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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File: EAC-98-238-51466

Office: Vermont Service Center

Date:

MAY 22 2001

IN RE: Petitioner:
Beneficiary:



Petition: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(4)

IN BEHALF OF PETITIONER: Self-represented

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a church. It 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), to perform services as an associate pastor/Bible instructor. The director denied the petition finding that the petitioning church failed to establish that the beneficiary had had the requisite two years of continuous work experience in a qualifying religious occupation or that the church had the ability to pay the proffered annual salary of \$20,000.

On appeal, an official of the church submitted proof of the beneficiary's admission as an R-1 religious worker and stated that the salary would be adjusted to \$13,000.

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 is described as a church claiming a congregation of 200 members. The petitioner asserted that the beneficiary was last admitted to the United States as an R-1 nonimmigrant religious worker employed by the Northeastern Conference of the denomination.

The first issue raised by the director is whether the petitioner has established that the beneficiary had had the requisite two years of continuous work experience in a qualifying religious occupation.

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.

The petition was filed on August 19, 1998. Therefore, the petitioner must establish that the beneficiary was continuously engaged in a qualifying religious occupation since at least August 19, 1996.

The director noted that the petitioner failed to submit verification of the beneficiary's admission in R-1 classification and further noted that the beneficiary's W-2 Wage and Tax Statements for 1997 indicated three separate secular jobs and did not establish that he had been continuously employed in a religious occupation.

On appeal, the petitioner submitted a faint copy of the visa page of a passport indicating admission as claimed and stated that the church has the ability to pay the reduced salary to the beneficiary even if it must be taken from the current pastor's salary, who is leaving for continuing education.

On review, the statute requires that the alien have been continuously carrying on the religious occupation specified in the petition. While the alien was apparently admitted as claimed, his W-2 forms reflects 1996 wages of \$252 from the Northeastern Conference and no wages from the denomination for all of 1997 and 1998. The implication in the documentation submitted that the beneficiary may have volunteered part-time for the church, while engaging in unauthorized secular employment, does not satisfy the prior experience requirement. In addition, the beneficiary's failure to fulfill the terms of his nonimmigrant admission brings in doubt his intention to fulfill the terms of the instant petition. For these reasons, it must be concluded that the petitioner has failed to establish that the beneficiary was continuously engaged in a qualifying religious occupation from at least August 1996 to August 1998.

The next issue in the director's decision is the prospective employer's ability to pay the proffered wage.

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 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 internal financial statements from the church to demonstrate the ability to pay which do not satisfy the regulatory requirements. In addition, the petitioner seeks to amend the terms of remuneration. A material change to a visa petition may not be made on appeal, but requires the filing of a new petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

Beyond the discussion in the director's decision, administrative notice is made that the petition is deficient on additional grounds. The petitioner failed to establish that it is a qualifying organization exempt from, or eligible for exemption from, taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations pursuant to 8 C.F.R. 204.5(m)(3)(i). While the Pastor stated that evidence of qualifying tax-exempt status was submitted, a review of the record reveals no such documentation. As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

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.

ORDER: The appeal is dismissed.