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U.S. Citizenship and Immigration Services
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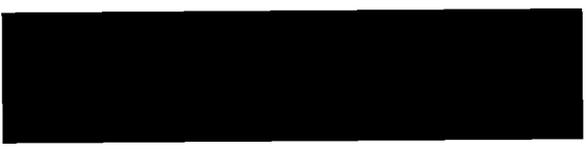
IN RE:

Petitioner:
Beneficiary



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:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO subsequently remanded the petition to the director for a new decision based on revised regulations. The director determined that the petitioner had failed to submit required evidence, and therefore the director again denied the petition and certified the decision to the AAO. The AAO will affirm the director's decision.

The petitioner is a Baptist church in Brooklyn, New York. 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 mission pastor of a subordinate church in Orlando, Florida. The director determined that the petitioner had not established that the beneficiary will work at a qualifying tax-exempt religious organization, or that the beneficiary's position involves full-time employment.

The director issued the certified decision on July 15, 2009. As required by the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.4(b)(2), the director allowed the petitioner 30 days in which to submit a brief in response to the certified decision. To date, more than six months after the decision date, the record contains no further correspondence from the petitioner or from counsel. We therefore consider the record to be complete, and will issue a decision based on 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 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 first stated basis for denial concerns the petitioner's tax-exempt status. The USCIS regulation at 8 C.F.R. § 204.5(m)(8) states:

Evidence relating to the petitioning organization. A petition shall include the following initial evidence relating to the petitioning organization:

- (i) A currently valid determination letter from the Internal Revenue Service (IRS) establishing that the organization is a tax-exempt organization; or
- (ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or
- (iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, as something other than a religious organization:
 - (A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;
 - (B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;
 - (C) Organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization; and
 - (D) A religious denomination certification. The religious organization must complete, sign and date a religious denomination certification certifying that the petitioning organization is affiliated with the religious denomination. The certification is to be submitted by the petitioner along with the petition.

The initial filing of the petition on April 20, 2007 included a copy of an IRS determination letter dated April 4, 2002, ruling that the petitioning church in Brooklyn is a tax-exempt church.

In a letter dated March 1, 2007, [REDACTED] pastor of the church in Brooklyn, stated: "Our main branch is located in Brooklyn, NY and now in Orlando Florida, which [the beneficiary] has been established to Pastor since December 2003." [REDACTED] signed the Articles of Incorporation of the Orlando church.

On May 8, 2007, the director issued a request for evidence (RFE), stating that the petitioner had established the tax-exempt status of the New York church, but not that of the separately-incorporated church in Florida. In response, the petitioner submitted documentation of the Florida church's exemption from state sales and use tax. This documentation is not IRS documentation of federal tax-exempt status.

The petitioner submitted copies of its IRS Form 990 returns (which contain information comparable to income tax returns) for 2005 and 2006. The returns identify the beneficiary as a compensated officer of the New York church, who received \$15,600 in 2005 and \$20,700 in 2006.

The director denied the petition on August 27, 2007, based in part on the finding that the petitioner had not sufficiently linked the churches in New York and Florida. The director noted that the IRS determination letter "is not a group exemption letter and it does not confer tax exempt status upon subsidiary units."

On appeal, [REDACTED] stated that "the Board [of the New York church] supervised [the beneficiary's] activity as well as making payment for his role as Pastor."

The AAO remanded the petition to the director on December 16, 2008, for consideration under new regulations published on November 26, 2008. On February 4, 2009, the director advised the petitioner of the newly-published regulation at 8 C.F.R. § 204.5(m)(8), as quoted earlier in this decision. In response, the petitioner submitted another copy of what counsel described as the "IRS tax exempt certification for the petitioning church located in New York." Materials submitted in response to the director's notice repeated the assertion that the petitioning church in New York is the beneficiary's employer.

In denying the petition on July 15, 2009, the director repeated the finding that "the beneficiary is claimed to be employed at a branch church in Orlando, Florida," and that the IRS letter issued to the New York church "is not a group exemption letter." The director found that the petitioner had established the state, but not federal, tax-exempt status of the Florida church. The director therefore concluded "the petitioner has not established that the beneficiary will be employed at an organization that holds [federal] tax exempt status."

