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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 29 2003

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: 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]

PUBLIC COPY

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 Citizenship and Immigrations Services (CIS) 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.

Cindy M. Gomez for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Nebraska Service Center, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted and the order dismissing the appeal will be affirmed. The petition will be denied.

The petitioner seeks classification of 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), in order to employ her as a lay "youth pastor" at an annual salary of $26,400.

The petitioner filed a Form I-360, Petition for Amerasian, Widow or Special Immigrant, on February 12, 2001. The petition was denied by the center director in a decision dated September 26, 2001 on the grounds that the petitioner failed to establish that the beneficiary had the requisite two years of membership in the denomination and the petitioner's ability to pay the proffered wage.

The petitioner, by and through counsel, filed an appeal from that decision with an appellate brief and additional evidence. Counsel asserted that the beneficiary had more than the requisite two years of membership in the denomination and submitted a copy of the petitioner's 2000 Internal Revenue Service (IRS) Form 990 as proof of its ability to pay the proffered wage.

The AAO dismissed the appeal on July 18, 2002. The AAO determined that the petitioner had adequately established that the beneficiary satisfied the two-year denominational membership requirement. However, the AAO concluded the petitioner had failed to establish that it is a qualifying religious organization, a qualifying job offer had been tendered to the beneficiary, it had the ability to pay the beneficiary the proffered wage, and the beneficiary had two years of continuous experience in a religious occupation at the time the petition was filed.

Counsel for the petitioner now files a motion to reopen with a brief and additional documentation addressing the AAO's concerns.

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 petitioner in this matter is a church affiliated with the [redacted] denomination. The beneficiary is a native and citizen of Korea who was last admitted to the United States on May 23, 1998, as a B-2 visitor. The record reflects that the beneficiary was subsequently granted R-1 classification valid from January 12, 1999 to October 31, 2001.[1]

In order to establish eligibility for classification as a special immigrant religious worker, the petitioner must satisfy each of several eligibility requirements.

The first issue to be addressed in this proceeding is whether the petitioner has established that it is a qualifying religious organization as defined in this type of visa petition proceeding. The regulation at 8 C.F.R. § 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

(i) Evidence that the organization qualifies as a nonprofit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious

[1] An alien with at least two years membership in a religious denomination may qualify for nonimmigrant R-1 classification under section 101(a)(15)(R) of the Act without a showing of prior work experience. For special immigrant classification under section 101(a)(27)(C) of the Act, the alien must also establish at least two years of experience in the position being offered.

organizations; or

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under section 501(c)(3).

In addressing this requirement, counsel submitted a 2000 IRS Form 990 tax return and a tax-exempt letter from the Internal Revenue Service dated December 21, 1998, reflecting the petitioner's address as [redacted] However, in a letter from the General Secretary of KAPC verifying the petitioner's membership in the denomination, the petitioner's location was identified as [redacted] Furthermore, in filing the Form I-360 petition, the petitioner did not disclose its mailing address, having all correspondence sent to counsel. The petitioner did not submit any documentation under its own letterhead to permit the Service to verify its location.

On motion, counsel explains, and submits documentation to establish, that the petitioner moved from its location at [redacted] to [redacted] on August 17, 1996. Based on a review of the information and evidence provided on motion, it is concluded that the petitioner has satisfactorily established that it is a qualifying religious organization.

The second issue to be addressed is whether the petitioner has established that a qualifying job offer has been tendered. The regulation at 8 C.F.R. § 204.5(m)(4) states, in pertinent part, that:

> *Job offer.* The letter from the authorized official of the religious organization in the United States must state how the alien will be solely carrying on the vocation of a minister, or how the alien will be paid or remunerated if the alien will work in a professional capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support.

Initially, the description of the duties of the position, the job offer, and the terms of remuneration were all submitted by counsel. In dismissing the appeal, the AAO noted that counsel is not an authorized official of the church and, absent a detailed job-offer letter from an official of the church, this requirement had not been satisfied.

On motion, counsel submits an undated letter, with translation,

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[2] Counsel has explained on motion that there was a clerical mistake showing the petitioner's new address as [redacted] instead of [redacted] in documentation submitted by counsel on appeal.

from the petitioner's senior pastor listing the duties of the position of "youth minister/educational evangelist." The letter does not name the beneficiary as the intended employee, does not indicate the terms of remuneration, and fails to establish that the beneficiary will not be solely dependent on supplemental employment or the solicitation of funds for support. It is concluded, therefore, that the petitioner has failed to establish that a qualifying job offer has been tendered.

