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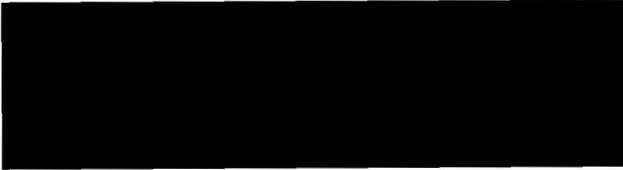
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: LIN 06 031 51294 Office: NEBRASKA SERVICE CENTER Date: SEP 02 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant 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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) remanded the matter for further consideration and action. The director again denied the petition and certified the decision to the AAO for review. The AAO will affirm the director's decision to deny the petition.

The petitioner is an interdenominational church and ministry. 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 the director of the petitioner's Women's Discipleship Program. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established its ability to compensate the beneficiary.

On June 20, 2007, the AAO withdrew the director's decision and remanded the petition, stating that the director's denial rested on flawed arguments, but that nevertheless questions of eligibility remained. The AAO also found that the stated employment arrangements raised questions about the continued viability of the job offer. In the second, certified denial, the director reiterated the previously stated grounds for denial, making more specific findings in response to the appellate decision. The director also found, pursuant to the AAO's observations, that the petitioner had not set forth a viable long-term job offer.

Following the AAO's remand order, the director issued a request for evidence (RFE) on March 10, 2008, instructing the petitioner to answer specific questions of concern to the director. The petitioner responded to the RFE, but the response contained no discussion of the issues raised in the RFE. Instead, the petitioner established that the beneficiary had returned to New Zealand owing to family emergencies. We note that the RFE did not concern matters known only to the beneficiary, and therefore the beneficiary's travel should not have precluded a substantive response to the RFE.

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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

In the certified decision dated July 8, 2008, the director allowed the petitioner 30 days in which to supplement the record, pursuant to Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 103.4(a)(2). The 30-day response period established by regulation has elapsed, and the AAO has received no further submission from the petitioner. Accordingly, the AAO considers the record of proceeding to be complete, and shall render its decision based upon the record as it now stands.

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 under consideration concerns the beneficiary's past experience. CIS regulations at 8 C.F.R. § 204.5(m)(1) require 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." 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate that, immediately prior to the filing of the petition, the alien has the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on December 5, 2005.

In an introductory letter, [REDACTED] and [REDACTED], Senior Pastors of the petitioning entity, stated that the beneficiary had worked full-time for the petitioner "since October 9th, 2003," but a Certificate of Ordination indicated that the beneficiary was not an ordained minister prior to May 1, 2005. Subsequently, in response to a March 7, 2006 request for evidence (RFE), [REDACTED] and [REDACTED] stated: "Since October 2005 [the beneficiary] has been Director/Pastor of the Women's Discipleship Program."

In its June 20, 2007 remand order, the AAO stated:

The director has not, heretofore, ruled on whether or not the very significant changes in the nature of the beneficiary's work between 2003 and 2005 affect the continuity of her work. The petitioner has stated that the beneficiary's duties as the "Director/Pastor" of the Women's Discipleship Program constitute "99%" of the beneficiary's work, but the beneficiary was not a pastor until May 2005, and the Women's Discipleship Program did not exist prior to October 2005.

The director's March 10, 2008 RFE afforded the petitioner the opportunity to explain how the beneficiary was able to perform the duties as Director/Pastor of the Women's Discipleship Program before she became a minister, and before the Women's Discipleship Program existed.

In the certified denial, the director concluded that the petitioner had not shown that the beneficiary had the required two years of experience as Director/Pastor of the petitioner's Women's Discipleship Program immediately preceding the petition's filing date. The AAO affirms this finding.

The second issue to be considered here concerns the petitioner's ability to compensate the beneficiary according to the terms of employment. The CIS 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 director, in the 2006 RFE, requested "bank letters and or financial records for the religious organization, recent audits, church membership figures, and the number of individuals currently receiving compensation," and "evidence that the religious organization has the financial capability to pay the beneficiary's wage." The director did not cite or quote from 8 C.F.R. § 204.5(g)(2). The petitioner's response included unaudited balance sheets.

