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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 15 2008  
WAC 07 121 53694

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

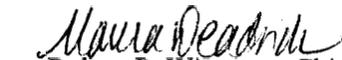
PETITION: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 an assistant 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, the petitioner submits additional 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 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 April 30, 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 March 14, 2007 letter accompanying the petition, the petitioner stated that the beneficiary was currently working at the petitioning organization as assistant pastor and “is responsible for ministerial responsibilities such [as] preaching [and] directing church, teaching, leadership [and] training new ministers” for the petitioner. The petitioner stated that the beneficiary worked “more than forty hours per week” and that his salary “will be” \$20,000 per year. The petitioner submitted no documentation to corroborate the beneficiary’s work during the qualifying period.

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

Provide evidence of the beneficiary’s work history beginning May 4, 2005 – May 4, 2007 only. 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.

The director also instructed the petitioner to “Submit copies of the beneficiary’s IRS Forms W-2 (Wage and Tax Statement) for 2005 and 2006.”

In response, the petitioner submitted an October 24, 2007 letter from [REDACTED], Assistant Superintendent for the petitioning organization, in which he certified that:

[The beneficiary] has been working for the Jehova Shammah Church of the Nazarene, earlier known as the Stamford Second Spanish Church of the Nazarene, for the past five years. In addition to being assistant pastor of this church, he is also in charge of a new mission work in Danbury, Connecticut, where his responsibilities include preaching, teaching, visitation, and overall directing in the development of this new work. He has worked at this for the past two years.

The petitioner stated that the beneficiary "is a consecrated minister," and provided information regarding the job duties of an assistant pastor, to include the following:

1. Pastoral Duties
  - a. Call regularly on the members of the church.
  - b. Go on evangelistic soul-winning visitations regularly.
  - c. Follow up on visitors and prospects through phone contacts, letters, and in-home visits.
  - d. Visit shut-ins and residents in rest homes.
  - e. Visit hospitals, keeping senior pastor and staff informed of visits.
  - f. Coordinate counseling for spiritual problems, making appropriate referrals for other counseling requests.
  - g. Preach in senior pastor's absence or upon his or her request.
  - h. Assist in baptisms and administering the sacraments.
  - i. Teach in the Sunday School department whenever needed.
  - j. Participate in one-on-one discipleship.
2. Worship
  - a. Assist pastor in worship planning.
  - b. Utilize musical gifts.
  - c. Substitute as congregational music leader as needed.
3. Administration
  - a. Manage office in cooperation with the senior pastor.
  - b. Be liaison person for benevolent requests (work with the team leader).
  - c. Work as intermediary on television ministry and general church publicity.
  - d. Schedule regular times of prayer and fasting for the church in cooperation with the senior pastor.
  - e. Coordinate Lay Institute to Equip (LITE), a program that focuses on establishment perpetuation.

In a separate letter also dated October 24, 2007, Reverend Blish stated that the "local church has not extended W-2 forms for its ministers." The petitioner submitted copies of the beneficiary's Internal Revenue Service (IRS) Tax Return Transcripts for the years 2005 and 2006, on which the beneficiary reported self-employment income of \$20,000. The transcript does not indicate the beneficiary's occupation but the Northern American Industry Classification System (NAICS) code is shown as 813000. It is noted that the NAICS code for religious organizations is 813110.<sup>1</sup> The petitioner also submitted a copy of a June 28, 2007 "Local Minister's License," which certified that the beneficiary was licensed as a local minister with the petitioning organization for a one-year period.

Further, although the beneficiary's tax documentation shows that he received and reported self-employment income in 2005 and 2006, the documentation submitted by the petitioner does not indicate that the beneficiary received any compensation from the petitioner.

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<sup>1</sup> U.S. Census Bureau webpage at <http://www.census.gov/epcd/www.naics.html>, accessed on October 15, 2008 and incorporated into the record.

The director denied the petition, stating that the documentation “fail[ed] to provide further information on the types of duties performed in the religious occupation,” and did not mention the beneficiary’s work in Danbury, Connecticut.

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, the petitioner submits documentation regarding payments that it made to the beneficiary in 2007. As these payments are after the filing date of the petition, they do not provide evidence of the beneficiary’s employment during the two years immediately preceding the filing of the visa petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The director concluded that the petitioner did not provide further information on the types of duties performed by the beneficiary in the religious occupation or mention any work performed by the beneficiary in connection with his work in Danbury, Connecticut. However, the petitioner provided the duties of the position of the associate pastor, and stated that the beneficiary’s ministerial responsibilities included preaching, teaching, leadership, and training new ministers. Further, the petitioner stated that in Danbury, the beneficiary’s duties included preaching, teaching, visitation, and overall directing in the

development of this new work. Accordingly, the record provides sufficient evidence of the beneficiary's duties as associate pastor and with the petitioner's organization in Danbury.

Nonetheless, the evidence submitted by the petitioner is insufficient to establish that the beneficiary worked as a full-time assistant pastor for two full years prior to the filing of the visa petition. Although the petitioner provided copies of the beneficiary's income tax transcripts showing that he reported income from self-employment in 2005 and 2006, there is no record that this income was from the petitioner or for work in the qualifying religious occupation. Additionally, the petitioner submitted evidence that the beneficiary was licensed as a minister in 2007, but no indication of any licensing prior to that date.

Accordingly, the evidence is insufficient to 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.

Beyond the decision of the director, the petitioner has not 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.

The petitioner stated that the beneficiary would be paid \$20,000 for his services. The petition was filed on April 30, 2007. 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 no documentation with the petition to establish its ability to pay the proffered wage. In response to the RFE, the petitioner submitted an unaudited copy of its financial report for the fiscal year April 1, 2006 through March 31, 2007. The petitioner also submitted copies of the beneficiary's tax transcripts for 2005 and 2006; however, these documents do not indicate the source of the beneficiary's self-employment income.

On appeal, the petitioner submits copies of checks made payable to the beneficiary dated June through December 2007, indicating that they were for "salary." The checks are dated approximately one week apart and are in the amount of \$384.61. The petitioner also submitted a copy of its payroll register for the beneficiary that also lists these checks. However, none of the checks indicate that they were processed by the bank and therefore are not evidence that the beneficiary actually received compensation for his services.

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. Therefore, the petitioner has failed to establish that it has the ability to pay the beneficiary 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.