The evidence of record, including IRS Form 990 returns, are consistent with the petitioner's assertion that the source of the beneficiary's compensation is the New York church, which, in turn, is clearly an IRS-recognized tax-exempt non-profit organization. 8 C.F.R. § 204.5(m)(8) requires the petitioner to submit an IRS recognition letter "relating to the petitioning organization." The petitioner has satisfied this particular regulatory clause, because the petitioning organization, based in New York, had

documented its own federal tax-exempt status. We cannot, however, rely on this clause in isolation, out of context of the rest of the regulations. (We note that the clause presumes the existence of a “petitioning organization,” whereas 8 C.F.R. § 204.5(m)(6) allows an alien to file on his or her own behalf, in which case there exists no “petitioning organization.”)

8 C.F.R. § 204.5(m)(3) requires that the beneficiary must “work for a bona fide non-profit religious organization in the United States, or a bona fide organization which is affiliated with the religious denomination in the United States.” 8 C.F.R. § 204.5(m)(5) defines the terms “bona fide non-profit religious organization” and “bona fide organization which is affiliated with the religious denomination,” and both definitions specify that such organizations must “possess[] a currently valid determination letter from the IRS.”

Supplementary information published with the new rule explained the reasoning behind requiring the submission of a valid IRS determination letter:

A requirement that petitioning churches submit a tax determination letter is a valuable fraud deterrent. An IRS determination letter represents verifiable documentation that the petitioner is a bona fide tax-exempt organization or part of a group exemption. Whether an organization qualifies for exemption from federal income taxation provides a simplified test of that organization’s non-profit status.

Requiring submission of a determination letter will also benefit petitioning religious organizations. A determination letter provides a petitioning organization with the opportunity to submit exceptionally clear evidence that it is a bona fide organization.

73 Fed. Reg. 72276, 72280 (Nov. 26, 2008).

The beneficiary is based in Orlando, Florida, and his duties take place in Orlando at a place identified as a church. The beneficiary’s paychecks show the address of the Orlando church, and so do IRS Form 1099-MISC statements issued to reflect the beneficiary’s annual compensation. It is difficult to conclude that the beneficiary is not “work[ing] for” the entity in Orlando. We conclude that it would undermine the stated anti-fraud objective described above if USCIS were to allow a tax-exempt entity to file petitions relating to proposed employment at other entities that are incorporated separately and not covered by a group exemption. If a prospective employer cannot produce the required IRS determination letter, a second entity cannot use its own IRS determination letter to vouch for that employer, regardless of the claimed affiliation between the two entities. To allow otherwise would be to encourage unrecognized entities to evade regulatory requirements by having their workers employed, on paper, by other entities that might be hundreds of miles away (as is the case here).

The petitioner has not submitted the required IRS determination letter to show that the church in Florida, where the beneficiary has worked and intends to continue working, is recognized as tax-exempt. The asserted affiliation with the tax-exempt petitioning church in New York is not sufficient to establish eligibility. We will therefore affirm the director’s finding in this regard.

The second and final issue raised by the director concerns the extent of the beneficiary's employment. The USCIS regulation at 8 C.F.R. § 204.5(m)(2) requires that the beneficiary must "[b]e coming to the United States to work in a full time (average of at least 35 hours per week) compensated position."

The USCIS regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation, either abroad or in lawful immigration status in the United States, continuously for at least the two-year period immediately preceding the filing of the petition. The petition was filed on April 20, 2007. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work throughout the two years immediately prior to that date.

The USCIS regulation at 8 C.F.R. § 204.5(m)(11)(i) requires that, if the alien was employed in the United States during the two years immediately preceding the filing of the application and received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns.

With respect to the beneficiary's prior experience, the petitioner filed a petition on December 17, 2003, to change the beneficiary's nonimmigrant status to that of an R-1 religious worker. The Form I-129 petition (receipt number SRC 04 056 52805) indicated that the beneficiary was to work full-time and earn \$2,000 per month, equal to \$24,000 per year. We will revisit the information in the nonimmigrant petition when we discuss the issue of the beneficiary's compensation.

In his March 1, 2007 letter, [REDACTED] listed the beneficiary's duties:

- To preside over Sunday Services (including sermons, adult forum, etc.)
- Other scheduled weekly services/monthly business meetings, etc.
- Performing weddings, funerals, Burials, etc.
- Visitations/Counseling (hospitals, family crisis, etc.)
- Youth Program (oversight of existing programs, etc.)

[REDACTED] stated that the petitioner paid the beneficiary "a starting salary of \$300.00 on a weekly basis, which was increased to: \$500 in January 2005 biweekly, to \$850 in February 2006 biweekly." We note that the change of salary from \$300 weekly to \$500 biweekly is not an "increase," but rather a reduction in pay to only \$250 per week. The petitioner submitted copies of five processed checks for \$850 each, payable to the beneficiary and dated between December 22, 2006 and February 19, 2007.

