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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: SRC 05 109 51731 Office: TEXAS SERVICE CENTER Date: JAN 08 2007

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

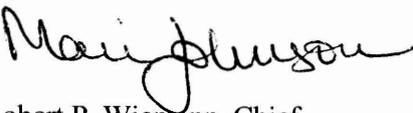
PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:



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 Director, Texas 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 constituent church of the Korean Evangelical Church of America. 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 Sunday school principal and Bible worker. The director determined that the petitioner had not established: (1) that the beneficiary had the requisite two years of continuous work experience in the occupation immediately preceding the filing date of the petition; (2) the petitioner's ability to pay the beneficiary's proffered salary; or (3) that the beneficiary's position qualifies as a religious occupation.

On appeal, the petitioner submits a brief from counsel and various documents.

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 we shall address concerns the beneficiary's past experience. 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 March 8, 2005. Therefore, the petitioner must establish that the beneficiary was continuously

performing the duties of a Sunday school principal and Bible worker throughout the two years immediately prior to that date.

Rev. \_\_\_\_\_ Pastor of the petitioning church, states that the beneficiary “has been working as the Principal of Sunday School and Bible worker since May 2002.”

The petitioner submits copies of monthly checks that the petitioner had issued to the beneficiary to cover her salary (\$902.50 per month) and housing (\$500 per month). The checks are dated between November 2002 and January 2005. There are no checks from July 2003. The checks were copied before being cashed or deposited. The petitioner has also submitted copies of bank statements from October, November and December 2004, showing that the beneficiary’s October and November paychecks were presented for payment during those months.

On May 28, 2005, the director issued a request for evidence (RFE), instructing the petitioner to “Submit a detailed description of the beneficiary’s prior work experience including duties, hours, and compensation. Submit an IRS certified copy of the beneficiary’s income tax returns with all the pertaining W-2s for the two years preceding the filing of this petition.”

In response, the petitioner submits further bank documents showing the processing of paychecks to the beneficiary from September 2002 to May 2005, including July 2003 checks that had been omitted from the initial submission. There is no documentation that the April 2004 checks were processed, but the existing records amply demonstrate a general pattern of monthly payments.

Copies of the beneficiary’s federal tax returns, not certified by the Internal Revenue Service (IRS), show that the beneficiary reported \$12,000 in wages in 2003, and the same amount in 2004. The beneficiary listed her occupation as “Church Staff.” The petitioner provides copies of IRS Form W-2 Wage and Tax Statements for 2002 and 2004. The 2002 form shows \$6,000 in salaries, and the 2004 form shows \$12,000, before withholding of taxes. The Forms W-2 also purport to show a housing allowance, but this information was added after the forms were printed. On the 2002 form, the phrase “HOUSING ALLOW.” and the numerals “3000” are darker than the surrounding text, and the “3000” is not aligned with the “.00” that immediately follows. On the 2004 form, the phrases “HOUSE ALLOWANCE” and “6000.00” have been handwritten into a blank space. This alteration of the Forms W-2 is of some concern, but contemporaneous bank records show that the petitioner issued the housing allowance checks, and that the petitioner presented them for payment.

In denying the petition, the director acknowledged that the beneficiary identified herself as “Church Staff” on her 2003 and 2004 income tax returns, but found: “It cannot be determined that the beneficiary has worked in a religious occupation prior to filing Form I-360.” The director also found that the record lacks “a detailed description of the beneficiary’s employment history in the United States.”

On appeal, counsel asserts that the petitioner submitted “overwhelming evidence of employment.” Considering that the petitioner had documented regular payments to the beneficiary throughout (and before) the qualifying period, we must concur with counsel in finding the director’s conclusions to be, at best, insufficiently explained.

