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FILE: WAC 06 216 51639 Office: CALIFORNIA SERVICE CENTER Date: **OCT 16 2008**

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:



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. The director further determined that the petitioner had not established that it has extended a qualifying job offer to the beneficiary.

On appeal, counsel states that the petitioner initially entered into a verbal agreement with the beneficiary but was under the impression it could not compensate the beneficiary because of his immigration status. Counsel submits a brief and 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 first issue 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 7, 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 a June 28, 2006 “letter of invitation,” the petitioner stated that the beneficiary had been employed as a pastor with the Anyang Central Presbyterian Church in Korea since January 1, 2001, and that his duties included “preaching & sermon for Worship, leading Bible studies, guiding & counseling for spiritual way, Baptism & communion services, mission to poor, old and handicap person by free foods, cloths by donation and pray[er].” The petitioner submitted a copy of a “letter of appointment” indicating that the beneficiary was appointed as a pastor of Anyang Central Presbyterian Church on January 1, 2001, and a June 16, 2006 “certificate of employment” signed by the Reverend [REDACTED], senior pastor of Anyang Central Presbyterian Church, certifying that the beneficiary had been employed as a pastor at the church since January 2001.

The petitioner also submitted a document purportedly showing salary payments for the beneficiary from January 2003 through June 2006. The document indicates that the beneficiary was paid the equivalent of \$21,000 in U.S. dollars in 2003 and 2004, \$22,400 in 2005 and \$11,200 through June 2006. The document does not indicate who prepared it or the source of the information used to prepare the document.

In a Notice of Intent to Deny dated July 13, 2001, the director advised the petitioner that it had not submitted documentary evidence that the beneficiary had been remunerated for his services. The director instructed the petitioner to:

Provide documentary evidence of the beneficiary’s work history beginning July 6, 2004 and ending July 6, 2006 only. Provide a breakdown of duties performed in the religious occupation for an average week. Include the employer’s name, specific job duties, number of hours worked per week, remuneration, and level of responsibility and who supervised the work. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported himself or herself (and family members, if any) during the two-year period or any other activity with which the beneficiary was involved that would show financial support. [Emphasis in original.]

In response, the petitioner resubmitted the documentation discussed above and provided copies of transaction receipts notifying the beneficiary of incoming wire money transfers to his bank account.

These transactions are dated January 24, 2007 and July 5, 2007. The petitioner also provided copies of deposit slips indicating that the beneficiary and/or his wife deposited \$4,000 to their account on August 11, 2006 and \$9,000 on August 14, 2006. As the wire transfers and the deposits made by the beneficiary occurred subsequent to the qualifying period, they do not provide evidence that he was continuously employed as a pastor 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, the petitioner submits what it identifies as the beneficiary's personal banking statements. However, the documents dated during the qualifying period are in Korean and are not accompanied by an English translation. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The petitioner submitted no other documentation to corroborate the beneficiary's employment during the qualifying period. 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.

In her NOID, the director also noted that the petitioner had submitted two other petitions for religious workers in which it sought the services of the beneficiaries of the petitions as a pastor and a missionary. The director stated that the petitioner indicated the duties of pastor in one petition (CIS receipt number WAC 07 011 50582) as “Worship, Bible teaching, Baptism, funeral & wedding ceremony, outreach mission, spiritual guiding by counseling, leading conference meeting for special events, and other Pastoral services.” The director stated that in the second petition (CIS receipt number WAC 05 191 53047), the petitioner stated that the duties of a missionary were “preaching & sermon for Worship, leading Bible studies, guiding & guiding for spiritual way, helping [the] poor, old and handicap person by free foods, cloths by donation, and pray[er].”

The director noted that the duties that are to be performed by the beneficiary are related more to the position of missionary than to that of pastor, and questioned whether the beneficiary had been employed in the same occupation as the proffered position.

In his August 2, 2007 letter accompanying the petitioner’s response to the NOID, counsel stated:

[T]here is a clear line of leadership in the C&MA [Christian and Missionary Alliance] which identifies persons whom evangelize as Missionaries as leaders of a small congregation. The definition of a Pastor in this organization has the very same requirements of their Missionaries; but has more numerous responsibilities over larger congregations.

Counsel also asserted that, “According to the organizational laws which govern the C&MA, [the beneficiary] is an associate Pastor,” and that “The C&MA define[s] ‘Pastor’ as an official worker licensed by the district, and is officially recognized as an associate leader of a C&MA church within the district.” No documentation in the record, however, supports counsel’s statements. 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 Obaighena*, 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).

