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FILE: [Redacted]
WAC 06 233 53367

Office: CALIFORNIA SERVICE CENTER Date: **SEP 18 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 an assistant minister. The director determined that the petitioner had not established that the position qualifies as that of a religious worker or 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 first issue presented on appeal is whether the petitioner has established that the position qualifies as that of a religious worker.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation, which is defined at 8 C.F.R. § 204.5(m)(2) as follows:

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical

workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering the beneficiary qualifies as a religious occupation or vocation as defined at 8 C.F.R. § 204.5(m)(2). The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

Citizenship and Immigration Services (CIS) therefore interprets the term “traditional religious function” to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

In its July 7, 2006 letter accompanying the petition, the petitioner stated that the proffered position was that of assistant minister, and that the job duties will include:

- (1) assisting the pastor in conducting worship services;
- (2) providing spiritual guidance to church members;
- (3) administering Sunday church services for children and youth members;
- (4) organizing and running bible studies for church members;
- (5) visiting new and existing church members at home or hospitals.

The petitioner stated that the beneficiary’s commitment to the job in the past has totaled more than 40 hours per week. The petitioner further stated that the position requires a minimum of two years of theological education and a minimum of two years full time experience as an assistant pastor, and that the beneficiary would receive an annual salary of \$18,000.

The petitioner submitted copies of its articles of incorporation, one dated April 10, 2001 and one dated July 20, 2001. The April articles appear to be only a partial copy, as it is not signed. The document provided for three positions within the organization, a pastor, junior pastor and pianist. The duties of the junior pastor were to help the pastor “and mainly handle all the Administration work.” The July document does not identify any specific positions within the organization. The petitioner also provided a copy of its bylaws. This document also appears to be a partial copy, as it only addresses the positions within the church. The bylaws identify 16 positions within the church, including senior pastor, associate pastor, assistant pastor/missionary, evangelist, pastoral assistant and assistant evangelist. The duties of the associate pastor, assistant pastor/missionary and evangelist are identified as follows:

Associate Pastors

As an ordained Pastor, he/she is instrumental in assisting the Senior Pastor in all aspects of the Church’s affairs. Like the Senior Pastor, he must have graduated from a recognized Seminary and function as an administrator, communicator, and counselor.

Assistant Pastor/Missionary

The Assistant Pastor performs many of the same duties as the Associate Pastor, though the Associate Pastor is still his superior. The primary difference is that Assistant Pastors are not ordained, even though they have completed their educational training from a Seminary or a Bible College.

Evangelist

Must be a graduate of Seminary School or a Bible College, needs consistory approval and must not have ANY criminal records. Must have been baptized five years prior to employment. Assists the clergy members with all aspects of the church affairs. [Emphasis in the original.]

In a December 11, 2006 request for evidence (RFE), the director instructed the petitioner to submit evidence that the proffered position related to a traditional religious function. In a February 28, 2007 letter, the petitioner stated:

The position requires to [sic] assist the pastor in conducting worship services; to provide spiritual guidance to church members; to administer Sunday church services for children and youth members; to organize and to run bible studies for church members; to pay visits [to] home and businesses of congregation members accompanying the pastor, and to conduct other administrative supports [sic] to the request from the pastor.

In a second RFE dated April 17, 2007, the director instructed the petitioner to:

Submit evidence of the petitioning church's religious denomination having a history of employing a paid full-time Assistant Minister in a traditional religious function. Provide the following evidence to establish the proffered position is recognized as a religious occupation related to a traditional function in this religious denomination or organization: constitution; by-laws; and a letter from a Superior or Principal of the religious denomination or organization in the United States explaining how the position offered qualifies as a traditional religious function. Clearly indicate who has been performing this function in the past. [Emphasis in the original.]

In response, counsel submitted a July 9, 2007 letter requesting additional time in which to respond to the RFE.

In her August 27, 2007 decision denying the petition, the director noted that the petitioner is permitted 12 weeks in which to submit the requested documentation and that, pursuant to 8 C.F.R. § 103.2(b)(8), additional time may not be granted. The director, therefore, based her decision on the record as it stood.

The director noted that the petitioner's articles of incorporation, enacted in 2001, provided for three positions, and that the duties of the junior pastor were to "help the Pastor and mainly handle all the Administrative work." The director stated that "[a]dministration work does not relate to a traditional religious function," and further noted that the articles of incorporation did not make provisions for an assistant minister. The director determined that the position of assistant minister "may be the same" as that of associate pastor, and as such,

as the duties were mainly performing administrative work, did not qualify as a traditional religious occupation.

On appeal, the petitioner stated that the director “erroneously cited [the] incorrect old version of [the] Articles of Incorporation,” and that the articles had been revised on July 20, 2001 and do not “provide duties of positions in the church.” The petitioner stated that evidence submitted, such as the certificate of employment, structure of the church, and the job offer, show that the duties of the proffered position relate to traditional religious functions within the church.

