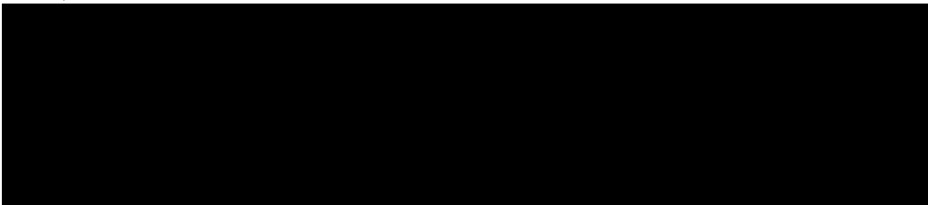


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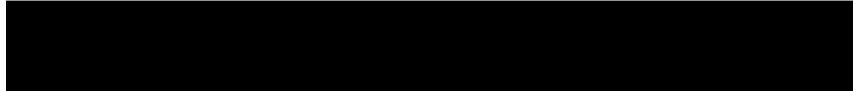
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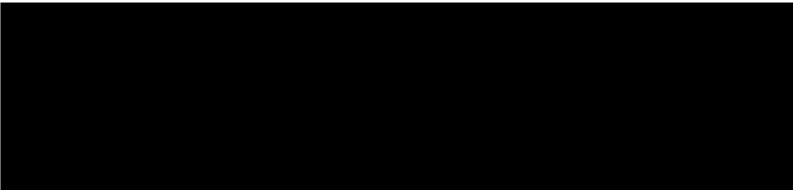
Petitioner:



Beneficiary:

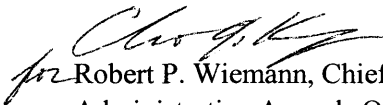
PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

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.


for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an international missionary organization. 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 director of Evangelism and Missions at Midwest Theological Seminary (MTS). The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience in the position sought immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established its ability to pay the beneficiary's proffered wage.

On appeal, the petitioner submits additional financial and corporate documents and a brief from counsel.

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, 2008, 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, 2008, 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).

First, we examine the issue of the beneficiary's experience. The regulation at 8 C.F.R. § 204.5(m)(1) 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." 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate that,

immediately prior to the filing of the petition, the alien has the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on January 5, 2004. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a director of Evangelism and Missions throughout the two years immediately prior to that date.

In a December 30, 2003 letter accompanying the initial filing of the petition, [REDACTED] President of the petitioning organization, wrote:

It is our desire to continuous employment [sic] of [the beneficiary] in a religious occupation as professional missionary and religious ministries training worker, and missionaries of Information Technology for networking operator. . . .

[The petitioner] trains and dispatches missionaries worldwide and provides theological education through Midwest Theological Seminary and various seminars in member countries and through International Evangelical Bible Institute. . . .

[The beneficiary] is has been work [sic] the last four years conducting a preaching and worship service Sunday School of the International Baptist Church, Fairview Heights, IL. . . .

[The beneficiary] will also provide continually the Information Technology management services to [the petitioner] by creating, maintaining, and finding of resources the internet homepage, the software development for missionary management and promotional file for members and its educational programs through Midwest Theological Seminary. . . . [The petitioner] would like to continue to employ [the beneficiary] as Director of professional missionary and Information Technology [sic].

An academic transcript and "Certificate of Graduation," both dated December 30, 2003, and a photocopied diploma indicate that the beneficiary received a Master of Divinity degree from MTS on June 28, 2002. Exactly a year later, on June 28, 2003, the petitioner issued the beneficiary a license "to preach the Gospel."

A copy of a "Verification of Church Ministry," issued by the International Baptist Church, Fairview Heights, Illinois and dated August 20, 2003, states that the beneficiary has "served . . . the church ministry including as Church Choir leader, Prayer team leader and Sunday school superintendent" since March 10, 2000, and currently "is serving as an assistant pastor of the International Baptist Church." The letter is signed by [REDACTED], identified here as "Senior Pastor" of the International Baptist Church.

Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements show that MTS paid the beneficiary \$16,000 in 2000, \$29,600 in 2001 and \$33,600 in 2002. The seminary's federal Employer Identification Number (EIN) is [REDACTED]. The petitioning organization uses the same street address as the seminary, but has a different EIN [REDACTED].

On May 21, 2004, the director issued a request for evidence (RFE), instructing the petitioner to submit additional evidence and information regarding the beneficiary's duties during the two-year qualifying period.

In response, the petitioner submitted additional tax and payroll documents, showing the beneficiary's receipt of a salary consistent with full-time employment.

The petitioner also submitted a job description for the position of Director of Evangelism and Missions. The description lists eight "Specific Responsibilities," including "[a]dminister and supervise the information technology department," "management of . . . internet communications policies," "provide advisory and training services to evangelism/missionary students," and "Coordinate[] and deliver[] new student orientation programs for international students." First among the list of qualifications is "Master of Divinity degree or other related masters level degree from a recognized institution."

The director denied the petition on November 9, 2004, stating:

Correspondence from the petitioner, dated December 30, 2003, states: "It is our desire to continuous (sic) employment of [the beneficiary] in a religious occupation as professional missionary and religious ministries training worker, and missionaries of Information Technology for networking operator." . . .

However, additional correspondence from the petitioner, dated August 20, 2003, states that the beneficiary has been employed as "Assistant Pastor of International Baptist Church," from March 10, 2000. The document states that the beneficiary "has been served (sic) for the church ministry including as Church Choir leader, Prayer team leader and Sunday school superintendent." . . .

[T]he discrepancy between the position offered in the petitioner's December 30, 2003 correspondence and the duties described in its August 20, 2003 correspondence indicate that the beneficiary had not performed the religious vocation, professional work or other work continuously for at least the two-year period immediately preceding the filing of the instant petition. Further, the petitioner has provided evidence which appears contradictory regarding the exact nature of the position being offered [to] the beneficiary.

The director noted that the petitioner responded to the RFE by identifying yet another job title, "Director of Evangelism and Missions," and providing a new list of responsibilities. The director found that the petitioner had not established that the beneficiary had served continuously in any of the above positions throughout the two-year qualifying period.

On appeal, with regard to the beneficiary's activities at International Baptist Church, counsel states that the beneficiary "served in a volunteer capacity as Assistant Pastor, Church Choir leader, Prayer Team leader and Sunday School superintendent. . . . The beneficiary receives no remuneration for those services. They are not to be considered 'employment' for the purposes of the petition." Counsel states that the petitioner mentioned these activities only to establish the beneficiary's religious convictions, not qualifying experience.

Counsel states that payroll and tax documents show that MTS has consistently employed the beneficiary throughout the 2002-2004 qualifying period. These documents establish employment during the required

period, but they do not demonstrate continuous employment in the same position in which MTS now seeks to employ the beneficiary. The petitioner has indicated that the position of Director of Evangelism and Missions requires a Master of Divinity degree. It necessarily follows that someone who does not hold a Master of Divinity degree is not qualified to serve as MTS's Director of Evangelism and Missions.

The record demonstrates that, when the qualifying period began on January 5, 2002, the beneficiary did not hold a Master of Divinity degree. Rather, he was still studying for that degree at MTS. Counsel does not contest this sequence of events, asserting instead that "the responsibilities of the beneficiary have increased and expanded during the time period that he has been employed by the Petitioners, so that now he has expanded his responsibilities further into the substance of the religious activities of the Petitioners. It could be argued that the beneficiary has even moved into a professional capacity." It could also be argued, however, that the most demonstrably religious duties that the beneficiary has performed for MTS are the ones that he has most recently assumed.

