

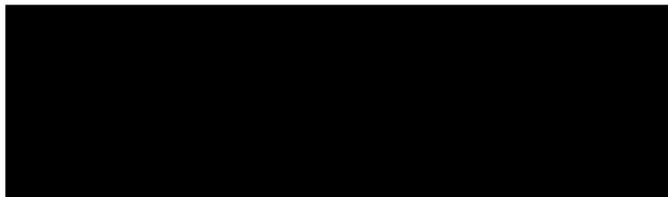
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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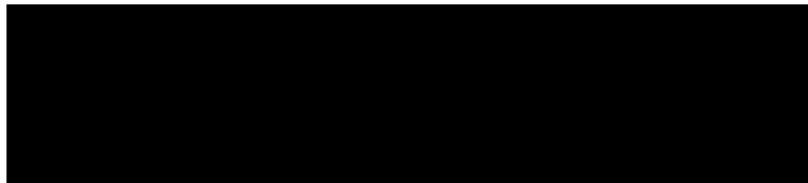
DATE: **JUN 23 2011** Office: CALIFORNIA SERVICE CENTER

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, initially approved the employment-based immigrant visa petition. On further review, the director determined that the petitioner was not eligible for the visa preference classification. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke (NOIR) approval of the petition and her reasons for doing so, and subsequently exercised her discretion to revoke approval of the petition on September 24, 2008. On December 16, 2008, the Administrative Appeals Office (AAO) remanded the matter for consideration under new regulations. The Director, California Service Center, again denied the petition and, following the AAO's instructions, certified the decision to the AAO for review. The AAO will affirm the director's September 24, 2008 decision.

As stated, the instant petition was previously approved on April 25, 2006 and subsequently revoked. The AAO's remand for application of the new regulation was in error. Accordingly, for purposes of this certification, we withdraw our previous finding and focus our review on the director's original decision, which was correctly based upon the regulations in effect at the time the petition was originally approved. Nonetheless, as the AAO conducts appellate review on a *de novo* basis, all of the evidence of record will be considered. *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 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 a missionary (pastor). The director determined that the petitioner had not established 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, that the petitioner has extended a qualifying job offer to the beneficiary, and that it has the ability to pay the proffered wage.

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.*

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 is whether the petitioner has established that the beneficiary worked continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the visa petition.

The regulation in effect at the time the petition was filed at 8 C.F.R. § 204.5(m)(1) provided, 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. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States.” 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) stated, 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 May 16, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a pastor throughout the two-year period immediately preceding that date.

In a May 8, 2003 letter, submitted in support of the petition, the petitioner, through its “moderator,” the [REDACTED], verified that the beneficiary had worked with the petitioning organization as a pastor since July 7, 1999 in an R-1 nonimmigrant religious worker status with an annual salary of \$18,000. In a May 1, 2003 letter, [REDACTED] again certified to the beneficiary’s employment as a pastor since July 7, 1999. The petitioner also submitted a copy of an Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, indicating that it paid the beneficiary \$18,000 in wages in 2002, and an uncertified copy of the beneficiary’s unsigned and undated IRS Form 1040, on which he listed the wages reflected on the IRS Form W-2.

The petitioner further submitted a copy of a June 15, 1995 Bachelor of Arts in Theology certificate from the Chong Shin College & Theological Seminary in U.S.A. In an October 16, 1998 letter, the college’s dean, [REDACTED], certified the beneficiary’s graduation resulted from the completion of a correspondence course in which he had been enrolled since September 1993. The petitioner provided a copy of the beneficiary’s transcript which shows that he completed 36 hours of study with the Chong Shin College & Theological Seminary and that he was credited with 96 hours from an unidentified college.

In a request for evidence (RFE) dated May 12, 2004, the director instructed the petitioner to submit additional documentation regarding the beneficiary’s qualifying work experience:

Provide evidence of the beneficiary’s work history for at least the period beginning May 16, 2001, and ending May 16, 2003. Provide a breakdown of duties performed in the religious occupation for an average week. Include the employer’s name, specific job duties, the number of hours worked, [and] remuneration . . . Ideally, this evidence should come in a way that shows monetary payment, such as W-2 forms, pay stubs, or other items showing the beneficiary received payment. Documentation

showing the withholding of taxes is good evidence. However, you may also show payment through other forms of remuneration. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported him or herself (and family members, if any) during the two-year period or what other activity the beneficiary was involved in that would show support.

