

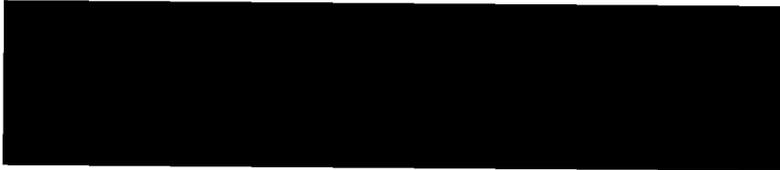
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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DATE: Office: CALIFORNIA SERVICE CENTER

JUN 28 2011

FILE:

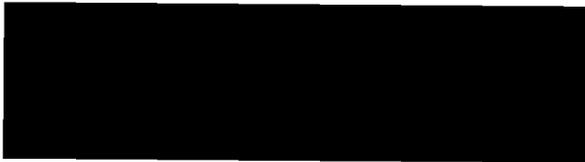


IN RE: Petitioner:
Beneficiary:



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:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition and it 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 pastor. The director determined that the petitioner had not established how it intends to compensate the beneficiary and that it has established a need for the beneficiary's services.

The petitioner states on appeal that it has paid the beneficiary in the past and that the petitioner needs the beneficiary's full time service. The petitioner 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 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 issue presented on appeal is whether the petitioner has established how it intends to compensate the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(10) provides that the petitioner must submit:

Evidence relating to compensation. Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. If IRS [Internal Revenue Service] documentation, such as IRS Form W-2 [Wage and Tax Statement] or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

The petitioner did not initially identify any specific compensation that the beneficiary would receive. Although the petitioner stated in its March 5, 2007 letter that it was submitting copies of the beneficiary's tax returns and IRS Forms W-2 with the petition, the record is not clear that such documentation was included in the petitioner's initial submission with the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. In response to the director's request for evidence (RFE) dated June 14, 2007, the petitioner submitted copies of IRS Forms W-2 on which it reported that it paid the beneficiary wages of \$4,500 in 2003, \$18,600 in 2004 and \$20,400 in 2005 and 2006. The petitioner also provided copies of its payroll journals indicating that it paid the beneficiary \$1,700 per month from January through June 2007 and partial copies of its bank statements for December 2006 and January 2007.

On April 3, 2009 an immigration officer (IO) visited the petitioner's premises for the purpose of conducting a compliance review to verify the petitioner's claims. The IO reported that he was unable to make contact with the beneficiary at the petitioner's location and that listed phone numbers were either not in service or calls were not answered. On April 24, 2009, the IO interviewed the beneficiary and [REDACTED] the official who signed the petition on behalf of the petitioning organization. According to [REDACTED] the petitioner was not then paying the beneficiary a salary because he was no longer in an authorized immigration status; however, [REDACTED] stated that the petitioner was providing the beneficiary with room and board. [REDACTED] also stated that the petitioner's active membership was only 20. The IO noted that the petitioner's mortgage was \$2,800 per month and questioned its current ability to compensate the beneficiary.

On June 19, 2009, the director informed the petitioner of the IO's findings and advised the petitioner that it had not established that it "has the means to consistently compensate the beneficiary at the proffered rate." In response to the director's Notice of Intent to Deny (NOID), the petitioner stated that the proffered salary was \$1,500 to \$1,800 per month plus room and board. The petitioner further stated it had paid the beneficiary a minimum of \$1,800 per month since he began his employment with the petitioning organization in 2003. The petitioner also stated that it has also provided the beneficiary with "living facilities" that it had not included in the compensation package. The petitioner stated that its membership had increased from 20 to 41 since the date of the onsite inspection of its premises and that:

[T]he Church has begun to increase its membership so the monthly donation income should increase. [Our] average [bank] balance is equivalent to about \$1800 or more per month which is what we are supposed to pay [the beneficiary] so if [he] has the proper authorization to continue working, we would have continued to pay his salary as we have consistently paid from June 2003 until June 2008.

The petitioner also stated that:

Even, assuming for the sake of agreement, if the Church pledges to pay a smaller monetary portion such as \$1,000 per month that would be sufficient for [the beneficiary's] expenses since his living expenses are covered by room and board at the Church, he gets food through meals dropped by Church members and he can spend small portion of the money on food, his car that he bought 5 years ago is paid off from the money he earned from his salary. So, the value of the housing – Los Angeles, a small 1 bedroom apartment would be about 900-1000 per month so that would make his total compensation package at 1800-2000 per month.

Either way, we believe the Church can support his salary. As noted, the Church property also has about \$500,000 equity value as a fall back if need.

The petitioner submitted copies of IRS Forms W-2 that it issued to the beneficiary in 2007 and 2008 on which it reported wages of \$20,400 and \$10,200, respectively. The petitioner also submitted partial copies of its bank statements from July 2008 through June 2009. The bank statements reflect ending balances ranging from \$244.99 in February 2009 to \$6,924.42 in November 2008. For at least two months, February and April 2009, the petitioner's ending bank balances fell below the \$1,800 per month that it stated it would pay the beneficiary. 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.

The director denied the petition, finding in part that the petitioner “has failed to submit verifiable documentation to establish the financial viability of the organization and consequently has failed to substantiate claims that the petitioner will be able to compensate the beneficiary for full time employment in the United States.”

On appeal, the petitioner again states that it has paid the beneficiary consistently in the past and that it provides the beneficiary with a place to live. It also states that it has enough equity in its

property to obtain a line of credit or second mortgage to meet the financial burden of the beneficiary's salary. The petitioner submits photographs of the church, partial copies of its monthly bank statements for October, November and December 2009 and a copy of its 2010 budget. The petitioner also submits information obtained from the realtor.com website on which it has attempted to compare the value of its property to other homes in the area.

