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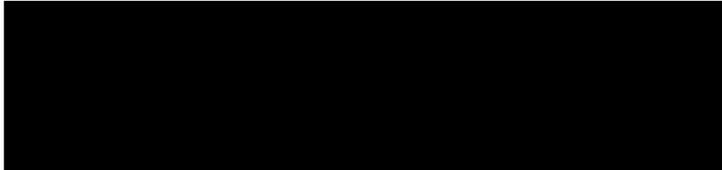
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE:



Office: VERMONT SERVICE CENTER

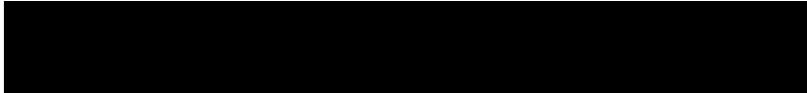
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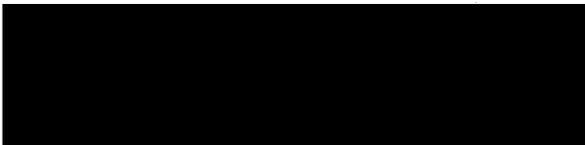
Petitioner:



Beneficiary:

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:



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.

*Maria Deadrick*

Robert P. Wiemann, Chief  
Administrative Appeals Office

for

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.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 its senior pastor. The director determined that the petitioner had not established its ability to pay the beneficiary's proffered salary.

On appeal, the petitioner submits a brief from counsel and 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 . . . ; 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 sole stated basis for the denial concerns the petitioner's ability to pay the beneficiary's salary of \$27,456 per year. The regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate 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. Pursuant to 8 C.F.R. § 204.5(d), the priority date is the petition's date of filing, in this instance September 22, 2004. The petitioner must, therefore, establish that it has been able to pay the beneficiary's proffered wage from September 22, 2004 onward.

In the initial submission, Rev. [REDACTED] Director of the petitioner's [REDACTED], stated: "The church has the financial ability to hire [the beneficiary] based upon the attached financial records. He will continue to receive an income [in] excess of \$27,456.00." The "attached financial records" include the petitioner's budgets for 2002 through 2004, which show the following data:

	2002	2003	2004
Total [income] expected	\$181,000.00	\$95,000.00	\$100,000.00
Salaries	70,000.00	40,000.00	40,000.00
Total [expenses]	105,000.00	63,500.00	63,000.00

A "Consolidated Income Statement" shows the following data:

	2001	2002	2003
Total Revenues	\$74,481.00	\$73,892.00	\$64,675.18
Compensation	34,321.00	28,417.00	32,700.85
Total Expenses	63,197.00	53,671.00	71,804.00
Net Income	11,284.00	20,221.00	-7,129.05

The two documents, taken together, do not indicate that the petitioner's actual income and expenditures have closely matched the projections in its budgets. In 2003, for instance, the petitioner apparently grossly overestimated its expected income and underestimated its total expenses. Furthermore, the "Consolidated Income Statement" stops at 2003, and therefore it does not document the petitioner's finances as of the 2004 filing date. The statement shows a significant decline in income from 2002 to 2003, accompanied by an even greater increase in expenses, resulting in a four-digit shortfall for the latter year. The line item for "Compensation" does not identify the individual(s) who received that compensation.

On May 31, 2005, the director requested additional evidence, including a list of church employees and their salaries, as well as additional documentation of the church's finances and salary payments. The director specifically requested a "photocopy of a current financial statement that either has been reviewed or audited by a Certified Public Accountant" and "copies of Quarterly Withholding Statements for at least eight quarters prior to filing."

In response, the petitioner submitted a "Statement of Financial Position" reviewed, but not audited, by a certified public accountant. The statement contains the following information:

	2003	2004
Current Assets	\$45,235	\$42,593
Total Income	65,121	73,757
Pastor's Allowance	46,278	43,395
Pastor's Compensation	32,701	33,858
Total Expense	78,978	77,253
Change in Net Assets	-13,858	-3,496

Apparently, the "Pastor's Allowance" includes, but is not limited to, the "Pastor's Compensation." The 2003 "Pastor's Compensation" figure matches the earlier 2003 "Compensation" figure (rounded to the nearest dollar), but not all the figures from 2003 match. The negative income on the new "Statement of Financial Position," for instance, is nearly double the loss reported on the earlier "Consolidated Income Statement."

The petitioner also submitted copies of Internal Revenue Service Form 941 Employer's Quarterly Federal Tax Returns. The Forms 941 show that the petitioner paid between \$6,277.26 and \$16,319 in wages each quarter between the second quarter of 2002 and the third quarter of 2004. The total reported figure for 2003 is \$49,500.85. On the return for the first quarter of 2003, the petitioner indicated that it had two paid

employees. In 2004, the petitioner indicated that it had only one employee; wages paid in that year never exceeded \$9,100 in a given quarter. Wages for the first three quarters of 2004 total \$25,988.94. Counsel states that the beneficiary was the petitioner's sole paid employee in 2004, and one of the two paid employees in 2002 and 2003. The documentation itself, however, does not identify the employees who received the reported wages, and therefore the documentation cannot confirm counsel's assertions. There is no indication as to how the petitioner divided wages paid in 2003 between its two employees.

