C1

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: AUG 28 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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:

PUBLIC COPY

[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 immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a church affiliated with the Reformed Church in America organization, which is affiliated with the Presbyterian denomination. 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 the Religious Director of Nursery and Children.

The director denied the petition, finding that the petitioner failed to establish that the offered position qualifies as a religious occupation for the purpose of special immigrant classification, and that the beneficiary has had the requisite two years of continuous experience in a religious occupation. The director further found that the petitioner failed to establish that it had the ability to pay the proffered wage.

On appeal, counsel for the petitioner submits a brief.

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 beneficiary is a 40-year old native and citizen of Korea. According to the Bureau's records, the beneficiary entered the United States as a B-2 nonimmigrant visitor for pleasure on August 30, 1998. The petitioner states that the beneficiary changed her status to an R-1 nonimmigrant religious worker on March 28, 2001. The petitioner failed to provide corroborating evidence of the change of status. There is no record of a change in status in the Bureau's databases.

The first issue to be addressed in this proceeding is whether the petitioner established that the proposed position constitutes a qualifying religious occupation for the purpose of special immigrant classification.

8 C.F.R. § 204.5(m)(2) states, in pertinent part, that:

> *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.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in the regulations. The statute is silent on what constitutes a "religious occupation" and the regulation states only that it is an activity relating to a traditional religious function.

The petitioner provided the Bureau with the following description of the beneficiary's job duties:

> The Religious Position Offered. [The beneficiary] is being offered permanent employment in the position of Nursery Director. In that capacity, [the beneficiary] evaluates educational curricula; establishes nursery program; recruit, train and supervise teachers. Meets with parents in need of childcare, provides learning and recreational nurture experience to children of congregation. Attends meetings of Educational Committee.

[Sic.] In response to a request for additional evidence, the petitioner wrote the following:

> The scope of the [proffered] position is to prepare and provide Christian religious program for our children, from infants to age 5. Duties of the position include: administration of the nursery department; meeting with the Education Committee; training and supervising teachers; teaching Bible and Bible stories; leading the children in worship (singing and praying); establishing annual summer Bible school; evaluating and recommending curriculum; organizing children's camp and revival programs; recruitment of children for programs; meeting with parents.

The director determined that the record is insufficient to establish that the proffered position qualifies as a religious occupation. The director further determined that certain duties such as teaching Bible stories and classes, leading songs and prayer, and organizing camp, do not require specific religious training above the level of a caring and dedicated congregation member to perform them.

On appeal, counsel for the petitioner asserts that the proffered position requires religious training, i.e., an academic degree in Christian Education.

The unsupported 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).

It is noted that there are discrepancies in the beneficiary's initial job description and that provided on appeal. Initially, the petitioner indicated that the beneficiary cared for children ranging in age from infancy to five years. On appeal, the petitioner indicated that the beneficiary would work with infants and small children through grade 4. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Although one or more of the beneficiary's job duties may involve activities that relate to a traditional religious function, such as teaching religion, the majority of the duties are secular. Caring for infants and toddlers, administering the nursery department and organizing camps are not activities that relate to a traditional religious function. The petitioner has failed to establish that the proffered position is a religious occupation.

The next issue to be addressed in this proceeding is whether the beneficiary had been continuously carrying on a religious occupation for the two years preceding the filing of the petition. 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 June 14, 2001. Therefore, the petitioner must establish that the beneficiary was continuously carrying on a religious occupation since at least June 14, 1999.

Counsel for the petitioner wrote in a letter to the Bureau that "the beneficiary was working as a volunteer during 1999, 2000 and during January, February and March 2001." The Pastor of the petitioning church wrote the Bureau that:

> [The beneficiary] has been working for us on a paid full time basis under the R-1 Status since April 1, 2001. The R-1 was approved on March 28, 2001.
>
> [The beneficiary] also served us as [a] full time volunteer worker in a similar position prior to March 28, 2001. She began serving as the volunteer Nursery Director in our Education Department on January 1, 1999, therefore working as a volunteer for a period of more than two years.

The director determined that the petitioner had failed to establish that the beneficiary has the required two years of continuous experience in the religious occupation. The AAO concurs.

The statute and its implementing regulations require that a beneficiary had been continuously carrying on the religious occupation specified in the petition for the two years preceding filing. Because the statute requires two years of continuous experience in the same position for which special immigrant classification is sought, the Bureau interprets its own regulations to require that, in cases of lay persons seeking to engage in a religious occupation, the prior experience must have been full-time salaried employment in order to qualify.

The legislative history of the religious worker provision of the Immigration Act of 1990[1] 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).

In *Matter of Sinha,* 10 I&N Dec. 758 (Reg. Com. 1963), the Commissioner determined that if the beneficiary were to receive no salary for church work, he would be required to earn a living by

---

[1] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

obtaining other employment. In analogous reasoning, the Bureau determines that unpaid experience does not qualify as the beneficiary must have sought outside employment to support himself. Further, without income tax returns and W-2's, the Bureau is unable to determine how and whether the beneficiary has been employed.

The director denied the petition, in part, finding that the petitioner failed to provide sufficient evidence of its ability to pay the beneficiary. The petitioner failed to address this issue on appeal.

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.

The petitioner has not furnished the church's annual reports, federal tax returns, or audited financial statements that are current as of the date of filing the petition. Therefore, the petitioner has not satisfied the documentary requirement. For this reason as well, the petition may not be approved.

In review, the petitioner has failed to overcome the director's objection to approving the petition.

Further, while the determination of an individual's status or duties within a religious organization is not under the Bureau's purview, the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests within the Bureau. Authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States. *Matter of Hall*, 18 I&N Dec. 203 (BIA 1982); *Matter of Rhee*, 16 I&N Dec. 607 (BIA 1978).

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

ORDER: The appeal is dismissed.