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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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OCT 17 2007

FILE:

[REDACTED]
SRC 06 131 53647

Office: TEXAS SERVICE CENTER Date:

IN RE:

Petitioner:

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition for abandonment, reopened the proceeding on the petitioner's motion, and denied the petition on the merits. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an assembly of the Apostolic Church U.S.A. 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 the director of the petitioner's children's ministry. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a children's ministry director immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established its ability to compensate the beneficiary.

On appeal, the petitioner submits copies of bank statements and a brief from counsel.

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).

First, we shall address 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 21, 2006. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a children's ministry director throughout the two years immediately prior to that date.

The initial submission includes a copy of an October 2, 2005 letter to the beneficiary from Tunde Koroede, Senior Pastor of the petitioning church. The letter reads, in part:

Thank you for your service to the body of Christ at [the petitioning church] especially in the Children's Ministry for the past three years.

As we have mentioned, our children's Department continues to grow as our membership grows. The church board has therefore determined that it is necessary we assign a Coordinator, who will lead the department, design and implement a curriculum that will train our children. The Coordinator must be an ordained minister of God.

By the recommendation of the Presbytery, The Church Board would like to offer you the position of Director of Children's Ministry. The starting date will be February 1, 2006, assuming your authorization is valid at that time. The compensation for services will be Eighteen Thousand, One Hundred and Fifty Dollars (\$18,150.00) per year.

Pastor Koroede's letter is ambiguous regarding the nature and extent of the beneficiary's past work for the petitioner, referring to what was then a future "starting date" for the beneficiary's position as director of the children's ministry, but also recognizing the beneficiary's "service . . . for the past three years."

A photocopy of a "Certificate of Ordination to Office of Deaconess" indicates that the beneficiary was "duly set apart and ordained to the office of a DEACONESS of The Apostolic Church" on May 4, 2003.

On November 27, 2006, the director issued a request for evidence (RFE), instructing the petitioner to submit "evidence of the beneficiary's work history beginning March 21, 2004 and ending March 21, 2006," including documentation "that shows monetary payment." The director further stated: "[i]f any work was on a volunteer basis, provide evidence to show how the beneficiary supported him or herself . . . during the two-year period or what other activity the beneficiary was involved in that would show support."

In response, the petitioner submitted an unsigned "Work History," stating that the beneficiary "has been working for the church as the director of the Children's Ministry on a volunteer basis since **February 2004**" (emphasis in original) and "has been generously supported by church members, her brothers, [REDACTED]" The petitioner's response included no corroborating evidence of these claims. The petitioner provided telephone numbers for [REDACTED] but the petitioner is responsible for obtaining and submitting the required evidence; it cannot suffice for the petitioner simply to provide telephone numbers of potential witnesses.

The director denied the petition on May 22, 2007, stating: “volunteer activities do not constitute qualifying work experience” for the purposes of the immigrant classification sought. On appeal, counsel states that the director’s decision “is contrary to the agency’s explicit statement that the regulations had been revised to account more clearly for uncompensated volunteers in 56 Fed. Reg. 66965 (Dec. 27, [1991]).” The cited revision to the regulations pertains specifically, and exclusively, to nonimmigrant religious workers. Therefore, the December 27, 1991 regulatory revisions cannot properly be cited with respect to special immigrant religious worker petitions.

Counsel asserts: “[t]he Petitioner submitted evidence that [the beneficiary] has been working as director of the Children’s ministry on a volunteer basis since February 2004.” The only “evidence” submitted to that effect is an unsigned letter from an unidentified source.

We note that the petitioner cannot meet its burden of proof and establish the beneficiary’s eligibility simply by establishing that the beneficiary was an active church member during the two-year qualifying period. The Board of Immigration Appeals has held 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, without compensation, to religious duties. See *Matter of Varughese*, 17 I&N Dec. 399, 402 (BIA 1980). This case law was in place when Congress enacted the Immigration Act of 1990. The legislative history of the 1990 Act 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 (Sept. 19, 1990). See also *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (Congress is presumed to be aware of existing administrative and judicial interpretations). In line with case law 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. We note that the Ninth Circuit Court of Appeals has upheld the AAO’s interpretation of the two-year experience requirement. See *Hawaii Saeronam Presbyterian Church v. Ziglar*, 2007 WL 1747133 (9th Cir., June 14, 2007).