Earlier documentation in the beneficiary's file allows further insight into the beneficiary's activities at the outset of the 2002-2004 qualifying period. The present petition is not the first that the petitioner has filed on the beneficiary's behalf. The petitioner had previously filed a petition, with receipt number LIN 02 115 53466, on February 16, 2002. Because less than two years separate the filing dates of the two petitions, the first petition was filed during the qualifying period covered by the second filing. The earlier petition included a February 12, 2002 letter from [REDACTED], which reads, in part:

[The petitioner] proposes to continuous[ly] employ [the beneficiary] . . . as Director of Computer Network Operations. . . .

[The petitioner] would like to continuous[ly] employ [the beneficiary] as Director of Network Operations. [The beneficiary's] duties would include establishing and maintaining the internet webserver, e-mail server, software develop[ment] for student management and INTRANET library by ASP, Local Area Network (LAN) and promotional file for members and for [the petitioner's] educational programs through Midwest Theological Seminary. . . .

He developed a program server called INTRANET on the Internet website. . . . Also during this time he developed a[] website to Midwest Theological Seminary through the INTERNET technologies.

In this 2002 letter [REDACTED] did not state that the beneficiary was MTS's director of evangelism and missions, or that his position required a Master of Divinity degree. The position as originally described appears to have been concerned almost exclusively with computer services; the beneficiary appears to have been essentially a webmaster and software designer. It is far from clear that such duties amount to a qualifying religious occupation as 8 C.F.R. § 204.5(m)(2) defines that term. There is no demonstrable difference between designing a web site for a religious employer as opposed to a secular employer. The 2002 letter did not indicate that the beneficiary was, to any great extent, responsible for determining the religious content of the site.

From the available information, the beneficiary has not merely shown typical progression within a given position. Rather, the position itself has changed significantly, now involving key functions that the beneficiary simply was not qualified to perform two years before the filing date. At best, the petition now under consideration was filed prematurely. We affirm the director's finding that the petitioner has not shown that the beneficiary possessed the necessary continuous experience in the position at the time of filing.

The remaining issue concerns the prospective employer's ability to pay the beneficiary's proffered wage. 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 petitioner submitted copies of an audited financial report for the fiscal year ending June 30, 2000, and an IRS Form 990 return for the 2001-2002 fiscal year. These documents show net income and current assets each in the hundreds of thousands of dollars. The Form 990 return was prepared in May 2003. The audit report is addressed to the petitioner and the seminary, and treats the two as a single entity for financial purposes. Under "Name of organization," the Form 990 return shows the petitioner's name, but under "Web site" it shows the web address of the seminary. The return also indicates that the petitioner exists "to train pastors . . . and other church workers . . . by offering on-campus and correspondence courses." Such pastoral training is certainly in keeping with the typical activities of a theological seminary.

The initial submission contains copies of two IRS determination letters. The earlier letter, dated January 8, 1991, addressed to the petitioning organization at its previous address in Fairview Heights, Illinois, contains the preliminary determination that the petitioner "can reasonably be expected to be a publicly supported organization described in sections 509(a)(1) and 170(b)(1)(A)(i)" of the Internal Revenue Code (the Code). A subsequent letter dated April 19, 1994, revises this finding and indicates that the petitioner is "an organization of the type described in section 509(a)(2)" of the Code.

The petitioner's initial submission did not specify the amount of the beneficiary's compensation, although 8 C.F.R. § 204.5(m)(4) requires the prospective employer to specify the terms of compensation. Accordingly, in the RFE, the director requested information regarding the terms of the job offer. The director also requested more recent financial documentation.

The petitioner's response included copies of the previously submitted IRS determination letter from 1994, as well as a third letter, dated October 28, 2002, indicating that MTS is "an organization described in sections 509(a)(1) and 170(b)(1)(A)(ii)" of the Code. Thus, the IRS has classified the seminary separately, and in a different classification, from the petitioning organization. In a joint letter dated August 2, 2004, [REDACTED] and [REDACTED] Secretary of the petitioner's board, stated: "Midwest Theological Seminary . . . is the educational

arm of” the petitioning entity. The letter indicated that the beneficiary has worked for both entities but “[h]is pay has continually come from Midwest Theological Seminary.” This last claim is consistent with the Forms W-2 submitted previously, as well as newly submitted copies of pay receipts that identify the seminary as the beneficiary’s employer. The letter further indicated that the seminary “operated under the auspice of” the petitioner until it obtained its own IRS recognition as a 501(c)(3) tax exempt nonprofit organization in 2002.