The petitioner's initial submission included a weekly "Work Schedule" showing 30¼ hours of duties. All but three of the items listed on the schedule are church services. The other items are "Sunday School," "Training class for new Christian Workers and Bible Study," and "Bible Study for Sunday School Workers." The schedule did not show the time spent on other duties described by [REDACTED]. [REDACTED] such as weddings, visitation, and youth programs.

In the May 2007 RFE, the director instructed the petitioner to submit “a breakdown of duties performed in . . . an average week,” including “the number of hours worked.” The petitioner’s response to the RFE included a “[b]reakdown of duties for an average week,” showing a list of duties and times that is similar, but not quite identical, to the “Work Schedule” submitted previously. While the two schedules disagreed on some specifics, both showed a total of 30¼ hours of classes and services per week.

In the August 2007 denial notice, the director found that “the beneficiary works on a part-time basis.” On appeal from that decision, counsel stated:

The work schedule provided indicated those dates and times that occur every week and are a predetermined part of the pastor’s weekly calendar. The list provided was not meant to be a comprehensive list of the work performed by the pastor on a weekly basis. It was provided to outline those activities that were readily identifiable because of their consistent nature. . . .

Duties such as weddings, funerals, baptisms . . . , hospital visits and crisis counseling cannot by their nature be placed on a weekly schedule. . . . The schedule also did not indicate intangibles such as sermon preparation time (2 – 5 hours a week), and prayer, which are intrinsic to the work of a minister but are difficult to quantify.

As noted previously, the beneficiary’s R-1 status was conditioned on a job offer showing \$2,000 per month for full-time work, but the petitioner paid the beneficiary significantly less than that amount. On October 14, 2008, the AAO informed the petitioner that the consistent underpayment of the beneficiary’s salary raised questions of eligibility. In response to the AAO’s letter, the beneficiary stated that, previously, he had been “reluctant to ask for my full salary” because his adult son was not willing “to remain in the United States.” (The beneficiary did not explain how this issue related to the matter of his compensation, or why having more dependents in his household would incline him to request lower compensation.) The beneficiary stated that he now draws his full salary and that his son has returned to Canada.

The petitioner submitted a letter from [REDACTED] dated October 20, 2008, indicating that the petitioner had increased the beneficiary’s salary to \$2,000 per month. The timing of the salary increase – days after the AAO’s notice – does not appear to be coincidental. 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). At the same time, the underpayment is not automatically evidence that the beneficiary worked a reduced schedule, as there is no indication that he earned an hourly wage rather than a periodic salary.

The director’s February 2009 notice did not directly address the issue of the beneficiary’s work schedule. Nevertheless, counsel briefly touched on the issue in a letter in response to that notice. Counsel stated: “the employer is not required to pay the offered wage until after permanent residence is granted. . . . Rather, the payment of wages is relevant to determine if [the] employer is able to pay the wage in the future.”

The issue here is not the petitioner's ability to compensate the beneficiary as such. Rather, our concern is with the regulatory requirement that the proposed employment must be full-time (at least 35 hours per week). The petitioner has indicated that the beneficiary's intended future duties are essentially the same as his past duties. As such, if the beneficiary's past work was part-time, then there is reason to presume that it will continue to be part-time in the future, and little reason to presume that the beneficiary's duties will spontaneously expand to fill more hours per week.

In the July 2009 certified denial notice, the director stated: "the beneficiary's weekly schedule has only been 30.25 hours per week. The petitioner has established that the beneficiary has been employed only on a part-time basis."

It is clear that the petitioner paid the beneficiary less than the \$2,000 per month promised on the Form I-129 petition in 2003. The record contains no contemporaneous evidence to show that the beneficiary requested or voluntarily accepted a reduced rate of pay. The petitioner and the beneficiary made no claims to that effect until after the director observed that the beneficiary's compensation did not match the terms to which the petitioner attested, under penalty of perjury, on the Form I-129 petition.

The significant underpayment of the beneficiary's salary during the two-year qualifying period is consistent with disqualifying interruptions in the continuity of the beneficiary's work. If, on the other hand, the petitioner worked continuously to the extent claimed, the implication is that the Form I-129 petition contains false information about the beneficiary's compensation. Neither alternative casts the petition in a favorable light. We find that the petitioner has not persuasively rebutted the director's findings, and therefore we agree with the director that the petitioner has not sufficiently established the beneficiary's continuous employment during the qualifying period.

The AAO will affirm the certified decision 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, the petitioner has not met that burden.

ORDER: The director's decision of July 15, 2009 is affirmed. The petition is denied.