With the above discussion in mind, we note that the petitioner has never claimed, let alone demonstrated, that the beneficiary’s past experience with the petitioning church was on a full-time basis. Rather, the evidence suggests otherwise. In the letter submitted with the initial filing, [REDACTED] did not state that the beneficiary had acted, in the past, as the petitioner’s director of children’s ministry. Instead, [REDACTED] indicated that the recent growth of the congregation, and thus of the children’s department, made it “necessary we assign a Coordinator, who will lead the department.” If the appointment of a [REDACTED] or “Director” resulted directly from recent growth, then it stands to reason that, prior to such growth, the children’s department was previously too small to justify such a position. This inference, drawn from the petitioner’s own submissions, leads us to conclude that the petitioner’s children’s department did not consistently provide full-time work for the petitioner continuously throughout the two-year qualifying period.

For the above reasons, we affirm the director’s finding that the evidence is insufficient to establish that the beneficiary has been continuously performing qualifying duties during the two years immediately preceding the filing of the petition.

Furthermore, we note that the petitioner, on the Form I-360 petition, identified the beneficiary's "Current Nonimmigrant Status" as "A-2." The beneficiary's A-2 visa itself, reproduced in the record, states "Consulate General of Nigeria / Atlanta, GA." Pursuant to INA Section 101(a)(15)(A)(ii), 8 U.S.C. § 1101(a)(15)(A)(ii), A-2 status applies to certain "officials and employees who have been accredited by a foreign government . . . and the members of their immediate families." Under Part 8 of the Form I-360 petition, which instructed the petitioner to provide "[i]nformation about the [beneficiary's] children and spouse," the petitioner wrote "NONE." The petition also indicated that the beneficiary was widowed, meaning she could not derive A-2 status as the spouse of an A-2 principal alien who was actively employed by a foreign government. Given the beneficiary's age at the time of filing, she could not qualify as the dependent child of an A-2 principal alien under 8 C.F.R. § 214.2(a)(2)(ii), (iii) or (iv). Given these facts, it appears that the beneficiary's A-2 status derived from her own employment with a foreign government, rather than her familial relationship with an unidentified official or employee of a foreign government.

If the beneficiary was entitled to A-2 nonimmigrant status as a principal alien at the time of filing, then we can infer that the beneficiary was employed by a foreign government, presumably at the Nigerian Consulate in Atlanta (identified on her visa). If so, then the beneficiary had a source of income (employment at the consulate) that the petitioner failed to mention when the director specifically asked for information about the beneficiary's material support and the activities that contributed to that support. Furthermore, the beneficiary's employment at the consulate would clearly limit the time that was available for the beneficiary to work at the petitioning church.

If, on the other hand, the beneficiary was *not* an employee or official of a foreign government as of the filing date, or a qualifying dependent thereof, then the beneficiary was not entitled to A-2 status as of the filing date. If the beneficiary's then-current nonimmigrant status was not A-2 as of the filing date, then it would necessarily follow that the Form I-360 petition contains false information, which the petitioner subsequently would have compounded by reiterating the beneficiary's A-2 status in response to the RFE.

The remaining basis for denial concerns the petitioner's ability to pay the beneficiary's salary of \$18,150 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.

The petitioner's initial submission specified the amount of the proffered annual salary, but included no evidence of the petitioner's ability to pay it. Accordingly, the director, in the RFE, instructed the petitioner to submit the required evidence of ability to pay. The director, echoing the above regulatory language, instructed the petitioner to submit "copies of annual reports, federal tax returns . . . or audited financial statements."

The petitioner responded to the RFE, but the response did not address the issue of the petitioner's ability to pay the beneficiary's salary. Counsel, in a cover letter, explained how each new exhibit related to an issue in the RFE – but counsel did not acknowledge the issue of the petitioner's ability to pay the beneficiary's salary, nor did counsel identify any evidence that was intended to address that issue.

In denying the petition, the director correctly found that “[t]he petitioner failed to submit the requested evidence [of the petitioner's] ability to pay.” On appeal, counsel does not explain the petitioner's failure to submit the requested (and required) financial documents in response to the RFE. The petitioner submits copies of several bank statements. 8 C.F.R. § 204.5(g)(2) 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.” Bank statements are not included on the list of acceptable documents. 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).

Furthermore, even if the bank statements were acceptable evidence, the petitioner failed to provide this evidence in response to the RFE. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). *See also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). Therefore, the AAO need not discuss the bank statements in detail.

The petitioner's submission of bank statements on appeal is both facially insufficient and untimely. The director made no error in finding that the petitioner failed to establish its ability to pay the beneficiary's proffered salary (a salary which, as of the date of filing, the petitioner had never paid to the beneficiary). We therefore affirm that finding.

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.