The petitioner also submitted more recent tax documentation, including a Form W-2 showing that the seminary paid the beneficiary \$36,680 in 2003. In the RFE response, the petitioner still did not specify the wage or salary that the prospective employer intends to pay the beneficiary in the future, but the pay stubs in the record indicate that the beneficiary’s monthly salary was \$3,280 per month as of January 2004, a \$200 increase from the monthly salary in 2003.

The director denied the petition, stating that the petitioner’s financial documentation from 2002 and earlier is “irrelevant” because it predates the petition’s filing date, and noting that the more recent documentation shows that MTS, not the petitioner, paid the beneficiary in 2003 and 2004. The director stated: “because MTS is not the petitioning entity, and evidence clearly establishing the relationship between the petitioner and MTS has not been provided, this evidence does not establish that the petitioner has the ability to pay the offered wage.”

On appeal, counsel requests “leave to allow Petitioner to add Midwest Theological Seminary as Petitioner.” There exists no mechanism for substitution of petitioners at the appellate stage. Furthermore, substitution is unnecessary. The petitioner in a special immigrant religious worker petition need not be the intending employer. The petitioner can be the “alien, or any person in behalf of the alien.” 8 C.F.R. § 204.5(m)(1).

Similarly, 8 C.F.R. § 204.5(g)(2) does not require evidence that the *petitioner* is able to pay the proffered wage. Rather, the regulation requires “evidence that the *prospective United States employer* has the ability to pay the proffered wage” (emphasis added). The regulation goes on to require that “[t]he petitioner must demonstrate this ability,” but we interpret this simply to mean that, because the burden of proof is on the petitioner (whoever that petitioner may be), the petitioner is responsible for producing evidence that the prospective employer is able to pay the proffered wage.

While it is not necessary (or possible) to change the designation of the petitioner, we acknowledge counsel’s stipulation that, at this point, the petitioner and MTS are two separate entities, MTS having “become fully independent of” the petitioner in 2002 as part of its efforts to gain accreditation from the Transnational Association of Christian Colleges and Schools. In this proceeding, the source of the beneficiary’s income, and thus his employer, has consistently been MTS. Therefore, the petitioner must demonstrate that MTS has been able to pay the beneficiary’s proffered wage since the filing date, and will remain able to do so up to the point that the beneficiary obtains lawful permanent residence.

As we have already demonstrated, the petitioner, through counsel, stipulates that MTS used to be part of the petitioning entity but is now an independent entity. The early financial documentations date from a period when MTS and the petitioner were still connected, and MTS had access to the petitioner’s financial resources.

On appeal, the petitioner submits MTS's IRS Form 990 returns for the fiscal years ending June 30, 2003 and 2004. The 2002-2003 return was executed on January 9, 2004, and therefore did not yet exist when the petitioner filed the petition on January 5, 2004. At the time of filing, the most recent return available was for the 2001-2002 tax year, which the petitioner has already submitted. The 2002-2003 and 2003-2004 returns submitted on appeal continue the pattern of previous documents, showing that MTS's revenues for those years exceeded its expenses by hundreds of thousands of dollars. Pay stubs in the record show that MTS has consistently paid the beneficiary without difficulty.

We find that the petitioner has submitted the documentation required by 8 C.F.R. § 204.5(g)(2), and that this documentation, augmented by pay stubs, amply demonstrates that MTS has been and continues to be able to compensate the beneficiary at a rate of over \$3,280 per month, which was the rate of pay in effect as of the filing date in January 2004. We withdraw the director's finding to the contrary. The petition remains denied, however, owing to the finding relating to the beneficiary's prior experience.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.