We note that the director noted that the petitioner's RFE response did not include the beneficiary's Form W-2 for 2003. On appeal, counsel states: "we sincerely believed that CIS adjudicator failed to notice Beneficiary's W-2 which was submitted at the time of filing. But we hereby again produce beneficiary's 2003 W-2." The petitioner's initial filing contains no Forms W-2, and the evidence list submitted with the initial filing does not mention any Forms W-2. As noted previously, the petitioner's RFE response included copies of the beneficiary's Forms W-2 from 2002 and 2004. It appears that the petitioner simply submitted the 2002 form by mistake. The newly submitted 2003 Form W-2, like the forms for other years, shows information about the housing allowance that appears to have been inserted into the form.

Documentation from the Internal Revenue Service confirms the information on the Forms W-2 from 2002, 2003 and 2004, except that the documents do not reflect the \$3,000 or \$6,000 "housing allowance" sums. This is consistent with that information having been added to the forms after the fact. Despite these anomalies, we find no indication of fraudulent intent. As we have already noted, canceled checks, themselves marked "housing," corroborate the annotations. The petitioner's failure to include this information on the original Forms W-2 may or may not be an issue of concern to the IRS, but it is not grounds for denial of an immigrant visa petition. The preponderance of evidence clearly favors the petitioner with regard to the beneficiary's past employment, and we hereby withdraw the director's contrary finding.

The next issue concerns the petitioner's ability to pay the beneficiary's monthly salary of \$1,000 plus \$500 for housing costs. 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 bank statements submitted with the petitioner's initial submission show balances of \$48,577.75 as of October 31, 2004, dropping sharply to \$13,825.55 at the end of November, and decreasing further to \$9,975.53 a month after that. The petitioner submits partially translated documents in the Korean language, labeled "2004 Budget," "2004 Expenditures," and "2005 Budget." A budget reflects anticipated income and expenses; it does not document cash flow that has already occurred. The record offers little information about the source of the "Expenditures" document.

As noted above, the petitioner has submitted documentation showing that the petitioner has paid the beneficiary throughout the qualifying period. The initial submission includes copies of quarterly returns, showing that the petitioner paid steady or increasing amounts in salaries every quarter from the third quarter of 2002, when the petitioner paid \$3,000 in salaries, to \$9,600 paid in the last quarter of 2004. There is no return for the second quarter of 2003 or the first quarter of 2004. The returns do not specify the number of the petitioner's employees.

In the RFE, the director instructed the petitioner to submit “copies of annual reports, federal tax returns, or audited financial statements,” as the regulations require. In response, the petitioner submits copies of previously submitted materials. Also, counsel states that the response includes an “audited financial statement.” The document, however, is not an audited financial statement. It is, rather, an unaudited financial statement with an accountant’s compilation report. The compilation report reads, in part:

A compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.

Management has elected to omit substantially all of the disclosures ordinarily included in financial statements prepared on the modified cash basis of accounting. If the omitted disclosures were included in the financial statements, they might influence the user’s conclusions about the organization’s financial position.

The financial statement has obviously not been audited, and counsel’s assertion to the contrary is simply false.

The director, in denying the petition, stated that the petitioner’s submission “of unaudited financial related documents” does not meet the regulatory requirements at 8 C.F.R. § 204.5(g)(2). On appeal, counsel calls the director’s decision “absurd and incomprehensible” because the petitioner had submitted “overwhelming evidence of Petitioner’s past and future ability to pay the offered salary of \$1,500 such as Petitioner’s bank statement, and 2004 and 2005 internally audited church budget, and CPA’s financial statement and Compilation report.”

In the RFE, the director had put the petitioner on notice that acceptable evidence of ability to pay “shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.” This requirement derives directly from federal regulations at 8 C.F.R. § 204.5(g)(2). Counsel, on appeal, notes that the director requested an “Audited financial Statement,” and counsel asserts that the petitioner’s RFE response included “everything we were asked to provide.” As we have already observed, the financial statement that followed the RFE included an advisory that the statement was not audited, and therefore the preparer could not endorse “conclusions about the organization’s financial position.”

