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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090
Mail Stop 2090



U.S. Citizenship
and Immigration
Services

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FILE:

EAC 06 219 51612

Office: CALIFORNIA SERVICE CENTER

Date:

NOV 24 2008

IN RE:

Petitioner:

Beneficiary:



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.

JF Grissom
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 for missions. 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.

On appeal, counsel asserts that, in addition to being a full-time religious student during the qualifying two-year period, the beneficiary “continually worked within his vocation.” Counsel submits additional documentation in support of the appeal.

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.” 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 July 25, 2006. Therefore, the petitioner must establish that the beneficiary was continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

In its June 12, 2006 letter accompanying the petition, the petitioner stated that the beneficiary was ordained and licensed with its ministry in 1995 and served at the Church of Kenya. The petitioner further stated that the beneficiary “came to the United States in year 2003 to complete his ministerial studies.” The petitioner stated that the beneficiary was “[p]resently . . . pursuing [a] Masters of Arts in Counseling at Cincinnati Christian University,” and “has volunteered his services to this ministry for the last few years as a special events speaker and a visiting instructor to our Full Gospel Bible Institute.”

The petitioner submitted a copy of a certificate of ordination and a “certificate of license” certifying that the petitioner ordained and licensed the beneficiary as a minister on November 29, 1995. In addition, the petitioner submitted a copy of a certificate indicating that the beneficiary received a Bachelor of Arts degree with a major in ministerial education from God’s Bible School and College in Cincinnati, Ohio on May 20, 2006. The petitioner also submitted copies of ten flyers reflecting that the beneficiary participated in and/or hosted several conferences or similar events in 2004, 2005 and 2006. The petitioner submitted no documentary evidence that the beneficiary taught at its Bible institute and no evidence as to how the beneficiary supported himself and his family during the qualifying period.

In a request for evidence (RFE) date December 11, 2006, the director instructed the petitioner to:

Provide evidence of the beneficiary’s work history for the years 2004, 2005 and 2006. Provide experience letters written by the previous and current employers that include a breakdown of duties performed in the religious occupation for an average week. Include the employer’s name, specific dates of employment, specific job duties, number of hours worked per week, form and amount of compensation, and level of responsibility/supervision. In addition, submit evidence that shows monetary payment, such as pay stubs or other items showing the beneficiary received payment. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported himself during the two-year period or what other activity the beneficiary was involved in that would show support.

In its February 28, 2007 response, the petitioner stated that the beneficiary had “volunteered his services to this ministry for the last few years.” The beneficiary also provided a February 28, 2007 statement in which he stated that between 2004 and 2006, he was a full-time student at God’s Bible School and College and that he was attending graduate school at Cincinnati Christian University. The beneficiary further stated:

During the same years I have been assigned speaking engagements through [the petitioning organization]. The honorariums received have basically covered my travel expenses to these speaking engagements. I have been able to meet the basic needs of my family during this period of going to school through the generosity of several churches and individuals, who have given me monthly offerings to support my education and ministry.

The petitioner provided three letters in which each of the writers attests to providing financial support to the beneficiary and his family. In a February 23, 2007 letter addressed to the beneficiary, [redacted] of the King Christian Center, stated that the Center’s Board had “met recently and a decision was made to send support to you and [redacted] [the beneficiary’s wife] in the amount of \$300.00 [per] month for 2007.” The petitioner also provided a May 10, 2006 letter from [redacted] who identified herself as the pastor’s assistant at Church of Fire Ministries in [redacted] Ohio. [redacted] stated that the church provided the beneficiary and his family assistance in the amount of \$700 per month. The letter did not indicate when the church began providing financial support to the beneficiary. In a May 4, 2006 letter, Reverend [redacted] stated that he and his wife contribute \$200 per week to the financial needs of the beneficiary and his family. However, the petitioner submitted no documentation to corroborate any financial support made by these individuals or received by the beneficiary. 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)).