The third issue to be addressed in this proceeding is whether the petitioner has demonstrated its ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part, that:

> 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 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 annual reports, federal tax returns, or audited financial statements.

In response to the director's request for additional documentation concerning the petitioner's ability to pay, counsel submitted an unaudited 2000 financial statement. On appeal, counsel submitted a an unaudited statement of support and revenue, expenditures and changes in fund balance for the nine months ending September 30, 2001. Counsel also submitted a 2000 IRS Form 990 tax return; however, due to the discrepancies in address on this document as discussed above, the AAO determined the document to be insufficient to satisfy this requirement. The AAO also noted that absent a detailed description of the size of the petitioner's congregation, its number of employees, and proof of the beneficiary's remuneration for the two years as claimed, the Bureau was unable to conclude that the amounts reported on a tax return were sufficient to support the beneficiary.

On motion, counsel asserts that the church has about 300 members and employs two full-time pastors, one full-time youth minister/educational evangelist, and one full-time church evangelist. Counsel states that two part-time pianist/choir conductors decline salaries, offering their wages to the church. Counsel further asserts that the petitioner's certified public accountant's 2002-to-date financial reports show the petitioner's financial strength, with assets of more than $1,200,000 and a positive fund balance of more than $460,000. However, while a 2002-to-date financial statement was provided on motion, it is not an audited statement and does not establish that the petitioner had the ability to pay the beneficiary the proffered wage as of the

date of filing the petition. Further, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the petitioner also has failed to overcome this reason for the denial.

The final issue to be addressed is whether the petitioner has establish that the beneficiary had two years of continuous experience in a religious occupation at the time the petition was filed. The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that:

> All three types of 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.

As previously noted, the petition was filed on February 12, 2001. Therefore, the petitioner must establish that the beneficiary was continuously carrying on a religious occupation as a youth pastor since at least February 12, 1999.

The legislative history of the religious worker provision of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (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. *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 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 proceeding 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).

The term "continuously" is also 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 studies. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

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. Comm. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 1963).

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 be otherwise would be outside the intent of Congress.

In addressing this requirement, counsel submitted a letter dated August 6, 2001, also signed by the pastor of the church, stating that the beneficiary was continuously employed by the church since approval of the R-1 petition on January 12, 1999. The center director concluded that the prior experience requirement had been satisfied.

On review, the AAO concluded that the petitioner furnished insufficient proof to satisfy the above requirement. The AAO determined that the letter from petitioner's counsel was not sufficient to satisfy the burden of proof. The AAO noted that to establish that an alien is qualified in a religious position and had been performing the duties of such a position, acceptable evidence includes a letter from a Superior or Principal of the denomination in the United States. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980), and that such letter should be supported by contemporaneous evidence such as the beneficiary's U.S. federal tax returns for the two-year period.

On motion, counsel submits copies of unsigned 2000 and 2001 tax returns for the beneficiary's spouse, indicating that it is a joint return. There is no indication as to the spouse or beneficiary's occupations, or who earned the incomes listed on the returns. No IRS Forms W-2 are included in the record. Based on the documentation provided, the AAO is unable to conclude that the beneficiary had been continuously employed in a full-time religious occupation during the requisite time period.

Furthermore, in order to establish eligibility for special immigrant classification, the petitioner must establish that the

offered position qualifies as a religious occupation as defined in the regulations. The statute is silent as to what constitutes a "religious occupation," and the regulation states only that it is an activity relating to a traditional religious function.

The Bureau interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed or beliefs of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination or the petitioning religious organization.

The AAO noted in its dismissal of the appeal that there was no indication that the petitioner has ever employed a person in this capacity in the past, and no explanation of its decision to do so at this time.

On motion, counsel addresses these concerns by asserting that the petitioner previously employed Rev. Sam J. King as a full-time youth pastor, or "educational evangelist." In support of this assertion, counsel submits copies of Rev. Kim's 2000 and 2001 IRS Forms 1040, again unsigned and without IRS Forms W-2 attached. The documentation submitted is insufficient to establish that the position is traditionally a permanent, full-time, salaried occupation within the denomination or the petitioning religious organization.

In reviewing an immigrant visa petition, the AAO must consider the extent of the documentation furnished and the credibility of that documentation as a whole. The petitioner bears the burden of proof in an employment-based visa petition to establish that it will employ the beneficiary in the manner stated. See *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966); *Matter of B. Semerjian*, 11 I&N dec. 751 (Reg. Comm. 1966).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The order dismissing the appeal is affirmed. The petition is denied.