On appeal, counsel does not directly acknowledge the regulatory requirements. Counsel asserts that the petitioner’s budget was “internally audited.” On appeal, the petitioner submits a new English-language “2004 Annual Financial Report,” to which counsel refers as an “internally audited annual report.” Comparison of the documents shows that the “annual financial report” is simply a new translation of the Korean-language document previously identified as the “2004 Budget.” A budget and an annual report are not the same thing, and applying both labels to the same document creates confusion rather than resolves it. Also, the record is devoid of evidence that the document was “internally audited.”

Counsel states that the financial compilation statement “is ‘technically not audited,’” but dismisses this concern as “rather arbitrary.” The word “audited” is found in the controlling regulations, which the director

has no discretion to modify or disregard. Similarly, counsel certainly lacks the authority to interpret the regulations and rule on which parts are important and which are mere technicalities, to be modified at the petitioner's discretion.

In contesting the director's finding, counsel cites two federal court cases and an unpublished appellate decision. The cited appellate decision is not a published precedent, and it is therefore not binding in other proceedings. The decision, issued by the AAO in 2003, deals with the manner in which a C corporation disposes of its income at the end of the tax year. It does not modify or discard the evidentiary requirements for ability to pay. The petitioner in the cited decision had, in fact, provided tax returns. The issue there was what was in those returns, rather than whether or not the petitioner had to provide them at all.

Counsel cites *Stankovic v. INS*, 94 F.3d 1117 (7<sup>th</sup> Cir. 1996) to state that the director must "make a careful and individualized determination." The court in *Stankovic* found that the Board of Immigration Appeals had made findings contrary to the evidence of record. Counsel has not shown that such is the case here. *Stankovic* does not state that a petitioner can exempt itself from documentary requirements simply by refusing to generate the required documents.

Counsel cites *Henry v. INS*, 74 F.3d 1, 4 (1<sup>st</sup> Cir. 1996), stating that the "adjudicator's failure or neglect to consider significant and relevant factors . . . is an abuse of discretion." At issue in *Henry* was an application for adjustment of status, which is a discretionary decision. The regulations at 8 C.F.R. § 204.5(g)(2), however, are not discretionary; they list the forms that acceptable evidence "shall" take, and they do not indicate that the requirement of an audited financial statement is waived if the employer simply chooses not to pay for an audit. (Such a policy would simply provide employers of intending immigrants with an incentive not to audit their finances.)

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). While the petitioner has submitted proof of past payments to the beneficiary, the regulations do not state or imply that a history of past payments is sufficient to demonstrate that the petitioner will continue to be able to make those payments.

We acknowledge that many religious institutions have financial arrangements that may differ from those of other organizations such as for-profit businesses. Nevertheless, 8 C.F.R. § 204.5(g)(2), by its plain wording, applies to "any petition filed by or for an employment-based immigrant which requires an offer of employment." Nothing in the regulatory language limits this provision to petitions filed with Form I-140 rather than Form I-360. Because the special immigrant religious worker classification requires an offer of employment, it falls within the compass of that regulation. Furthermore, pursuant to 8 C.F.R. § 204.5(c), for most employment-based immigrant classifications that require an offer of employment, only the employer may file the petition. An alien cannot, for example, self-petition as an outstanding professor or researcher. The only employment-based immigrant classification that requires a job offer, and for which current regulations permit an alien to self-petition, is the special immigrant religious worker classification. Thus, the reference at 8 C.F.R. § 204.5(g)(2) to "any petition filed by . . . an employment-based immigrant which requires an offer of employment" can only refer to special immigrant religious worker petitions. We must

conclude, therefore, that the regulations, in their current form, apply the documentary requirements of 8 C.F.R. § 204.5(g)(2) to special immigrant religious worker petitions. The Service Centers and the AAO lack the authority to exempt churches arbitrarily from this requirement.

We note that an audited financial statement is not the only acceptable type of evidence. As a 501(c)(3) non-profit organization, the petitioner could have prepared IRS Form 990 returns, which are analogous to tax returns as regards their content. Churches are not required to file such returns, but it does not appear that they are prohibited from doing so voluntarily. Such a process would, presumably, involve less expense than an audit.