The petitioner provided copies of the beneficiary’s Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, for the years 2004 through 2006. However, these forms are not signed or dated. Further, each return reports self-employment income of \$25,200. The source of this income is not clear. The money the beneficiary allegedly received from King Christian Center, the Church of Fire Ministries and [redacted] were not remuneration for services rendered but rather given as gifts. Additionally, the beneficiary does not claim any business expenses, even though he stated that the honoraria he received “basically” covered his travel expenses. The petitioner’s profit and loss statement for 2005 showed \$1,000 in honorarium for the beneficiary and the 2006 statement shows \$800 in honorarium.

In response to a second RFE dated April 3, 2007, wherein the director again sought information regarding the beneficiary’s work during the two years preceding the filing of the visa petition and the means by which he supported himself financially during that period, the petitioner submitted two additional letters from individuals who allegedly provided support to the beneficiary. In a June 11, 2007 letter, [redacted] senior pastor of Lebanon Community Fellowship in Lebanon, Virginia, confirmed that his church “has been supporting [the beneficiary] while he has been in school from January 2004 to the present in the amount of \$200 per month.” In a June 12, 2007 letter, [redacted] stated that he had been a “consistent monthly financial supporter of [the beneficiary] since 2004 to the present in the amount of \$400 per month.” However, the petitioner again failed to provide documentary evidence of these payments. *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).

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.

Counsel states on appeal that the “requirement of compensation in the form of a traditional salary was specifically questioned by then Circuit Judge ██████████ in *Camphill Soltane v. DOJ*, 381 F.3d 143 (3rd Cir. 2004), and that “this criticism has found acceptance by the AAO.” First, according to the record of proceeding, the beneficiary’s intended place of work is in Virginia, which is not under the jurisdiction of the Third Circuit Court of Appeals. ██████████ was never a binding precedent for this proceeding. Further, as noted by counsel, the Third Circuit Court of Appeals found the AAO’s decision that religious worker petitions traditionally must involve a salaried position to be “questionable.” In support of its reasoning, the court cited to the supplemental language in the promulgating rule at 8 C.F.R. § 214.2(r)(3)(ii)(D) that applies to an unrelated class of aliens: R-1 *nonimmigrant* religious workers. 56 Fed. Reg. 66965, 66966 (Dec. 27, 1991). Contrary to the *special immigrant* classification under review here, the R-1 nonimmigrant religious worker classification does not require any previous experience, whether compensated or not. It is unclear why the court cited to language from an unrelated regulation rather than one that applied to the special immigrant religious worker petition under review. In any event, while the court found that the AAO “failed to show why the position offered by ██████████ does not qualify,” it also determined that it “need not set forth here a definitive test regarding when a job may or may not be characterized as a ‘religious occupation.’” Instead, the court vacated and remanded the case to allow the AAO to develop its position (as well as its position on three other determinations) because

the court could not “sustain the decision of the AAO on this ground without further evidence or explanation.”

As discussed above, CIS recognizes that some religious work is performed in a clearly unsalaried environment, such as in the case of monks or nuns. However, in other religious settings 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.

The petitioner submitted several letters from individuals attesting that they provided the beneficiary with financial support but submitted no documentation to verify these contributions. As previously stated, going on record without supporting documentation is not sufficient to meet the petitioner’s burden of proof. *Matter of Soffici*, 22 I&N Dec. at 165. Additionally, the beneficiary reported self-employment income of \$25,200 on his federal tax returns for each year of the qualifying period. However, the record is not clear that this income was generated from the beneficiary’s work as a minister.

Counsel further asserts that “[v]oluminous evidence was submitted to demonstrate that [the beneficiary] continually preached the Christian Gospel during the relevant two year period.” However, the only evidence submitted by the petitioner of any work done by the beneficiary were ten flyers announcing his participation in or hosting of conferences. Only eight of these flyers indicate that these conferences occurred in the qualifying period, and of these eight, two were for the same two-day conference in June 2006 and none were for more than three days. Therefore, the petitioner submitted no evidence that the beneficiary was consistently practicing his vocation throughout the two-year period immediately preceding the filing of the visa petition.

Counsel also argues on appeal that the beneficiary has been a full-time religious student throughout the qualifying period, and that in *Matter of Z-*, 5 I&N Dec. 700 (Comm. 1954), the Board of Immigration Appeals (BIA) “rejected the conclusion that a Catholic priest engaged in full time religious study during the relevant two year period had not been continuously carrying on his vocation.” Counsel also states that this position is consistent with that expressed by Citizenship and Immigration Services (CIS), in a May 8, 1992 memorandum from ██████████ then Acting Commissioner for Adjudications, and in a September 12, 2006 memorandum from Michael Aytes, Acting Associate Director, Domestic Operations.

