

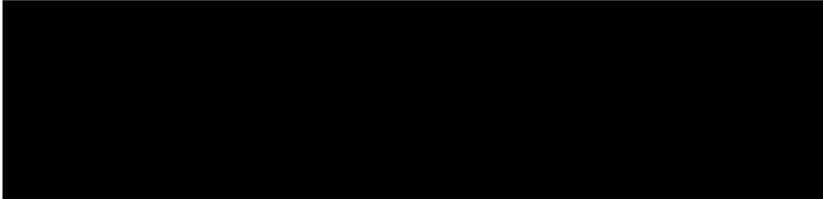
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **DEC 16 2010**

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:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision. Because the record, as it now stands, does not support approval of the petition, the AAO will remand the petition for further action and consideration.

The petitioner is a Southern Baptist 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 associate pastor. The director determined that the petitioner had not established that the position qualifies as a religious occupation.

On appeal, the petitioner submits statements from counsel, a letter from a church official, and supporting documents.

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 September 30, 2012, 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 September 30, 2012, 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 director's decision revolves around the question of whether the beneficiary's intended position qualifies as a religious occupation. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(5) defines a "religious occupation" as means an occupation that meets all of the following requirements:

(A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination.

(B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.

(C) The duties do not include positions that are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible.

(D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

The petitioner filed the Form I-360 petition on December 29, 2008. In a letter accompanying the initial filing, [REDACTED] senior pastor of the petitioning church, stated:

[The beneficiary] is an ordained Southern Baptist Minister and she is qualified to serve as Associate Pastor (Religious Minister) for our religious organization. . . .

As a full-time Associate Pastor, beneficiary's duty is to conduct religious worship and perform other spiritual functions associated with beliefs and practices of the Southern Baptist denomination and provide spiritual and moral guidance and education to church members, under supervision of the Petitioner. This is pursuant to Article 5, Section 2 of our By-Laws and Constitution. Specifically, her functions are as follows:

1. Lead congregation in worship services
2. Prepare and deliver sermons and other talks in English & Spanish
3. Interpret doctrine of Christianity
4. Instruct people who seek conversion
5. Conduct weddings and funeral services
6. Administer religious rites and ordinances
7. Visit sick and shut-ins, and help the poor
8. Counsel those in spiritual need and comfort bereaved
9. Oversee religious education program.

. . . We certify that [the beneficiary] will be solely carrying on the vocation of a religious minister.

The petitioner submitted a copy of the beneficiary's 1996 Diploma of Theological Studies from the [REDACTED] and copies of two ordination certificates, issued to the beneficiary in 1996 and 2003, respectively.

Article 5, Section 1 of the petitioner's constitution lists the following "Church officials" who "may be considered as the Church council":

- 1) Pastor
- 2) Deacons and Deaconesses
- 3) Secretary and Vice
- 4) Treasurer
- 5) Superintendent of the Sunday School and Vice
- 6) Director of Discipline
- 7) President of the Feminine Society
- 8) President of the Masculine Society
- 9) President of the Youth Society
- 10) Director of Choir

The document adds that other officials "[c]an be considered according to the need [*sic*] other directors of the distinct departments or committees as they are: [REDACTED] of prayer in homes or missionary cells, special days, program or statistics. All the responsibilities will be valid for one year and can be renewed [*sic*] at the discretion of the Pastor."

On March 2, 2009, the director instructed the petitioner to submit additional required evidence and information, including "a **detailed description** of the work to be done, including specific job duties" (emphasis in original). In response, [REDACTED] repeated the earlier list of nine duties, and broke those same duties down in the form of a schedule of the beneficiary's daily duties.

The petitioner's response included an attestation in which the petitioner indicated that its secretary, treasurer, and various directors were "Volunteers," and that the senior pastor was the petitioner's only other employee. In a translated letter, [REDACTED] stated "our church has 14 ministries for which we have 13 volunteers who carry out the responsibilities." The "ministries" include "Secretary," "Treasurer," and various directors, in a list strongly reminiscent of the list of "Church Officials" in the petitioner's constitution. (The vacant post for "Society of Women" explains why there were only 13 volunteers in 14 ministries.)