On February 10, 2006, the director denied the petition, stating that the petitioner has not established its ability to pay the beneficiary. The director based this finding on the net loss the petitioner reported in 2002 and 2003, and on the fact that "the Forms 941 are unsigned and undated. There is nothing to indicate who prepared the documentation or if the documentation was ever filed or received by the Internal Revenue Service."

On appeal, counsel states that the director "unreasonably required signatures on 941s and did not place petitioner on notice that this requirement would form part of the basis for denial. There was no reason to believe 941s were not filed." The burden is on the petitioner to establish that it filed the Form 941 returns; the director is under no obligation to presume as much. Counsel is, however, correct in asserting that the director did not previously request proof of filing. The petitioner, on appeal, submits copies of canceled checks payable to Fleet National Bank and the State of New Jersey. The "Memo" line on each check indicates that the payments relate to the Form 941 quarterly returns. The checks, therefore, serve as evidence that the petitioner actually paid its monthly liabilities as reflected on those returns.

Regarding the petitioner's reported net losses in 2003 and 2004, counsel accuses the director of a "particularly uncharitable" reading of the financial reports. Counsel acknowledges the "net loss of \$3,496 for 2004, the most recent report," but observes: "Even if the \$3,500 deficit were to . . . become an annual event, [the beneficiary] would still have 12 years before the cash would be depleted." The petitioner need only show its ability to pay the beneficiary between the filing date and the date the beneficiary adjusts status; it need not establish a bottomless or indefinite reserve of funds. We note that, by now, financial figures for 2005 and 2006 ought to be available, which would afford the petitioner the opportunity to support the claim that its losses in 2003 and 2004 were, in fact, uncharacteristic rather than symptomatic of a trend of decline.

Counsel asserts that, had the petitioner eliminated certain discretionary expenses, such as an "architect's fee," the petitioner's 2004 shortfall would not have occurred, and that the larger 2003 deficit "reflected several thousand dollars of non-recurring expenses," such as repairs, in addition to an uncharacteristic "drop-off in donations" that did not recur in 2004. Counsel's assertions are consistent with the itemized list of expenses in the record.

Most importantly, counsel asserts that the petitioner has, in fact, been paying the beneficiary the full proffered wage, and that the financial statements reflect these payments. Counsel states: "The record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage. W-2s and 941s have been provided." The Form 941 returns do not identify the recipient of the wages. The petitioner's September 2004 petition does not, as claimed, include Form W-2 Wage and Tax Statements. Therefore, the record does not, in fact, show that the beneficiary is the

individual who received the salary payments. This does not prove that someone else *did* receive them; merely that the petitioner has not met its burden of proof in this regard. The petitioner has retained and submitted copies of the checks used to pay employee withholding, but no comparable evidence of payments to the beneficiary. The appeal includes a copy of a paycheck issued to the beneficiary in March 2006, but no comparable evidence of payments to the beneficiary in 2004 or 2005. Thus, the petitioner's claim to have paid the beneficiary since before 2004 should receive due consideration, but only if the petitioner is able to establish that the beneficiary was, in fact, the recipient of the documented payments.

We turn now to the chief basis for our remand order. Counsel asserts, on appeal, that the director "apparently was satisfied with the form of presentation of the financial report." The "form of presentation," however, is a hurdle that the petitioner must overcome before the petitioner can be found to have established its ability to pay the beneficiary.

The director, in denying the petition, cited the regulation at 8 C.F.R. § 204.5(g)(2), but the director quoted only part of that regulation. A key passage, omitted by the director, states that evidence of ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." 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).

Mitigating the petitioner's failure to provide the above documents is the director's failure to cite the documentary requirements in the request for evidence or the notice of decision. The director must allow the petitioner a final opportunity to submit evidence that is acceptable under 8 C.F.R. § 204.5(g)(2). We acknowledge that the petitioner, as a tax-exempt church, will have no federal tax returns available, and would presumably not have produced annual reports of the types usually distributed to corporate shareholders, but this does not preclude the existence of audited financial statements. Indeed, counsel, on appeal, claims that the petitioner has already submitted "numbers . . . audited by a CPA." The accountant's review report, dated August 7, 2005, specifically states that the review "is substantially less in scope than an audit." The record does not, as counsel claims, contain an audited financial report. The director, in the request for evidence issued in May 2005, indicated that a "reviewed" financial statement would have the same weight as an audited statement, but there is no regulatory support for this assertion.

Therefore, 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 Administrative Appeals Office for review.