As previously discussed, the petitioner submitted two versions of its articles of incorporation. The April 2001 articles provide for three positions within the church. The July 2001 version does not identify any positions. However, the petitioner’s bylaws list 16 positions, including that of assistant pastor. Although it is not clear why the petitioner uses the term “assistant pastor” in its bylaws and “assistant minister” in its job offer, the duties of assistant pastor and those identified by the petitioner as having been performed by the beneficiary in the role of assistant minister are not inconsistent with each other or with traditional religious functions within a church.

Accordingly, the petitioner’s evidence is sufficient to establish that the proffered position is a religious occupation within the meaning of the statute and regulation.

The second 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 31, 2006. Therefore, the petitioner must establish that the beneficiary was continuously working in qualifying religious work throughout the two-year period immediately preceding that date.

In its July 7, 2006 letter accompanying the petition, the petitioner stated that the beneficiary had been serving as an assistant minister with the petitioning organization since April 17, 2002, when she was granted an R-1 nonimmigrant visa. The petitioner stated that the beneficiary performed the duties

enumerated previously and worked at least 40 hours per week. With the petition, the petitioner submitted copies of the beneficiary's Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, for the years 2004 and 2005. The beneficiary's tax returns, which are not dated or signed by the beneficiary, show that she reported \$8,400 in self-employment income for 2004 and \$18,000 in 2005.

In her December 11, 2006 RFE, the director instructed the petitioner to provide evidence of the beneficiary's work history from 2004 through 2006, copies of her tax returns for the same period, including IRS Forms W-2, Wage and Tax Statements, and her three most recent pay stubs.

In response, the petitioner stated that the beneficiary was paid an annual salary of \$8,400 for her services from 2002 through 2004 and \$18,000 annually thereafter. The petitioner submitted copies of IRS Form W-2 that it issued to the beneficiary in 2004, 2005 and 2006, and copies of unprocessed checks made payable to the beneficiary in the amount of \$1,500 dated December 2, 2006, January 6, 2007 and February 9, 2007. The petitioner also resubmitted copies of the beneficiary's 2004 and 2005 tax returns. We note that while the petitioner indicated that it issued the beneficiary a Form W-2 in each of these years, the forms do not indicate that it deducted any taxes from the beneficiary's pay. Additionally, on her tax returns, the beneficiary indicates that her income was from self-employment, which generally requires issuance of an IRS Form 1099-MISC, Miscellaneous Income, and not an IRS Form W-2.

In her second RFE dated April 17, 2007, the director again instructed the petitioner to provide evidence of the beneficiary's work during the qualifying period. As previously discussed, counsel responded with a request for additional time.

In denying the petition, the director noted the significant increase in the beneficiary's pay from 2004 to 2005, and concluded that the 2004 salary did not indicate full-time employment.

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).

The statute states at section 101(a)(27)(C)(iii) 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 stated that the beneficiary's 2004 reported income did not include housing, utilities and food, valued at \$500 per month, provided by the church as part of her compensation package. The petitioner provides a December 31, 2005 statement from [REDACTED], identified as an administrator, in which he summarizes what he states are the 2004 payroll details of the beneficiary's compensation. The document shows that the beneficiary was paid \$700 per month and provided with a room valued at \$150 per month, utilities valued at \$50 per month and food valued at \$10 per day. The document indicates that the beneficiary's total compensation package for 2004 was \$14,450. The petitioner, however, provided no documentary evidence to corroborate any of the additional compensation provided to the beneficiary. Furthermore, prior to appeal, the petitioner did not indicate that it provided the beneficiary with any additional compensation other than her salary.

Additionally, with its Form I-129, Petition for a Nonimmigrant Worker, which it filed on behalf of the beneficiary on February 25, 2002 (CIS receipt number SRC 02 112 54409), the petitioner stated that the beneficiary's "basic pay" would be \$12,000 per year. It did not indicate any other form of compensation to be provided to the beneficiary.

On appeal, the petitioner submits copies of the beneficiary's 2005 and 2006 IRS Forms 1040, each stamped with a receipt date by the IRS of September 25, 2007. According to the stamp, the date is proof of delivery only and is not an official receipt of the tax returns. As these returns were filed after the petition was denied, they are not contemporaneous evidence of the beneficiary's employment during the qualifying period. Like a delayed birth certificate, the late filing of the tax returns one to two years after the claimed transaction raises serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991) (discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings) Additionally, the petitioner submitted no evidence that the beneficiary filed a 2004 federal income tax return. In a September 26, 2007 statement signed by [REDACTED] who now identifies himself as secretary, the beneficiary's 2005 salary is listed as \$14,400. This is inconsistent with the amount reported on the IRS Form W-2 that the petitioner stated it issued the beneficiary in 2005 and is also inconsistent with the self-employment income reported by the beneficiary on her IRS Form 1040. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, the petitioner stated on its Form I-129 that the beneficiary was to serve as its director of adult ministry and evangelism. It indicated that her duties would be to "devise, organize and implement Christian educational programs for members; assist members in the better understanding of the teachings of the Bible; [and] hold discussion sessions." The petitioner submitted photographs that it states are of the beneficiary performing the duties of assistant minister and copies of church flyers, which show the beneficiary as "pastor." However, it submitted no objective evidence to corroborate that the beneficiary actually performed the duties of assistant minister. *Id.*

Given these unresolved inconsistencies and the lack of documentation to corroborate any compensation paid to the beneficiary, the evidence 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.

