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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: CALIFORNIA SERVICE CENTER

Date: NOV 17 2008

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IN RE:

Petitioner:

Beneficiary:

[Redacted]

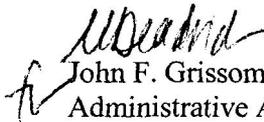
PETITION: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

[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.


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) 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 a pastor. The director determined that the petitioner had not established that the beneficiary was qualified for the position or that the petitioner has the ability to pay the proffered wage.

On appeal, counsel submits a brief and copies of previously submitted 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,

(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 presented on appeal is whether the petitioner has established the beneficiary is qualified for the proffered position.

The regulation at 8 C.F.R. § 204.5(m)(2) defines minister as:

[A]n 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.

The regulation at 8 C.F.R. § 204.5(m)(3)(ii)(B) provides that if the alien is a minister, the petitioner must provide evidence that “he or she has authorization to conduct religious worship and to perform other duties usually performed by authorized members of the clergy.”

In a record of its development submitted with the petition, the petitioner stated that it is an independent church and follows the requirements of the General Council of the Assemblies of God in Springfield, Missouri. The petitioner submitted a November 3, 1999 letter from The Ministry of National Convention of the Assemblies of God – Ministry of Madureira – Rio de Janeiro (The Ministry of CONAMAD), in which it confirmed that the beneficiary was an Evangelical minister and that the congregation of The Ministry of CONAMAD voted to send the beneficiary to Massachusetts to “minister to the large Portuguese-speaking community of that region.” The petitioner also submitted a November 3, 1999 statement from The Ministry of Madureiras in Goiânia, Goiás, Brazil, which declared that the beneficiary “became a member of this Holy Ministry on November 16, 1996 under authorization No. 14421.”

In a request for evidence (RFE) dated December 11, 2006, the director instructed the petitioner to submit evidence that the beneficiary had been ordained, evidence of the requirements for ordination, and that if the denomination did not have formal ordination procedures, “there must be other evidence that the individual has authorization to conduct religious worship and perform other services usually performed by members of the clergy.”

In a March 1, 2007 “offer of employment” submitted in response, the petitioner stated that the beneficiary had performed duties as its senior pastor since 1999. The petitioner resubmitted the letters from The Ministry of CONAMAD and additionally submitted a copy of a May 7, 2002 certificate from The Ministry of CONAMAD certifying that the beneficiary was ordained a pastor on May 5, 2002. The petitioner provided no explanation as to the reason for the beneficiary’s later ordination, given the claim that he has been its senior pastor since 1999 and that he was previously ordained in 1996. The petitioner further submitted the following: 1) a copy of a June 6, 1995 certificate from the Catholic University of Goiás, granting the beneficiary a bachelor’s degree in economics; 2) a copy of a diploma from the Betel Institute of Education granting the beneficiary a bachelor’s degree in theology on December 6, 1995; and 3) a copy of a certificate certifying that the beneficiary was ordained an evangelist on November 16, 1996 by the Regional Convention of the Evangelical Ministers of the Assemblies of God of Goiás State.

In a second RFE dated May 19, 2007, the director instructed the petitioner to:

List the minimum education, training, and experience necessary to do the job and submit documentary evidence to show that the beneficiary has met such requirements. Further, explain how the duties of the position relate to a traditional religious function.

In response, the petitioner resubmitted previously submitted evidence. In denying the petition, the director concluded that the petitioner had submitted insufficient evidence to establish the qualifications for the proffered position and that the beneficiary met those qualifications. The director questioned how a degree from a Catholic university prepared the beneficiary for his position as pastor of the petitioner’s denomination.

On appeal, counsel asserts that the director erred in requiring more evidence of the beneficiary's qualifications and in requiring a high standard of evidence by requiring the official records involving the beneficiary's selection as a senior pastor. Counsel states that the petitioner has submitted sufficient evidence to show that the beneficiary was ordained in 1996 as an evangelist of the organization in which he is practicing and received an "elevated" position when he was ordained as a pastor in 2002. Nothing in the record supports counsel's assertions regarding the purpose of the beneficiary's 2002 ordination. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner submits additional documentation about the history of the organization and that of the Assemblies of God, but no other documentation regarding the ordination requirements of the church or evidence that the beneficiary meets those requirements.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Accordingly, the petitioner has not established that the beneficiary was qualified for the position within the petitioning organization.

The second issue on appeal is whether the petitioner has established that it has the ability to pay 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.

In its March 1, 2007 letter, the petitioner stated that the beneficiary would be compensated at the rate of \$67,600 per year plus a monthly housing allowance of \$1,774. The beneficiary's proposed compensation package is therefore valued at \$88,888 annually. The petitioner filed its Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, on October 23, 2006. Therefore, the petitioner must establish that it had the continuing ability to pay the beneficiary the proffered wage as of that date.