The director correctly found that the petitioner has not submitted the evidence required by 8 C.F.R. § 204.5(g)(2). Counsel's arguments on appeal are unpersuasive or off-point, and attempt unsuccessfully to shift the discussion from what the regulations demand to what should reasonably be expected of a church, an argument that can only work in the absence of mandatory, non-discretionary requirements. The AAO lacks the authority to modify or overturn the regulatory requirements, and therefore it would not be fruitful to debate whether or not the AAO would seek to do so. We must, therefore, affirm the director's finding.

The final issue is whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The regulation at 8 C.F.R. § 204.5(m)(2) defines "religious occupation" as 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.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The regulation reflects that nonqualifying positions 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.

Rev. [REDACTED] describes the beneficiary's position:

1. Her Duty as the Principal of Sunday School

Her duty as a Principal of Sunday school . . . will be coordinating and supervising Sunday school classes and activities in every level from Kinder garden [*sic*] classes to Adult classes. She will be training and teaching Sunday school teachers on each level how to effectively teach Bible lessons and provide resources for the Sunday school teachers. She will organize

and lead programs and activities for all ages and train the volunteers who would like to teach the Sunday school.

## 2. Her duty as a Bible Worker

She will be teaching Bible to many groups in our church. It is our culture that the leaders of the church do home visitation. She will visit those who are sick at home or hospital and teach the Bible upon request from our church members. She will also seek out among our church members who are in need, sick, discouraged, and who need pastoral care and visit them personally or schedule pastoral visitations.

In the RFE, the director requested “evidence that the beneficiary’s primary duties in the proposed job require specific religious training beyond that of a dedicated and caring member of the religious organization.” In response, counsel states that the beneficiary’s “duties require specific religious training far more than that of just being a member of her church.” Counsel also asserts: “There is no official (formal) requirement that [a] person has to fulfill to be a Principal of Sunday School and Bible Worker for the church in this denomination. However, [a] person has to have considerable formal education (preferabl[y] with [a] College degree), and some training to be a Bible teacher . . . and considerable experience in religious/church works.” Counsel is neither an official of, nor a spokesman for the Korean Evangelical Church of America, and the assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 2, 4 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). A translated diploma shows that the beneficiary completed “the Bible college and leadership course offered by” Suyuri Church in Korea in May 2000. Other documents show that the beneficiary holds a college degree, but it is in business administration rather than any field related to religion.

In denying the petition, the director stated: “The evidence does not show that this is or ever was a paid position . . . requiring specified credentials or formal religious education.” On appeal, counsel observes that the regulations include “religious instructors” among qualifying religious occupations. Counsel also asserts that there is no legal support for the director’s imposition of a specified training requirement.

After careful and prolonged consideration of this issue, the AAO finds that the “training” issue has received a disproportionate amount of weight in adjudications of special immigrant religious worker petitions. Obviously, when a given position clearly requires specific training, 8 C.F.R. § 204.5(m)(3)(ii)(D) requires the petitioner to show that the alien possesses that training; but the issue of training should not be a primary factor when considering the question of whether that position relates to a traditional religious function. Of greater importance is evidence showing that churches or other entities within a given denomination routinely employ paid, full-time workers in comparable positions, and that those positions do not embody fundamentally secular tasks, indistinguishable from positions with secular employers.

We concur with counsel’s assertion that the director’s standards are “unduly restrictive” with relation to the statutory and regulatory requirements. Given the petitioner’s description of the beneficiary’s job duties, and other materials submitted with the petition, we find that the petitioner has established that the beneficiary’s position qualifies as a religious occupation. We withdraw the director’s finding to the contrary.

The petitioner has overcome most of the stated grounds for denial, but has not shown that it should be free from the regulatory constraints regarding ability to pay. Because the director has cited this factor as a basis for denial, the AAO is unable to withdraw the denial in its entirety.

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.