The director also instructed the petitioner to submit additional documentation regarding the beneficiary's ordination:

Provide a detailed description of the duties the beneficiary will be performing for the religious organization. Submit evidence to show that the beneficiary has been ordained and the requirements for ordination. If your religious organization does not have formal ordination procedures, submit the appropriate documentation from your religious organization that evidences the beneficiary has authorization to conduct religious worship and perform other services usually performed by members of the clergy within your religious denomination.

NOTE: The Certificate of Ordination submitted on behalf of the beneficiary notes he was ordained a pastor on April 27, 2003. The petitioner claims in its cover letter that the beneficiary has been employed "with this Mission as an Ordained Pastor since July 7, 1999 as a status of R-1." No evidence was submitted that the beneficiary was ordained prior to April 27, 2003. Submit valid, documented evidence of the beneficiary's ordination in the Presbyterian Church.

In its June 18, 2004 response, the petitioner stated that the beneficiary "has been a good employer [sic] as an ordained pastor during [sic] May 16, 2003" and that:

The beneficiary successfully passed the License for Preaching Examination given by *The General Assembly of Overseas Korean Presbyterian Churches* on April 27, 2003 . . . The beneficiary has been employed by the church as Education Missionary since July, 1999. He was ordained on April 2003 and he was given the preaching and sermon opportunities at the church by the denominational doctrine and creed.

The petitioner provided a weekly schedule for the beneficiary that included "prayers" meeting and conference for 1 hour on Tuesday through Saturday, "visitation of members" for 3 hours on Tuesday and Friday, counseling members by phone for 3½ hours on Tuesday and 6½ hours on Thursday, 3½ hours for "rearrangement file of members" on Wednesday, 3½ hours for preparation of Sunday worship on Friday and 2 hours on Saturday, 1 hour for student worship on Friday, 3½ hours to "give a lead to students" on Saturday, approximately ½ hour for worship preparation and 1 hour for student worship on Sunday, and 3½ hours for bible study on Sunday.

The petitioner submitted copies of three check stubs reflecting payments to the beneficiary of \$1,500 in March, April and May 2004. The petitioner also submitted a copy of a May 19, 2001

“certificate of graduation” certifying that the beneficiary had graduated from the Chong Shin University in U.S.A. with a Master of Divinity in Theology degree. Another copy of the beneficiary’s transcript for his bachelor’s degree now indicates that he was credited with 96 transfer hours from the Korea National Open University.

The director approved the petition on March 1, 2005. However, following an onsite inspection of the petitioner’s premises on May 20, 2007 and July 15, 2007, the director notified the petitioner of her intent to revoke the petition. In her June 24, 2008 NOIR, the director again noted the dates of the beneficiary’s ordination and advised the petitioner that the record did not establish that the beneficiary had the requisite two years experience in the proffered position.

In his July 21, 2008 letter accompanying the petitioner’s response, counsel stated that the beneficiary was hired as a missionary, which did not require ordination. He further stated that after graduating from school, the beneficiary was ordained a pastor but that “he never asked for this job performance. His job remains as same as religious worker in the title of ‘Missionary.’” The petitioner provided a partial copy of the Form I-129 Supplement in which it described the duties of the position of missionary as:

Coordinates activities of various denominational group [sic] to meet religious need of lay members. Assists and advises groups in promoting interfaith understanding. Develops the filed [sic] mission projects with the designated fund fund [sic] provided. Analyzes member participation and changes in congregation emphasis to determine needs for religious education. Visits the target areas to [persuade] to convert into the [P]resbyterian denomination.

