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FILE:

WAC 07 194 53858

Office: CALIFORNIA SERVICE CENTER

Date: OCT 14 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.

Robert P. Wiemann, 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 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 the director failed to ask for an explanation of the beneficiary's second job and give the petitioner a chance to rebut. Counsel submits a memorandum in support of the appeal and requests a remand of the petition so that the petitioner "has an opportunity to properly explain this issue." Counsel submits no 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 June 12, 2007. 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 May 10, 2007 letter accompanying the petition, the petitioner stated that it “was organized and established on December 31, 2004, and that the beneficiary joined the petitioning organization on April 10, 2005.” The petitioner further stated that the beneficiary “also worked as an Assistant Pastor of Gospel Assembly in Tampa Florida.” In other documentation submitted with the petition, the petitioner indicated that the beneficiary worked an average of 90 hours per week in his pastoral duties. The petitioner also indicated that the beneficiary served as an assistant pastor with the Gospel Assembly in Tampa from 2004 to 2007 and as the founder and pastor of the petitioning organization beginning in 2007.

The petitioner submitted its Internal Revenue Service (IRS) Form 990-EZ, Return of Organization Exempt from Income Tax, for the year 2006, indicating that it paid the beneficiary \$18,000 during the year. However, the IRS Form 990-EZ contains an original signature, is dated May 11, 2007, and contains no indication that it was filed with the IRS. It is unclear whether the tax return was prepared for submission to the IRS or prepared specifically for the purpose of this visa petition. Accordingly, the reliability of this document is brought into question. The petitioner submitted no documentation to corroborate any employment of the beneficiary prior to 2006 or any employment of the beneficiary in 2007. 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)).

In a request for evidence (RFE) dated August 8, 2007, the director instructed the petitioner to:

Provide evidence of the beneficiary’s work history for the two year period prior to the filing date. 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 hat other activity the beneficiary was involved in that would show support.

In response, the petitioner submitted an October 10, 2007 letter in which it stated that the organization was organized on December 31, 2004 as a prayer fellowship or group. The petitioner stated that it invited the beneficiary to become its spiritual leader and pastor on April 10, 2005, and that the group, under the beneficiary's leadership, adopted its present name on January 1, 2006. The petitioner submitted copies of IRS Form 1099-MISC, Miscellaneous Income, that it issued to the beneficiary in 2006 showing nonemployee compensation of \$18,000. The petitioner also submitted a copy of an IRS Form 1099-MISC showing that, in 2006, the beneficiary received approximately \$17,493 in nonemployee income from Sonic, Inc., a courier service. The petitioner further submitted copies of check stubs indicating that they were for monthly payments to the beneficiary for the periods July through September 2007. The stubs indicate a monthly payment of \$1,550 with the September stub indicating a year-to-date amount of \$9,300. Therefore, if the petitioner paid the beneficiary a salary of \$1,550 per month, the September check stub indicates that, through September 2007, the petitioner paid the beneficiary for only six months of the year.

The petitioner provided no documentation to corroborate the beneficiary's employment with Gospel Assembly in Tampa or any employment in 2005. In denying the petition, the director noted that the beneficiary had worked, and was paid for that work, in another occupation during the qualifying 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.

On appeal, counsel does not deny that the beneficiary worked for an organization other than the petitioner, stating:

While its [sic] is true that the beneficiary had a second job, that does not automatically mean that [he] did not have the position of the pastor. It is no secret that due to limited pay most clergy have second jobs (day jobs) to make ends meet for their families.

Counsel further asserts that the director failed to ask for a clarification of the beneficiary's other employment, and that the petitioner was unaware that this employment had become an issue. Counsel asserts that the director's denial of the petition based on an issue of which the petitioner was unaware "is fundamentally contrary to all notions of fairness and notice."

Nonetheless, in her RFE, the director specifically instructed the petitioner to provide evidence of the beneficiary's employment during the two-year qualifying period from all of the beneficiary's employers, both prior and current, to include experience letters and duties. The petitioner failed to submit any documentation, other than the IRS Form-1099 MISC, from any of the beneficiary's employers other than the petitioning organization. Further, the petitioner submitted no additional documentation in support of the appeal.

The evidence therefore does not establish that the beneficiary was continuously engaged in a qualifying religious vocation or occupation for two full years prior to the filing of the visa petition. Not only does the evidence indicate that the beneficiary was engaged in work other than that of a minister, the petitioner provided no documentary evidence to corroborate his employment during 2005 or for 2007 to the date of filing. Additionally, the documentation submitted to verify the beneficiary's employment in 2006 is less than reliable, as it consists of a tax return that may have been prepared only for the purpose of this visa petition.

Beyond the decision of the director, the petitioner has not established that it has extended a qualifying job offer to the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(4) states, in pertinent part, that:

*Job offer.* The letter from the authorized official of the religious organization in the United States must state how the alien will be solely carrying on the vocation of a minister, or how the alien will be paid or remunerated if the alien will work in a professional capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support.

In none of its documentation does the petitioner indicate the compensation that the beneficiary can expect to receive in the proffered position. On appeal, counsel indicates that the beneficiary, as with other clergy, must work a second job in order to support his family. The petitioner has not stated how the beneficiary will be solely carrying on the vocation of minister. Accordingly, the petitioner has failed to establish that it has extended a qualifying job offer to the beneficiary.

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.