Counsel attributed the confusion between the two positions as due to the petitioner “providing similar language when prosecuting both cases,” and that while the terms used vary slightly in the petitions, the described duties are still those of a religious worker.

Regardless of the title of the position used by the beneficiary, the duties assigned for the job to be performed by the beneficiary appear to be similar to those he allegedly performed with his previous employer. Further, the duties described by the petitioner for pastor are also sufficiently similar to that of those described for a missionary such that it can be concluded that the two positions are virtually the same for the purpose of this visa petition.

The second issue on appeal is whether the petitioner 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 its June 28, 2006 letter of invitation, the petitioner stated that the beneficiary would be employed on a full-time permanent basis as a pastor and would receive a monthly salary of \$2,000. As noted above, the petitioner stated that the beneficiary was, as of that date, serving as pastor of Anyang Central Presbyterian Church in Korea, and that his duties included “preaching & sermon for Worship, leading Bible studies, guiding & counseling for spiritual way, Baptism & communion services, mission to poor, old and handicap person by free foods, cloths by donation and pray[er].”

In her NOID, the director noted that the petitioner has filed “several petitions for both Missionaries as well as Pastors.” The director instructed the petitioner to:

Submit documentary evidence to show that the petitioning organization requires the services of three (3) pastors. Please ensure that the evidence addresses the following factors:

- Number of volunteer and paid ministers and staff serving the petitioner’s church
- Size of the congregation.
- Specific duties which the beneficiary will be undertaking vs. specific duties of other staff
- Has the church always had the services of a minister or staff to perform the duties that the beneficiary will be undertaking? If not, what circumstances created a need for the beneficiary’s services? [Emphasis in original.]

In its letter of June 28, 2006, which it resubmitted in response to the NOID, the petitioner stated that it had a 190-member congregation, and a budget of \$271,700. In an August 5, 2007 letter accompanying a supplemental response to the NOID, counsel stated that the petitioner had a congregation ranging from 70 to 120 members, four volunteer workers and three paid ministerial staff, and that the church had always had the services of a minister or staff who performed the duties of the proffered position. The petitioner submitted no documentation with the NOID to corroborate counsel’s statements. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The petitioner submitted an organizational chart; however, the chart does not identify whether the staff is paid or volunteer or the size of the church membership. The petitioner also submitted copies of Internal Revenue Service (IRS) Form 941, Employer’s Quarterly Federal Tax Return, and State of California Form DE6, Quarterly Wage and Withholding Report, for periods in 2005, 2006 and 2007. Copies of the petitioner’s June 2007 IRS Form 941 and California Form DE6, submitted on appeal, show that the petitioner paid six employees; however, the September 2007 forms show three employees.

On appeal, the petitioner submits another version of its organizational chart, with additional names and departments. It is not clear whether the chart is supposed to include every member of the petitioner’s congregation. The petitioner also submits a list in which it lists six paid employees (with two resignations in August 2007 and one position becoming a volunteer in June 2007), and three volunteers, including the beneficiary, who is listed as the education pastor.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533. The appeal will be adjudicated based on the record of proceeding before the director.

The director questioned whether, in view of the fact that the petitioner has filed several petitions for religious workers as pastors or missionaries, it has a sizeable congregation that would support the need for these services. The petitioner failed to respond to the director's inquiry. Accordingly, the petitioner failed to clearly establish that the beneficiary will be solely carrying on the vocation of a minister and therefore has failed to establish that it has extended a qualifying job offer to the beneficiary.

Beyond the decision of the director, the petitioner has failed to establish 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 June 28, 2006 letter, the petitioner stated that it would pay the beneficiary \$2,000 per month. The petition was filed on July 7, 2006. Therefore the petitioner must establish that it had the continuing ability to pay the beneficiary the proffered wage as of that date.

With the petition, the petitioner submitted a copy of its 2006 budget and copies of its IRS Form 941 and California Form DE6 for the March 2006 quarter. The beneficiary is not identified on the California Form DE6 as one of the employees to whom the petitioner paid wages in 2006. In response to the NOID, the petitioner submitted copies of IRS Form 941 and California Form DE6 for all quarters of 2006 and the first quarter of 2007, and on appeal, the petitioner submitted documentation for the quarters ending June and September 2007. The beneficiary is not listed as a paid employee on any of the California Forms DE6.

Although it submitted copies of IRS Forms 941, these tax returns only reflect wages that are reported paid during the stated quarter and does not reflect the amount of funds available to pay the beneficiary. The petitioner did not submit a copy of an IRS Form 990, Return of Organization Exempt from Income Tax, or a copy of an annual report or an audited financial statement. Accordingly, 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.

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ORDER: The appeal is dismissed.