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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[REDACTED]

AUG 21 2003

File: [REDACTED] Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

[REDACTED]

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:

[REDACTED]

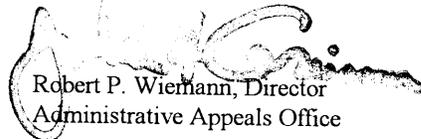
INSTRUCTIONS:

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. Wiermann, 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 appeal will be dismissed.

The petitioner is a “rabbinical college and rabbinical court.” 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 an instructor and fund raiser. The director found that the petitioner has not established that the beneficiary meets the two-year employment requirement, that the beneficiary will work as a full-time religious worker, or that the petitioner is able to pay the beneficiary’s proffered wage.

On appeal, the petitioner submits copies of bank statements and a letter from officials of TOV Community.

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)(1) echoes the above statutory language, and states, in pertinent part, that “[a]n alien, or any person in behalf of the alien, may file an 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.”

Two related issues in this proceeding are whether the petitioner has established that the beneficiary has the required past experience, and whether the prospective employment will be a full-time religious occupation. 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.

In appropriate cases, the director may request appropriate additional evidence relating to the eligibility under section 203(b)(4) of the Act of the religious organization, the alien, or the affiliated organization. 8 C.F.R. § 204.5(m)(3)(iv).

The petition was filed on April 30, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working in the job offered throughout the two-year period immediately preceding that date.

The beneficiary entered the United States under a B-2 visitor’s visa in 1993, and apparently has never had legal authorization to work in this country. In a letter dated March 21, 2001, Rabbi Tzadka¹ (no first name given) and Abe Rosenthal, respectively rabbi and president of TOV Community, a synagogue with branches in Monsey and Flushing, New York, state “in the past 8 years [the beneficiary] has served in our community . . . as a rabbinical teacher. He also leads prayers on a part time basis and supervises transactions of religious books.” In a letter dated April 22, 2001, Robert Fricker, officer of the petitioning entity, states:

[The beneficiary] is working for our organization and among his numerous responsibilities are as follows:

1. To visit those who are sick, this may include a visitation to the hospital, a nursing home, or the individual’s home.
2. Religious instructions for adults and children. This will include but is not limited to Hebrew lessons, bar mitzvah classes, adult education classes, and classes in reading the Torah and proper reading of the prayer services.

¹ The spelling of this name varies in the record. The spelling “Tzadka” used in this decision is found in the petitioner’s most recent submission.

3. Fund raising for the organization for our continued and ongoing services to the community at large. Fund raising will include but is not limited to personal contacts within and outside the community, dinners, and periodic fund raising events.

The final item on the list is of some concern because 8 C.F.R. § 204.5(m)(2) specifically excludes fund raisers from the category of “religious occupations.”

The petitioner originally offered only the general claim that the beneficiary has worked for the petitioner for eight years. The director requested detailed information and documentation showing the beneficiary’s duties and source of support for the qualifying two-year period. In response, Abe Rosenthal of TOV Community states “we have been providing [the beneficiary] with room and board from April 1999 until current” (sic). The date of the letter is April 23, 2002. Mr. Rosenthal does not provide supporting documentation or explain how the beneficiary was supported during the previous six years. The beneficiary states in a letter that he works eight hours a day from Sunday through Friday leading prayers and teaching classes for the petitioner, and that he visits the sick twice a week. The petitioner’s submission included no documentary evidence to confirm or clarify this claim.

The director denied the petition, stating that the petitioner has “not established that the beneficiary was a full-time religious worker for the entire two-year period from April 1999 to April 2001,” or “that the beneficiary would be a full-time religious worker in the job offered.”

On appeal, the petitioner submits a new letter, jointly signed by Abe Rosenthal and Rabbi Tzadka and dated August 15, 2002, indicating that the beneficiary “worked approximately 40 hours per week (full time Sunday through Friday),” for TOV Community “from April 1, 1999 through April 30, 2001.” The officials essentially repeat the claims set forth in the beneficiary’s earlier letter. They neither elaborate, nor submit any first-hand documentary evidence, nor explain why such evidence is not available. Their assertion that the beneficiary worked full-time for TOV through April 30, 2001, appears to contradict the petitioner’s assertion that the beneficiary was already working full-time for the petitioner as of April 22, 2001, as well as the earlier claim that TOV was still providing the beneficiary with room and board as of April 2002.

It is conceivable that TOV and the petitioner are connected somehow, but neither entity has expressly claimed such a connection, and the address provided for TOV does not match the petitioner’s. We are not obliged to presume such a connection just because this hypothetical connection might resolve some of the evident conflicts in the record.

The beneficiary appears to have been in the United States for eight years up until the petition’s filing date, with no apparent employment authorization. The petitioner has not shown that it has paid the beneficiary’s salary, nor has the petitioner otherwise established the beneficiary’s source of support during that substantial period of time.

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 remaining issue concerns the petitioner’s ability to pay the beneficiary’s proffered wage. 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. In a case where the prospective United States employer employs 100 or more workers, the director may

accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

Robert Fricker, identified above, has stated that the beneficiary "will earn an income of between \$15,000 and \$20,000 annually." The director instructed the petitioner to submit evidence of its ability to pay this salary. In response, the petitioner's accountant, Benjamin Stern, states "[a]ccording to the corporation's Vice-President, Mr. Avner Hazan, the corporation has sufficient revenues to pay [the beneficiary]. The source of the information contained in this letter is the representation of the Vice-President of the corporation, I have not 'audited,' 'reviewed' or 'compiled' the books and records of the company."

An accountant's second-hand statement from a company official is not an annual report, federal tax return, or audited financial statement. The petitioner has not shown that it employs 100 or more workers, which would trigger the "statement from a financial officer" clause, and even then an independent accountant retained by the petitioner is not a financial officer of the organization.

The director denied the petition in part because the petitioner failed to provide the required evidence of its ability to pay the beneficiary's wage. On appeal, the petitioner submits copies of bank statements showing a balance that fluctuates between less than \$700 and more than \$16,000, with the balance for most months falling below \$5,000. The statements show that the bank collected an insufficient funds fee on more than one occasion.

Bank statements do not provide a complete, reliable picture of the petitioner's financial status. Furthermore, it remains that 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.

For the reasons stated above, the petitioner has not overcome the grounds for denial. The record does not establish that the beneficiary has been or will be working full-time for the petitioner in a qualifying religious occupation, or that the petitioner has the financial ability to pay the beneficiary's proffered wage.

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.