In its remand notice, the AAO stated:

The director, in denying the petition, cited 8 C.F.R. § 204.5(g)(2) and asserted that the beneficiary's self-prepared, unaudited balance sheets cannot satisfy the regulatory requirements. On appeal, the petitioner correctly argues that the types of evidence requested by the director in March 2006 were not the same types that the director later listed in the denial notice. The petitioner is also correct in asserting that it is problematic to base the denial on the petitioner's failure to submit specific types of evidence that the director had never previously requested. The petitioner asserts that the director's reference to "recent audits" was vague and did not obviously refer to audited financial statements. The petitioner asserts that additional time is necessary to obtain an audited financial statement. By regulation, the appeal period (30 days) is considerably shorter than the 12 weeks allowed for a request for evidence.

We concur with the petitioner that the director erred by providing a list of allegedly acceptable documents in the request for evidence, and then denying the petition based on the petitioner's failure to adhere to a completely different list of documents. The proper remedy here is to call for the issuance of a new request for evidence, to allow the petitioner the opportunity to obtain an audited financial statement. At the same time, we note that (a) the petitioner is already aware that an audited financial statement is necessary, and is thus in a position to make at least preliminary arrangements; and (b) the regulation at 8 C.F.R. § 103.2(b)(8) specifically states that there can be no extension of the 12-week response period to a request for evidence. Therefore, if the petitioner fails to produce an audited financial statement (or other evidence acceptable under 8 C.F.R. § 204.5(g)(2)) in response to a future request for evidence, it would be proper for the director to deny the petition on that ground.

Pursuant to the above, the director should instruct the petitioner to submit audited financial statements covering the period from the petition's filing date (calendar year 2005) to the present.

In the 2008 RFE, the director requested evidence that conformed with the requirements listed at 8 C.F.R. § 204.5(g)(2). In the certified denial notice, the director cited the petitioner's failure to submit a substantive response to that RFE. The AAO affirms the director's finding that the petitioner has failed to establish its ability to provide the beneficiary's proffered compensation. The petitioner's protest that it was not afforded an opportunity to submit an audited financial statement rings hollow, the petitioner now having failed to submit that evidence in response to a direct request for it.

For the third and final ground for denial, we again quote from the AAO's prior decision:

Apart from, but related to the issue of the petitioner's ability to pay is the petitioner's ability to employ the beneficiary. The petitioner asserts that "99%" of the beneficiary's work is as the live-in director/pastor of its Women's Discipleship Program. The petitioner has stated that the program operates from a "home, which was provided free of charge to this ministry until late next year or maybe longer." The petitioner has not explained what arrangements, if any, are in place in the event that this loaned home becomes unavailable in the future. If the church loses the use of the home (which seems a distinct possibility, given the apparently casual nature of the arrangement) and has no replacement site, then the overwhelming justification for the beneficiary's continued employment will disappear. Also, if the church plans to purchase or rent a structure for the program, it is valid to inquire as to how this additional expense would affect the petitioner's continued ability to compensate the beneficiary. The hope that a donated or borrowed structure would be available, however grounded in the petitioner's confidence in its parishioners, cannot suffice to establish the continued availability of a *bona fide* offer of employment. The director must raise, and the petitioner must address, this issue in any further actions arising within this proceeding.

In the 2008 RFE, the director requested documentation showing either that the petitioner has been guaranteed "the extended use of the home," or else setting forth "what arrangements, if any, are in place in the event that this loaned home becomes unavailable in the future." The petitioner having failed to address this issue, the AAO affirms the director's finding that the petitioner has not established the existence of a viable job offer.

The AAO will affirm the denial of the petition 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.

ORDER: The AAO affirms the director's decision of July 8, 2008.