



U.S. Citizenship
and Immigration
Services

C-1



FILE:



Office: CALIFORNIA SERVICE CENTER

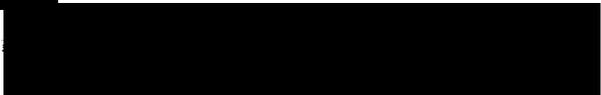
Date:

AUG 04 2004

IN RE:

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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to be "R. P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a church. 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 a religious instructor. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a religious instructor immediately preceding the filing date of the petition.

On appeal, the petitioner argues that the director's reasoning extends beyond regulatory authority.

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) 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 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 April 30, 2001. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a religious instructor throughout the two years immediately prior to that date.

Rev. Manuel Jose Martinez of the petitioning church states that the beneficiary "has been serving in our church for the last eight years" as a religious instructor, and that "[i]n our last business meeting we unanimously agreed to call [the beneficiary to serve as a] full time Religious Worker on a permanent basis."

The petitioner submits a copy of its 2001 budget, which does not include funds for the beneficiary's proposed salary of \$1,600 per month. The petitioner's 2000 profit and loss statement does not include any past salary payments except to the pastor. [REDACTED] deputy executive minister of [REDACTED] of Los Angeles, states of the beneficiary, "[e]ven though he is not receiving a salary, we consider him a religious worker for the quality of his service and amount of time that he dedicates." [REDACTED] does not specify this "amount of time." Several other witnesses attest that the beneficiary has been "very active" in the church, but they provide few details.

The director instructed the petitioner to provide further details about the beneficiary's work during the qualifying period, as well as information regarding how the beneficiary has supported himself during that time. In response, [REDACTED] states that the petitioner's weekly schedule has consisted of five hours "Teaching & Preaching," four hours of "Teaching & Discipleship," two hours of "Bible Study Home & Discipleship," four hours of "Youth Activities" and ten hours of "visiting," for a total of 25 hours per week. [REDACTED] states "[a]s soon as [the beneficiary] receives work authorization, we will hire him part time and place him on Salary at \$200 per week. When he receives hi[s] Green Card we will hire him full-time." Regarding the beneficiary's means of support, [REDACTED] states that the beneficiary "lives with a family of our church that provides him with room and board," and that the church gives the beneficiary "offerings" in unspecified amounts.

The director denied the petition, stating that the beneficiary "has been performing his duties on a part-time basis" and "does not receive [a] formal salary yet." The director stated "[b]ecause the statute requires two years of continuous experience in the same position for which special immigrant classification is sought, the prior experience must have been full-time salaried employment."

On appeal, [REDACTED] states that the director has read too much into the statute. Rev. Martinez quotes 8 C.F.R. § 204.5(m)(1), which states, "religious workers must have been performing the vocation, professional work, or other work continuously" (the petitioner's emphasis) during the qualifying period. Rev. Martinez does not explain the emphasis on the phrase "or other work." In context, the regulation does not mean that the beneficiary must have experience either in the position offered, or in some "other work." Rather, the term "other work" refers to religious work that is neither ministerial nor professional (requiring a bachelor's degree). The term "other work" does not provide broad leeway regarding the nature of the past experience.

[REDACTED] states that the director "is asking us to assume an absurd position; to hire an undocumented person with salary at least two years prior to obtain[ing] an employment authorization." The director, however, does not demand that the beneficiary have worked illegally. Rather, there exists the nonimmigrant R-1 religious worker category, under which an alien can lawfully work for the two years required. Alternately, the alien can accumulate the qualifying experience outside the United States. There is no indication that Congress intended or anticipated that aliens would attempt to satisfy the two-year experience requirement through work that they performed without lawful status in the United States. In this instance, the beneficiary has been in the United States since 1990. There is no indication of how long, if ever, the beneficiary was lawfully present in this country. The petitioner speaks of absurdities, but it is surely absurd to hold that, because the beneficiary has violated federal immigration law, possibly for over a decade, that alien is therefore entitled to especially lenient consideration when requesting an immigration benefit. [REDACTED] assertion that the special immigrant religious worker program exists primarily as a means for "undocumented people . . . to apply for legalization" is unsupported. Rev. Martinez asserts that the director should have afforded the beneficiary an opportunity to "at least obtain an employment authorization." That responsibility lies not with the director, who adjudicates rather than *solicits* petitions and applications.

Rather, *the petitioner* had the opportunity to seek a nonimmigrant visa on the beneficiary's behalf, to allow him to accumulate lawful experience. The petitioner's apparent failure to do so does not invalidate the director's decision.

Rev. Martinez states that the regulations contain no "explicit requirement that the work experience must have been full-time, and paid employment. . . . This is in recognition of the special circumstances of some religious workers, specifically those engaged in a religious vocation, in that they may not be salaried in the conventional sense and may not follow a conventional work schedule." It remains that the beneficiary does not work in a religious vocation. Rather, the petitioner has stated that it intends eventually to employ the beneficiary full-time and pay him a salary. Thus, the beneficiary is admittedly not a member of the class for whom, the petitioner claims, the regulatory language was intentionally left vague. It does not follow that aliens *outside* that class, such as the beneficiary, should benefit from language that, the petitioner admits, was intended to benefit someone else.

Leaving aside the issue of whether the beneficiary's experience cannot count unless he received a salary, the statute and regulations state that the beneficiary must have worked "continuously" in the position sought. In a 1980 decision, 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). By extension, part-time religious work is not "continuous." Given that the beneficiary's lack of legal status was clearly not preventing him from performing work for the church, that lack of status cannot explain why the beneficiary has worked only part-time (and, in the event of an approval, would have continued to do so until he became a lawful permanent resident). It is not clear what the beneficiary would do in the future, that he is not doing now, that would transform his work from part-time to full-time.

In line with case law 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 uncompensated 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 compensated. To hold otherwise would be contrary to the intent of Congress.

Another issue that arises when we consider the beneficiary's intended transition from volunteer to paid employee is the petitioner's ability to pay the beneficiary's 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 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. In this instance, the petitioner has not submitted any of the required types of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Furthermore, the documents that the petitioner *has* submitted do not establish the petitioner's ability to pay the beneficiary's salary. The petitioner has submitted bank statements showing a balance that rarely exceeds \$3,000. The petitioner's 2000 profit and loss statement showed a net income of only \$781.62. This documentation, on its face, argues against a finding that the petitioner is able to pay the beneficiary \$1,600 per month (\$19,200 per year). We note that, on appeal, Rev. Martinez states that "we have provision in our budget to start paying [the beneficiary] \$1,500 per month, immediately." This is less than the originally proffered amount, and the regulation states that the petitioner must be able to pay this wage as of the filing date, not as of the approval date.

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.