not pay the beneficiary for his services at any time during the qualifying period.¹

As noted above, the petitioner submitted no additional documentation in support of the petition. Therefore, the record does not establish that the beneficiary worked continuously as a religious education director for two full years preceding the filing of the visa petition.

Beyond the decision of the director, the petitioner has not established that it qualifies 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.

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.

With the petition, the petitioner submitted a copy of a May 25, 1984 letter from the IRS to the Korean Evangelical Church of "American [sic]," notifying that organization that it has received tax-exemption under section 501(c)(3) of the IRC as an organization described in section 509(a)(2) of the IRC. The letter does not specify that

¹ The director's reference to public records is apparently to those records maintained by the California Employment Development Department.

the exemption is based on [REDACTED] status as a religious organization and does not state that the exemption is applicable to any subordinate units.

The petitioner submitted a copy of a letter from [REDACTED] stating that the petitioner was covered under the tax-exemption granted to the denomination; however, as noted above, the IRS determination of the organization's tax-exempt status did not extend to any subordinate unit. The petitioner also submitted a copy of its articles of incorporation containing the dissolution clause required by the IRS in determining tax-exempt status under section 501(c)(3) of the IRC and a copy of a June 7, 1982 letter from the State of California Franchise Tax Board to the Korean Evangelical Church of America.

The petitioner must either provide verification of individual exemption from the 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.

The organization can establish eligibility under 8 C.F.R. § 204.5(m)(3)(i)(B) 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 Citizenship and Immigration Services (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.

While the petitioner submitted a copy of its articles of incorporation, it submitted no other evidence to establish its eligibility under 8 C.F.R. § 204.5(m)(3)(i)(B). Additionally, as previously discussed, the IRS certification of tax-exempt status to the Korean Evangelical Church of America did not apply to any subordinate unit and did not specify that the organization's tax-exempt status was based on its status as a religious organization.

Accordingly, the petitioner's evidence does not establish that it is a bona fide tax-exempt religious organization. This deficiency constitutes an additional ground for which the petition may not be approved.

Further beyond the director's decision, the petitioner has not established that it has the continuing 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 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 \$1,500 per month; therefore, it must establish that it has the continuing ability to pay the beneficiary the proffered wage as of May 2, 2000, the date the petition was filed.

To establish its ability to meet this regulatory requirement, the petitioner submitted a copy of a March 1, 2000 letter from an assistant operations officer from its bank, indicating that the petitioner maintained four accounts with the bank, the first opened in January 1998 and the last in January 2000.² The petitioner also submitted copies of checks made payable to the beneficiary in August, September and October 2000. However, the record does not reflect that these checks were ever presented for payment to the bank.

The above-cited regulation 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 primary evidence.

Accordingly, as the petitioner has not established that it has paid the beneficiary the proffered wage consistently in the past and has not submitted any of the required types of primary evidence, it has not established that it has the continuing ability to pay the proffered wage as of the filing date of the petition. This deficiency constitutes an additional ground for which the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

² The petitioner also submitted copies of monthly bank statements for the period April through September 1999. However, as these documents predate the filing of the petition, they are not probative of the petitioner's ability to pay the proffered wage as of May 2000, the date the petition was filed.



Page 8

ORDER: The appeal is dismissed.