The director revoked the petition, stating:

The beneficiary’s duties performed during [the] period from 1999 to 2002 are clearly different from his proffered duties in this instant I-360 petition. In response to the Service’s request on June 18, 2004, [REDACTED] stated that “the beneficiary has been employed by the church as Education Missionary since July 1999. He was ordained on April 2003 and he was given the preaching and sermon opportunities at the church by the denominational doctrine and creed” (Underline emphasis added). The beneficiary’s weekly’s schedule further elaborates his proffered duties as follows: prayers meeting and conference, preparation of worship, visitation of members, counseling by phone new members, worship for students Bible study . . . Clearly, the beneficiary has not been authorized to preach and conduct sermons anytime before April 27, 2003, the date he was ordained as a pastor. Therefore, the beneficiary did not have the two-year experience for the proffered position as of the date of filing this instant I-360 petition on May 16, 2003. . . .

In the instant case, the petitioner has provided conflicting information regarding the beneficiary’s position and his duties during [the] period from 1999 to 2004. The

petitioner also failed to show that the beneficiary has met the two-year experience requirement at the time of filing this petition.

On appeal, counsel argues that the petitioner “clearly indicated” that the beneficiary “has been employed by the church as Education Missionary since July, 1999” and that upon his ordination in April 2003, he was given “opportunities” to preach. The petitioner also provides copies of “volunteer service time sheet” from [REDACTED] reflecting volunteer hours performed by the beneficiary from 2005 through 2008.

Counsel further asserts that the beneficiary’s duties as outlined in the petition “are similar in scope and function to the term ‘minister’ as defined in the regulations,” that the director did not address the petitioner’s submission of its 2004 budget or the petitioner’s and beneficiary’s tax returns, and that the immigration officer (IO) who visited the petitioner’s premises did so early in the morning when the premises were unoccupied.

However, the record does not clearly establish, as alleged by counsel, that the proffered position is that of education missionary. In his May 1, 2003 letter, [REDACTED] stated that the position was that of “missionary (pastor) and certified that the beneficiary had served as “missionary (pastor) since July 7, 1999.” Further, in its June 18, 2004 letter submitted in response to the RFE, the petitioner stated that the beneficiary had been a good employee “as an ordained pastor” since May 16, 2003. The work schedule does not include any duties that are reasonably associated with the duties of “education missionary” or the duties that are outlined in the Form I-129 Supplement.

The record establishes that the proffered position is that of “pastor.” The only indication that the proffered position is that of education missionary is on the Form I-360 submitted following the AAO’s remand, and after notification of the deficiencies in the petition. 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 CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Section 203(b)(4) of the Act and the regulation in effect at the time the petition was filed, 8 C.F.R. § 204.5(m)(1), stated that the beneficiary must have two years continuous experience in the occupation for which he or she is seeking entry into the United States. The statute therefore clearly stated that the alien must be seeking entry into the United States in order to work for the organization in a religious vocation or occupation and “has been carrying on *such* vocation, professional work, or other work continuously for at least the 2-year period” [Emphasis added] immediately preceding the filing of the visa petition. The regulation at 8 C.F.R. § 204.5(m)(1) stated that the religious worker “must have been performing *the* vocation, professional work, or other work continuously . . . for at least the two-year period immediately preceding the filing of the petition.” [Emphasis added].

The petitioner has failed to establish that the beneficiary worked continuously in the same religious occupation for which he seeks entry into the United States. Accordingly, the petitioner has failed to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the petition.

The second issue is whether the petitioner has established that it extended a qualifying job offer to the beneficiary.

On May 20, 2007 and July 15, 2007, an IO visited the petitioner's premises for the purpose of verifying the claims in the petition. The IO initially visited the address listed by the petitioner on the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. The IO noted that the address, [REDACTED], was an apartment complex with no reference to a church at that location. On July 15, 2007, the IO visited the address of [REDACTED], listed on other correspondence in the record. The IO arrived at the location at 7:15 in the morning and "observed curbside, a folding church sign, which advertised [REDACTED]. The IO observed that the building directory listed Chong Shin College in USA and Chong Shin University in USA as occupants of suite 300. The IO reported that the third floor directory also listed the educational institutions as the occupants of suite 300, and a survey of the third floor revealed signs for the [REDACTED] the latter also located in suite 300. The IO could not identify any activity by the petitioner at either the address listed on its petition or the address that it used for other correspondence.