The director denied the petition on May 6, 2009. The director stated: "the petitioner has not established that the proffered duties related to a traditional religious function and that the position is recognized as a religious occupation within the denomination." The phrases "religious occupation" and "traditional religious function" appear repeatedly in the decision, and the only regulation that the director quoted was the definition of "religious occupation" at 8 C.F.R. § 204.5(m)(5). The director listed the "Church Officials" from the petitioner's constitution, and noted: "The constitution makes no reference as to Associate Pastor as one of the religious occupations."

On appeal, counsel argues that “all of [the beneficiary’s] responsibilities are traditional religious functions,” and observes: “the Petitioner has amended [its] Constitution to include Associate Pastor notwithstanding that it is the same as Pastor.”

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998). Therefore, the petitioner’s modification of its constitution at this late date cannot serve as a retroactive remedy.

There is, however, a more basic issue in this proceeding. The regulations make clear distinctions between a religious occupation and the vocation of a minister. The regulation at 8 C.F.R. § 204.5(m)(5) defines a minister as an individual who:

- (A) Is fully authorized by a religious denomination, and fully trained according to the denomination’s standards, to conduct such religious worship and perform other duties usually performed by authorized members of the clergy of that denomination;
- (B) Is not a lay preacher or a person not authorized to perform duties usually performed by clergy;
- (C) Performs activities with a rational relationship to the religious calling of the minister; and
- (D) Works solely as a minister in the United States, which may include administrative duties incidental to the duties of a minister.

The petitioner has not put forth the associate pastor position as a religious occupation. Rather, the record shows that the position is that of a minister, ordained and authorized to perform functions of the clergy. As [REDACTED] observes on appeal, the beneficiary has “the same duties and responsibilities which I perform everyday as the Senior Pastor.”

The director relied heavily on the petitioner’s constitution, which does not show the title of “associate pastor” in the list of “Church Officials.” An “officer,” for organizational purposes, is not necessarily the same as an employee. The officer list is not a comprehensive or exclusive listing of church employees. Almost every position named on the list is a volunteer position rather than a paid occupation. Furthermore, some of the listed positions, such as “Secretary” and “Treasurer,” strongly appear to be secular rather than religious in nature. Therefore, there is no reason to base eligibility in any large measure on inclusion or exclusion from the officer list in the petitioner’s constitution. Even then, as [REDACTED] points out on appeal, the associate pastor is a type of pastor, which tops the officer list in the petitioner’s constitution.

The denial of the petition rests entirely on the finding that the beneficiary's position is not a religious occupation, with no consideration for the ministerial nature of the position. For the reasons discussed above, we will withdraw that finding and, therefore, the denial decision.

We will not approve the petition outright, because the director must resolve other issues. The AAO may identify additional grounds for denial beyond what the Service Center identified in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The regulation at 8 C.F.R. § 204.5(m)(12) reads:

Inspections, evaluations, verifications, and compliance reviews. The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

The record does not show whether or not a compliance review has taken place, or whether the petitioner has successfully completed such a review.

Finally, the regulation at 8 C.F.R. § 204.5(m)(10) requires the petitioner to provide verifiable evidence of how it intends to compensate the alien. In his first letter, [REDACTED] stated: "Beneficiary will be paid \$20,020 per year including all benefits," but he did not specify what the "benefits" would be. [REDACTED] later clarified that the beneficiary would receive \$19,756 per year "as well as health insurance for her and her family."

The record contains credible documentation that the petitioner has already paid the beneficiary a salary at the specified level, but the petitioner has not shown whether it has already provided health insurance as described, or whether arrangements for such insurance are in place. While insurance is not mandated by regulation, as the petitioner has claimed such as part of the beneficiary's remuneration, the petitioner must provide credible, verifiable evidence of its intent and ability to do so. 8 C.F.R. §§ 204.5(m)(7)(vi), (xi), (xii) and (10). Simply stating an intention to provide insurance in the future cannot suffice in this regard. By the same token, the petitioner cannot resolve this issue by changing the offer of compensation at this late date.

The director must provide the petitioner an opportunity to address the above issues. Therefore, the AAO will remand this matter for a new decision. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.