Beyond the decision of the director, the petitioner has not established that it is a bona fide nonprofit religious organization.

The regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

(3) *Initial evidence.* Unless otherwise specified, each petition for a religious worker must be accompanied by:

(i) Evidence that the organization qualifies as a nonprofit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases, evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organization.

The petitioner's April 2001 articles of incorporation states that is under the Korean Presbyterian Association and U.S. Mission Headquarters. The petitioner submitted a copy of an October 24, 2001 "certificate of church membership" from the Korean Presbyterian Association and U.S. Mission Headquarters, certifying that the petitioner belonged to the church association. The petitioner also submitted a copy of a May 5, 2000 letter from the IRS to the Korean Presbyterian Association and U.S. Mission Headquarters, notifying that organization that it was exempt from federal income tax as an organization described under sections 509(a)(1) and 170(b)(1)(A)(i) of the Internal Revenue Code (IRC). The letter did not indicate that the tax-exemption applied to any subordinate unit of the organization. The evidence does not establish that the Korean Presbyterian Association and U.S. Mission Headquarters has applied for a group exemption applicable to its subordinate units.

Under IRS regulations, churches that meet the requirements of section 501(c)(3) of the IRC are automatically considered tax exempt and are not required to obtain recognition of its tax-exempt status from the IRS. Nonetheless, the petitioner must provide evidence to establish its tax-exempt status for the purpose of this visa petition. The petitioner can do this pursuant to 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting the documentation that the IRS would require to determine it is a tax-exempt religious organization. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operation for Citizenship and Immigration Services (CIS), *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003):

- (1) A properly completed IRS Form 1023,
- (2) A properly completed Schedule A supplement, if applicable,

- (3) A copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization, and
- (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

The above list is consistent with the regulatory requirement at 8 C.F.R. § 204.5(m)(3)(i)(B), cited above. The memorandum specifically states that the above materials are, collectively, the “minimum” documentation that can establish “the religious nature and purpose of the organization.” Thus, for example, a petitioner cannot meet this burden by submitting only its articles of incorporation. Also, obviously, it is not enough merely for the petitioner to submit the documents listed above. The content of those documents must establish the religious purpose of the organization.

The petitioner submitted a copy of its articles of incorporation and copies of church brochures. However, the brochures are in Korean and the petitioner did not provide English translations of the documents. 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 did not submit a copy of IRS Form 1023, as required by 8 C.F.R. § 204.5(m)(3)(i)(B).

The evidence submitted therefore does not establish that the petitioner is a bona fide nonprofit religious organization.

Additionally, the petitioner has not submitted evidence to establish 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.

The petitioner stated in its July 7, 2006 letter that the beneficiary would be paid \$18,000 per year and would work in excess of 40 hours per week. In A February 28, 2007 the petitioner confirmed that the beneficiary would be compensated at the rate of \$18,000 “plus fringe benefits.” The petitioner did not identify the fringe benefits that it would provide to the beneficiary. However, in a September 26, 2007 “certificate of employment,” the petitioner stated that the beneficiary would be compensated in the amount of \$14,400 yearly.

The petitioner has provided three different statements of the compensation that the beneficiary can expect in the proffered position. Given these different statements, the petitioner has not clearly stated how the beneficiary will be compensated for her work. Accordingly, the documentation submitted does not clearly indicate that the beneficiary will not be solely dependent on supplemental employment or the solicitation of funds for support, and therefore has failed to establish that it has extended a qualifying job offer to the beneficiary.

The petitioner has also 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 has made contradictory statements as to the amount of remuneration for the stated position. In one statement, the petitioner indicates that it will pay the beneficiary \$18,000 per year. In another, it indicates that it will pay the beneficiary \$18,000 annually plus fringe benefits. On appeal, the petitioner states that it would pay the beneficiary \$14,400 yearly. The petitioner submitted copies of IRS Forms W-2 indicating that it paid the beneficiary wages of \$18,000 in 2005 and 2006; however, the beneficiary reported this income as self-employment income on her IRS Forms 1040. The petitioner submitted no evidence to corroborate that it has previously compensated the beneficiary for her work and offered no explanation as to the different plans for compensation.

As evidence of its ability to pay either of the stated wages, the petitioner submitted a copy of its unaudited financial statements for 2006, a copy of its February 2007 monthly bank statement, a copy of its bank balance as of February 26, 2007, and copies of deposit slips dated in December 2001, August 2006, and January and February 2007. The petitioner submitted none of the evidence required by 8 C.F.R. § 204.5(g)(2). Therefore, the petitioner has failed to establish that it has the ability to pay the beneficiary either of the stated wages.

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.