The alien in *Matter of Z-* was a Catholic priest who was admitted to the United States for a year to pursue theological studies. With appropriate extensions, he remained in the United States for approximately two years. The former Immigration and Naturalization Service (now CIS) denied his application for a nonquota immigrant visa because he had not been continuously working in his vocation for the two years immediately preceding his application. The BIA held that, where the beneficiary was an ordained priest, the fact that he has engaged in a course of study in furtherance of his vocation does not mean that he has abandoned his vocation as a minister. Specifically, the BIA decision contains the following passage: “The fact that a priest engages in a course of study in the furtherance of his vocation does not support a conclusion that he has abandoned his calling as a minister or that he has taken any action other than that required of him as a minister or that he has engaged in an activity inconsistent with the vocation of a minister.” *Id.* at 703. The decision in *Matter of Z-* addresses the question of whether religious studies interrupt the work of a minister. The decision in *Varughese* addresses a different question, specifically whether unpaid, part-time religious work by a full-time student constitutes continuous work as a minister.

Also, when viewed in context, the cited passage from *Matter of Z-* suggests a narrow application:

It is conceded that when a priest has been ordained as such in the Catholic Church, he is required under canon law to celebrate holy mass daily, dispense the sacraments and guide the spiritual lives of those whom he serves and that he is a minister of a religious denomination as contemplated by section 101(a)(27)(F)(i). The fact that a priest engages in a course of study in the furtherance of his vocation does not support a conclusion that he has abandoned his calling as a minister or that he has taken any action other than that required of him as a minister or that he has engaged in an activity inconsistent with the vocation of a minister. . . . It is represented that a priest teaching in a boarding school also says daily mass, hears confessions, does youth guidance work, and on Sundays helps with religious services in neighboring parishes.

The analysis in *Matter of Z-* rests on specific factors, such as a priest's daily obligations under canon law, which the petitioner has not shown to apply to Belfast Full Gospel Ministries. In *Matter of Z-*, the Central Office quoted the petitioner's argument that the same logic regarding daily obligations applies to "all religious denominations," but there is no indication that the Central Office accepted this broad reading. Instead, the final finding refers repeatedly to "a priest" rather than "a minister." This deviation from the statutory term "minister," along with the specific reference to "canon law," indicates a narrow scope for the finding.

In *Varughese*, the BIA found that an alien did not accumulate continuous experience as a minister while he was a full-time student and a part-time, unpaid church worker. In this case, the petitioner has not submitted sufficient evidence to establish that the beneficiary continuously practiced his vocation while he attended school. The beneficiary alleged on his IRS Form 1040 that he earned over \$25,000 in self-employment income during each of the qualifying years. However, the documentation submitted does not corroborate that this income was from the beneficiary's ministerial work. If an individual were working full-time as a minister, concurrent seminary study would not interrupt that work. If the individual were not working full-time as a minister, however, such study would not take the place of actual ministerial work. Counsel maintains that the beneficiary "continually preached the Christian Gospel during the relevant two-year period" and during the course of his studies, but the petitioner has offered no evidence beyond the conference flyers to establish that the beneficiary preached full-time during that period. There is, likewise, no evidence that the petitioner compensated the beneficiary during that period. These facts appear to parallel those in *Varughese*. Accordingly, the petitioner has not established that the beneficiary has been continuously employed in a qualifying religious occupation for two full years immediately preceding the filing of the visa petition.

Beyond the decision of the director, the petitioner has not established that it has the 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 an annual salary of \$20,000 and would provide him with accommodations. The petition was filed on July 25, 2006. Therefore, the petitioner must establish that it had the continuing ability to pay the beneficiary the proffered wage as of that date.

As evidence of its ability to pay the proffered wage, the petitioner submitted unaudited copies of its financial statements for 2004, 2005 and 2006, and copies of Internet queries on two of its checking accounts.

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, the petitioner has not established that it has the ability to pay the proffered wage.

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.