The petitioner must establish that it had the continuing ability to compensate the beneficiary as of the date the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The evidence submitted by the petitioner indicates that it did not have the ability to compensate the beneficiary with the proffered salary of \$1,800 from the date the petition was filed and continuing to the date the beneficiary receives lawful permanent residence. For at least two months, the petitioner did not have sufficient funds in its bank account to pay the beneficiary. The petitioner alleges that it can use the equity in its building for the beneficiary's salary, if needed; however, the petitioner has made no application and has not received any funds for a line or credit or second mortgage on its property. Further, while the petitioner states that it provided the beneficiary with living quarters, a copy of a lease in the record indicates that the beneficiary paid rent to the petitioner. While the lease predates the beneficiary's employment with the petitioner, the petitioner submitted no documentation that it now provides free housing to the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner has failed to submit sufficient verifiable documentation to establish its continuing ability to compensate the beneficiary as of the date the petition was filed.

The second issue on appeal is whether the petitioner has established the need for the beneficiary's services and therefore would offer the beneficiary full time employment of at least 35 hours per week.

As discussed above, the petitioner stated that the beneficiary had worked for the petitioning organization as its assistant pastor since 2003. The IO reported that during his onsite inspection in April 2009, he was unable to make contact with the beneficiary. The IO also reported that during his interview with [REDACTED] and the beneficiary, Reverend Chung informed him that:

[T]he church was having a hard time [and] that they only have about 20 active members in the church at this time. Pastor [REDACTED] stated [that] he is only at the Los Angeles church about two weeks each month and relies on [the beneficiary] to conduct his duties while he is away.

The IO questioned whether “the current role that [the beneficiary] would fulfill in the church would consist of his working for the church over 35 hours per week.”

In response to the director’s June 14, 2007 RFE, the petitioner submitted a weekly work schedule for the beneficiary that included worship, visiting believers, bible research, arranging the church for worship and preparing the weekly church brochure. The director computed the beneficiary’s religious related duties to be 37 hours. In response to the director’s NOID, [REDACTED] stated:

I have been spending a significant amount of time in Tennessee to help with [REDACTED] and new direction for that church facility. Additionally, I have been called on by the Presbytery to assist them with establishing their own presence in Georgia . . . I do frequent missionary work like that and also did it in Michigan so I need to be able to rely on [the beneficiary] to work with our congregation and to perform the tasks that [REDACTED] normally performs . . .

Due to my absences and [the beneficiary’s] problem with the work status, we began to see a decline in our membership. The lowest point was about 20 members which was about the time of the personal interview at USCIS. However, as [REDACTED] establishment is well underway, I have been able to resume more duties with our Church. [The beneficiary] and I have been working on contacting our church members and encouraging them to come out to church. We have also been asking our existing members to introduce their friends to our church.

WE have been offering some new programs such as VBS (Vacation Bible School) which is good for the community and also draws new members to the church. As a result of our efforts, the membership is now increased to 41 members. We will continue to work diligently towards the growth and maintenance of our church . . .

However, we do need the full time services of [the beneficiary] since I do much missionary work and travel abroad for various missions and conferences, there is a vacuum in the leadership in our church which makes the growth stagnate.

The director determined that the petitioner’s membership growth did “not show the need for a full time Assistant Pastor” and that “the needs for such a small following can easily be met by part-time volunteers.” The director stated:

Moreover, the record clearly indicates the petitioning organization is not growing at a rate that justifies the employment of a full time pastor as well as a full time Assistant Pastor. Petitioner contends that the hiring of a full time Assistant Pastor will enable the organization to continue growing despite the frequent absence of the Senior Pastor from the Los Angeles area.

The director further stated that the work schedule provided by the petitioner was not clear as to the exact duties to be performed by the beneficiary and that the "totality of the circumstances does not convincingly establish that the beneficiary will indeed be employed as a religious worker on a full time basis."

On appeal, [REDACTED] acknowledges that the petitioner has struggled during the past year economically as well as from a manpower standpoint. [REDACTED] states that he has decided that his travels have adversely impacted the church too much and tendered his resignation effective February 15, 2009. As such, the beneficiary "will now be fully responsible for the leadership and growth of the church." The petitioner submitted a December 15, 2009 letter signed by the [REDACTED] in which he advised the church that he was resigning his position effective February 15, 2009 and that he beneficiary would have responsibility for leadership of the church. As previously discussed, however, the petitioner must establish eligibility at the time of filing the visa petition. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. [REDACTED] resignation, therefore, has no impact on the beneficiary's immediate eligibility for the visa petition.

Nonetheless, the AAO cannot agree with the director that the petitioner has not established that the proffered position offers the beneficiary full time employment. The petitioner has consistently stated that the beneficiary would be responsible for assuming the role of the pastor in his absence and [REDACTED] has consistently stated that he is often not available to serve in his role as pastor for the petitioning organization. Further, it is reasonable that the pastor and assistant pastor would be involved full time in trying to grow the church's membership and the slow growth is not necessarily a measure of whether the beneficiary's work is, or will be, of a full time nature.

The AAO finds that the petitioner has submitted sufficient documentation to establish that the proffered position offers the beneficiary full time employment and withdraws the director's decision to the contrary. However, as the petitioner has not established that it had the continuing ability to pay the beneficiary, it has not satisfactorily established how it intends to compensate the beneficiary.

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.