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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: SEP - 2 2003

IN RE: Petitioner: [redacted]
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)

PUBLIC COPY

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

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, 8 U.S.C. § 1153(b)(4), to perform services as a pastor. The director determined that the petitioner had not established that the beneficiary's position qualifies as a religious occupation.

On appeal, the petitioner argues that the beneficiary, ordained and authorized to perform the duties of authorized clergy, clearly qualifies as a minister as defined in the pertinent regulations.

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, 2003, 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, 2003, 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 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 regulation at 8 C.F.R. § 204.5(m)(2) offers the following pertinent definitions.

> *Minister* means an individual duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion. In all cases, there must be a reasonable connection between the activities performed and the religious

calling of the minister. The term does not include a lay preacher not authorized to perform such duties.

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.

[redacted] trustee president of the petitioning church, states that the beneficiary seeks "to serve in a capacity of ***Pastor and Chaplain***, to conduct religious worship, give pastoral care to sick members in the hospital and other functions that are normally performed by workers who serve in a similar religious position." Ms [redacted] states that the beneficiary served as an assistant pastor from 1989 to 1995 while pursuing "academic studies in Theology after which he was ordained a full Pastor."

The record contains documentation showing that the beneficiary earned a B.A. degree in Theology from Faith Bible College & Seminary, Lagos, Nigeria, on September 17, 1994. The record also contains the beneficiary's ordination certificate, dated July 9, 1995, issued by the petitioner's sister church in Nigeria.

The director instructed the petitioner to "[s]ubmit evidence that establishes that the beneficiary has the continuous two years full-time experience" immediately prior to the filing of the petition. The director requested a "detailed listing of the beneficiary's duties" and "evidence that the beneficiary's primary duties, for the two years of qualifying employment, require specific religious training beyond that of a dedicated and caring member of the congregation."

In response, the petitioner has submitted an affidavit from [redacted] who states that the beneficiary "performs . . . administrative duties for the church" such as presiding over meetings and conducting "hospital and prison visitations on behalf of the church." Ms [redacted] states that the beneficiary also "[d]irects all worships [sic] inside the church premises on Sundays, Wednesdays and Fridays" and presides over weddings, communions, baptisms, and so on. Ms. [redacted] indicates that the beneficiary's weekly schedule consists of 16 hours of counseling and visitation; 16 hours of church services; and 11 hours of "[t]eaching the Scripture."

The director denied the petition, stating "certain duties, such as presiding over meetings, teaching Scripture, counseling, and visitations, do not appear to require specific religious training about the level of a caring and dedicated congregation member to perform them." The director noted that the petitioner has "indicated that ordination is necessary," but the director also observed that the petitioner has "not indicated what the training requirements for ordination are." The director concluded "the past and proposed duties do not require advanced religious training and, therefore, [the occupation] does not qualify as a religious occupation."

On appeal, [redacted] states that the petitioner has never claimed "that the beneficiary intends to carry on any vocation other than that of the minister or Pastor." Ms. [redacted] discusses the various statutory and regulatory categories of religious workers, and asserts that the director has relied upon elements from several different categories, for instance discussing the criteria for a "religious occupation" rather than those of a "minister."

Upon careful consideration, we concur with the petitioner's assertion that the director erred in finding that the beneficiary, an ordained minister, is not a religious worker. Because this finding represents the sole stated ground for denial, the director's decision cannot stand.

Nevertheless, review of the record shows several potentially disqualifying issues which must be addressed. One such issue concerns qualifying prior experience. 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 June 14, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as a pastor throughout the two-year period immediately preceding that date. The regulation, mirroring the statute, states that the experience must be "in *the* religious vocation . . ." rather than "in *a* religious vocation. . . ." Therefore, it cannot suffice for the petitioner to show that the beneficiary has worked in various different religious capacities during those two years. The beneficiary's duties throughout the two-year period must be essentially the same as the beneficiary's prospective duties with the petitioner.

Documents in the record identify the beneficiary as a founder of the petitioning church. The petitioner's certificate of incorporation is dated May 5, 2000. That document contains a reference to a meeting called by the then-unincorporated church on July 5, 1998, but the record contains no contemporaneous documentation to establish that the petitioning church existed in any form prior to 2000.

The record also shows that the beneficiary was an intern hospital chaplain "from Fall 1998 through Summer 2000." The record contains little specific information regarding the beneficiary's duties as an intern hospital chaplain. In order for the petitioner to meet the two-year experience requirement, the petitioner must show that the beneficiary's hospital duties were largely identical to his subsequent work at the petitioning church, including leading worship services, performing sacraments, and the like. Because the statute and regulations very clearly define the two-year qualifying period as coming immediately before the filing date, no amount of experience as a

pastor before that period can compensate for shortcomings in the evidence that concerns the qualifying period.

The petitioner must also submit acceptable evidence of its ability to pay the beneficiary's proffered wage of $18,000 per year. 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 director instructed the petitioner to submit "a current financial statement that either has been reviewed or audited by a Certified Public Accountant." The petitioner has submitted a document entitled "Financial Statements and Accountant's Review Report." The certified public accountant who prepared the document states the review "is substantially less in scope than an audit in accordance with generally accepted auditing standards." The review reflects current assets of $30,700 as of December 31, 2001.

The above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be" in the form of tax returns, audited financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only in addition to, rather than in place of, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of evidence. The petitioner has submitted only an unaudited financial statement. The director erred in asserting that the report could be merely reviewed rather than audited; such an assertion is contrary to the plain language of the regulation.

Another issue relevant to payment must be addressed. Counsel has indicated that the beneficiary has worked without remuneration. The record contains no claim or evidence that the beneficiary has been paid for his work at any time during the qualifying two-year period.

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).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Com. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Com 1963).

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 salaried. To hold otherwise would be contrary to the intent of Congress.

The above is consistent with statutory and regulatory requirements that the alien must be engaged *solely* in the vocation of a minister. In this instance, the record is silent as to how the beneficiary has supported himself since he entered the United States in December 1997. The director should afford the petitioner an opportunity to address this issue.

Therefore, this matter will be remanded. 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.