

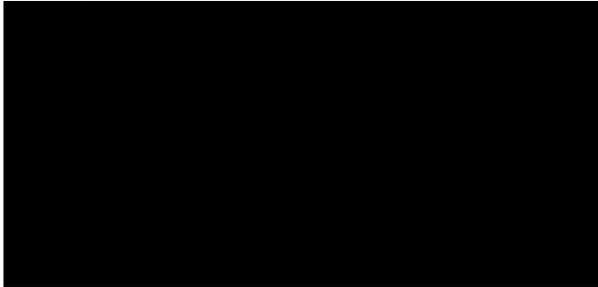
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U.S. Citizenship
and Immigration
Services



CI

FILE: [redacted] Office: TEXAS SERVICE CENTER Date **AUG 04 2004**

IN RE: Petitioner: [redacted]
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:



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, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a temple. 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 a congregational assistant. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience immediately preceding the filing date of the petition. The director further determined that the petitioner had failed to establish that the position qualified as that of a religious worker, that it had extended a valid full time job offer to the beneficiary, or that it had the ability to pay the beneficiary the proffered salary. The director denied the petition, in part, because the petitioner failed to establish that the beneficiary sought to enter the United States "solely for the purpose of carrying on the vocation of minister."

Counsel indicated on the Form I-290B, Notice of Appeal to the Administrative Appeals Unit, that a brief and/or additional evidence would be forwarded to the AAO within 30 days. As of the date of this decision, more than nine months after the appeal was filed, no further documentation has been received by the AAO. Therefore, the record will be considered complete as presently constituted.

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 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 a Form 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."

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:

(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.

The petition was filed on May 7, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working in the religious occupation throughout the two-year period immediately preceding that date.

The petitioner stated that the beneficiary worked with its congregation as a religious instructor for three years prior to the filing of the visa petition. The petitioner also stated that, although it did not pay the beneficiary a salary, she and her family received free membership in the petitioner's congregation (which it valued at \$600.00 annually) and the petitioner provided free education to her child(ren) (which it valued at \$100.00 per child). The petitioner also stated it waived the annual building fund assessment of \$600.00 per year. The petitioner does not specify the required frequency of the payment of educational fees.

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. Comm. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 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 generally salaried. To hold otherwise would be contrary to the intent of Congress.

In the rare case where volunteer work might constitute prior qualifying experience, the petitioner must establish that the beneficiary, while continuously and primarily engaged in the traditional religious occupation, was self-sufficient or that his or her financial well being was clearly maintained by means other than secular employment.

In its response to the director's Notice of Intent to Deny dated November 15, 2002, the petitioner intimated that the beneficiary relied on her husband's income for support during the two-year period prior to the filing of the visa petition. The petitioner submitted a copy of the beneficiary's 2001 Form 1040, U.S. Individual Income Tax Return, which she filed jointly with her husband. However, the petitioner submitted no direct evidence to establish the beneficiary's means of support for the two-year period immediately preceding the filing of the visa petition. Additionally, the petitioner submitted no evidence of the payments that it provided to the beneficiary, such as a voucher or Form 1099-Misc reflecting the in-kind payments that it provided to the beneficiary in lieu of a salary, or evidence that the beneficiary's children received free tuition.¹

The beneficiary's 2001 Form 1040 lists her occupation as "housewife." The record contains no corroborative evidence that the beneficiary was employed, in a compensated or uncompensated position, during the requisite two-year period. The record does not establish that the beneficiary was continuously employed in the religious occupation for two full years prior to the filing of the visa petition.

The petitioner stated that the duties of the proffered position would involve teaching the

¹ Although the petitioner indicates that it compensates the beneficiary by providing free education to her children in the Hebrew school, there is no evidence that the petitioner runs a school. It is unclear therefore as to the educational benefits the beneficiary receives for her children.

Torah and other Bible studies, the Hebrew language ... and religious customs such as observations of dietary laws, celebration of holidays etc. She will offer training and tutoring to classes and to individuals regarding Jewish culture and Hebrew. This person will also be involved in conducting or overseeing the children during services and assisting with the preparation of the customary religious meals for major holidays.

The director determined that the petitioner had not established that the position was a traditional function within the denomination and that the petitioner had, therefore, not established that the position was a religious occupation within the meaning of the regulation.

The regulation at 8 C.F.R. § 204.5(m)(4) states that each petition for a religious worker must be accompanied by a job offer from an authorized official of the religious organization at which the alien will be employed in the United States. 8 C.F.R. § 204.5(m)(2) offers the following definition of a "religious occupation":

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 these proceedings. 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 regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The list reveals that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as cantor, missionary, or religious instructor are examples of qualifying religious occupations. Persons in such positions are expected to perform services that are directly related to the creed and practice of the religion. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

Citizenship and Immigration Services (CIS) therefore interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed 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.

The petitioner submitted no evidence that the proffered position is defined and recognized by the Union of American Hebrew Congregations, its governing body. The petitioner also failed to submit evidence that the position is traditionally a permanent, full-time salaried position within the denomination. Further, there is no evidence that the position existed with the petitioner prior to the beneficiary assuming the position.

The evidence does not establish that the proffered position is a religious occupation within the meaning of the regulation.

The director also determined that the petitioner had not established that the proffered position offers full time employment.

The petitioner states that the beneficiary will be expected to work 30 hours per week. Consistent with the requirements of the U.S. Department of Labor's Bureau of Labor Statistics and other regulations pertaining to employment based visa petitions, CIS holds that employment of less than 35 hours per week is not full time employment. The petitioner has not established that it will provide permanent full-time employment to the beneficiary. Part-time employment is not a qualifying job offer for the purpose of this employment based visa petition.

The director also determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered salary.

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 above-cited regulation 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. In this instance, the petitioner has not submitted any of the required types of evidence. The petitioner submitted only a copy of its bank statements for the months of August through November 2002. Further, the petitioner submitted no evidence of its ability to pay the proffered salary during 2001.

The evidence does not establish that the petitioner had the continuing ability to pay the proffered salary as of the date the petition was filed.

The record reflects that the beneficiary entered the United States on a B2 visa in 1997. The director determined that the petitioner had not established that the beneficiary's sole purpose for entering the United States was to work for the petitioner as a religious worker.

We withdraw this determination by the director. The regulation does not require that the alien's initial entry into the United States to be solely for the purpose of performing work as a religious worker. "Entry," for

purposes of this classification, would include any entry under the immigrant visa granted under this category or would include the alien's adjustment of status to the immigrant visa.

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.