The petitioner submitted copies of Internal Revenue Service (IRS) Form 1099-MISC, Miscellaneous Income, indicating that it paid the beneficiary \$26,000 in nonemployee income in the years 2004 and 2005. The petitioner also provided copies of the beneficiary's IRS Form 1040, U.S. Individual Income

Tax Return, for the same periods on which he reported \$26,000 in self-employment income. The beneficiary also reported \$6,000 received in housing allowance for 2004 and \$10,000 in 2005. However, neither of the IRS Forms 1040 is signed or dated and both report the housing allowance as part of the beneficiary's gross income.¹ Further, on its IRS Form 990, Return of Organization Exempt from Income Tax, at Part V, List of Officers, Directors, Trustees, and Key Employees, the petitioner listed the beneficiary and indicated that it compensated him \$47,024 in 2004 and \$36,000 in 2005. The petitioner entered "None" on Schedule A, Part II, Compensation of the Five Highest Paid Independent Contractors for Professional Services. While the amount reported by the petitioner for 2005 corresponds with the amount the beneficiary reported on his IRS Form 1040, the petitioner provided no documentation to explain the difference in the amount reported in 2004 or why it claimed the beneficiary as an employee on its IRS Form 990 but allegedly paid him as an independent contractor. 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 petitioner also submitted copies of check stubs indicating that it began paying the beneficiary \$1,300 per week, beginning April 24, 2006, and submitted a copy of an IRS Form W-2, Wage and Tax Statement, for 2006 indicating that it paid the beneficiary \$46,800 in wages. The petitioner submitted no documentation to establish that it paid the beneficiary, either as an employee or as a nonemployee, during the first months of 2006. The petitioner also submitted no documentation that it provided the beneficiary with a housing allowance in 2006. The petitioner's IRS Form 990 for 2006 reflects that it compensated the beneficiary in the amount of \$46,800 and made contributions to an employee benefit plan or deferred compensation plan (Part V-A, column D) of \$21,480. The record does not indicate the exact nature of the compensation listed in column D. The evidence does not establish, therefore, that the petitioner has paid the beneficiary the proffered wage in the past.

The petitioner's IRS Forms 990 for the years 2004 through 2006 show net assets or fund balances of \$60,425, \$96,691, \$95,934, respectively. Thus, the petitioner's tax returns would appear to reflect that it had the continuing ability to pay the beneficiary the proffered wage as of the date the petition was filed. However, only the petitioner's 2006 return is signed and dated. Given the inconsistencies in the IRS Forms 1099-MISC issued to the beneficiary, the amount reported by the beneficiary on his IRS Form 1040, and the amount reported by the petitioner on the IRS Forms 990, the petitioner's federal tax returns are less than credible. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner submitted none of the other evidence required by the regulation at 8 C.F.R. § 204.5(g)(2). Therefore, we find that the petitioner has not established that it has the ability to pay the proffered wage.

¹ Clergy housing provided as compensation is excludible from gross income although it must be included for determining social security tax.

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

Under IRS regulations, churches that meet the requirements of section 501(c)(3) of the IRC are automatically considered tax exempt and are not required to obtain recognition of its tax-exempt status from the IRS. Nonetheless, the petitioner must provide establish its tax-exempt status for the purpose of this visa petition. The petitioner can do this pursuant to 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting the documentation that the IRS would require to determine it is a tax-exempt religious organization. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operation for 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.

With the petition, the petitioner submitted a copy of a certificate of exemption from the Massachusetts Department of Revenue exempting the petitioner from sales tax, and an unsigned and undated IRS Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code and the accompanying Schedule A. The petitioner submitted none of the documentation specified in the Yates memorandum and no other documentation required by 8 C.F.R. § 204.5(m)(3)(i)(B) to establish that it is exempt from taxation as a religious organization.

In response to the director's December 11, 2006 RFE, the petitioner resubmitted previously submitted documentation. In her May 19, 2007 RFE, the director informed the petitioner that the evidence submitted indicated that it was exempt from state tax and that it must establish that it was exempt from federal taxation. In response, the petitioner submitted an updated signed copy of IRS Form 1023, and a copy of its newly filed articles of incorporation. The articles, however, did not contain the dissolution clause required by the IRS. The petitioner also submitted documentation that it had submitted the IRS Form 1023 to the IRS for determination; however, according to correspondence from the IRS, the petitioner had failed to submit sufficient documentation for the agency to make a determination. The petitioner submits no additional documentation on appeal.

The petitioner has therefore failed to establish that it is a bona fide nonprofit religious organization.

Additionally, the petitioner has failed to establish that the beneficiary was continuously employed as a minister throughout the two-year period immediately preceding 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.” 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 October 23, 2006. Therefore, the petitioner must establish that the beneficiary was continuously working in qualifying religious work throughout the two-year period immediately preceding that date.

The petitioner stated that the beneficiary had served as its senior pastor since 1999. However, the petitioner failed to provide sufficient evidence to explain the beneficiary's ordination subsequent to his

affiliation with the petitioning organization and failed to establish that the beneficiary was qualified for the position throughout the two-year qualifying period. Additionally, as discussed previously, the petitioner submitted conflicting documentation as to the amount of compensation that it paid the beneficiary for his services. The petitioner also submitted copies of pay stubs indicating that it began paying the beneficiary \$1,300 beginning April 24, 2006. It submitted no documentation that it paid the beneficiary, as either an employee or a nonemployee, during the first months of 2006, or that he was otherwise compensated for his services during this 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).

Section 101(a)(27)(C)(iii) of the Act provides 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.

The petitioner has submitted insufficient documentation to establish that the beneficiary was qualified for the position or was compensated for his services throughout the two-year qualifying period. Accordingly, the petitioner failed to establish that the beneficiary worked continuously as a pastor throughout the two-year period immediately prior to the filing of the visa petition.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.

ORDER: The appeal is dismissed.