In her June 24, 2008 NOIR, the director notified the petitioner of the IO's findings and questioned whether the petitioner operated as claimed in its petition and therefore had extended a valid offer of permanent full-time employment to the beneficiary. In response, the petitioner submitted a July 17, 2008 letter from [REDACTED], president of Chong Shin University in USA, who stated that the petitioning organization had rented office space from the university since June 1997. The petitioner submitted a copy of a June 1, 1997 sublease agreement with Chong Shin University in USA, which indicates that the petitioner was leasing the entire suite with permission to use a piano and organ with a separate agreement. The lease does not provide for any consideration for the petitioner's use of the premises; however, the petitioner submitted copies of receipts and checks indicating that it paid from \$400 to \$500 per month in rent from 1997 through May 2008.

The petitioner also submitted a photograph of a door with a sign indicating that it leads to suite 300 and the Chong Shin University. The sign contains the hours for that organization. A sign on the door indicates that it is the location for the petitioning organization. The petitioner stated that the suite contains six offices, one of which it uses under its sublease. The petitioner indicates that other photographs are of the inside hallway of the suite, its offices, the school president's office, faculty office, music room, conference room, classroom and worship hall. The record is not clear as to how much of the university's premises the petitioner has permission to use. The petitioner submitted uncertified copies of its IRS Form 990-EZ, Short Form Return of Organization Exempt from Income Tax, for the years 2002 through 2006.

In revoking approval of the petition, the director observed that the sublease does not provide any specifics of the conditions of the petitioner's occupancy of suite 300, including the hours, purposes and "rentable area," and that the photographs do not provide evidence of any religious activity by the petitioning organization. Further, while the IO noted that at least one other church, the Dae Hak Presbyterian Church, was also located in suite 300, the petitioner's photographs included no evidence of this church.

On appeal, counsel asserts that "Dae Hak means "university" in the Korean language and that the Dae Hak Presbyterian Church is the school's chapel and that the "Petitioner has been used [sic] for conferences, meetings, and worship with time-shift agreement with the school." However, nothing in the record supports any of the statements by counsel. While Dae Hak may be Korean for "university," the record does not contain a translation of the term in the record and there is nothing in the record to establish that the Dae Hak Presbyterian Church is the school's chapel. Further, the record does not contain a copy of a "time-shift agreement" that outlines when the petitioner is authorized to use the school's facilities. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel argues that the IO's visit to the petitioner's premises at 7:15 am was "incomprehensible" if the attempt was to verify the petitioner's operation. Nonetheless, counsel concedes that there was no outward indication of the petitioner's presence in suite 300 during the IO's visit, and that a sign indicating the petitioner's location at that location was added only after the IO's visit. On appeal, the petitioner submits additional photographs that it states depict meetings by the petitioning organization. However, nothing in these photographs indicate that they are of the petitioning organization or provide conclusive evidence of the petitioner's operations. The petitioner provides a November 5, 2008 letter from the [REDACTED] in which the senior pastor attests to financial assistance provided by the petitioning organization. However, this letter is insufficient to establish that the petitioner operates in the capacity claimed in the petition.

The petitioner has submitted insufficient documentation to establish that it operates and has operated in the capacity claimed in the petition and therefore has extended a qualifying job offer to the beneficiary.

The third issue on appeal is whether the petitioner established that it has the ability to pay the beneficiary.

The petitioner stated that the beneficiary had been paid \$18,000 per year in the position of ordained pastor.

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

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 provided copies of IRS Form W-2, indicating that it paid the beneficiary \$18,000 from 2000 through 2005 and 2008, and \$21,000 in 2006 and \$24,000 in 2007. The petitioner also submitted uncertified copies of its IRS Form 990-EZ, Short Form Return of Organization Exempt from Income Tax, for the years 2002 through 2006. In revoking the petition, the director determined that the petitioner failed to provide copies of its annual reports, federal tax returns, or audited financial statements and therefore failed to submit insufficient documentation to establish its ability to pay the beneficiary. On certification, the petitioner submitted a copy of a social security earnings statement that confirms the wages reported by the petitioner for the stated years. Accordingly, the petitioner has submitted sufficient documentation to establish its ability to pay the beneficiary the proffered wage, and the AAO withdraws the director's decision to the contrary.

Nonetheless, as the petitioner has not established that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the visa petition and that it has extended a qualifying job offer to the beneficiary, the petition may not be approved.

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.