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FILE:



Office: TEXAS SERVICE CENTER

Date:

DEC 07 2004

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IN RE:

Petitioner:

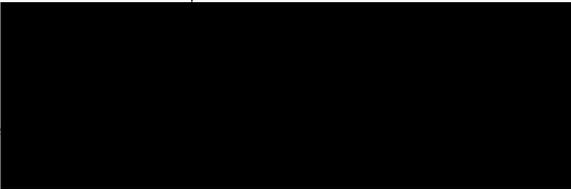
Beneficiary



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:



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.

Mari Johnson

& Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas 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 (the Act), 8 U.S.C. § 1153(b)(4), to perform services as an evangelist. The director determined that the petitioner had not established: (1) that the beneficiary had the requisite two years of continuous work experience as an evangelist immediately preceding the filing date of the petition; (2) the petitioner's ability to pay the beneficiary's proffered wage; or (3) that the beneficiary had entered the United States for the purpose of performing religious work.

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 Revenue 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 May 15, 2001. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of an evangelist throughout the two years immediately prior to that date.

The beneficiary entered the United States on April 17, 2000, and therefore she spent much of the qualifying period outside of the United States.

Jun Ro Park, minister of the petitioning church, states:

[The beneficiary] will be bringing the gospel to the disabled, ill, shut-ins, hospitalized, and any others unable to attend services at our church.

[The beneficiary] served as Visiting Assistant Pastor at the Sung Rim Presbyterian Church in Korea from 4/97 to 4/00. . . .

Since her arrival in the U.S., [the beneficiary] has performed as Evangelist for us.

[redacted] pastor of [redacted] Church, confirms that the beneficiary served as visiting assistant pastor from April 14, 1997 to March 31, 2000. Pastor Ko's letter contains no information about the beneficiary's duties or remuneration (if any).

The director requested "a detailed description of the beneficiary's prior work experience including duties, hours and compensations . . . accompanied by appropriate evidence." The director indicated that this information should cover the two-year period immediately prior to the filing date.

In response, the petitioner asserts that the beneficiary is one of seven unpaid volunteers at the church, rather than a paid employee. The petitioner cites a third-party summary of a decision by the Board of Alien Labor Certification Appeals (BALCA), indicating that "the Department of Labor (DOL) does not hold the position that unpaid experience cannot be used to establish an alien's qualifications for the job." This BALCA decision applies to experience in the context of alien labor certification. In this instance, the classification sought does not require labor certification, and the opinion of DOL or BALCA is without weight in the present proceeding. Even if the BALCA decision was controlling in this case, that decision indicates that the burden remains on the petitioner to establish that the claimed, unpaid "employment" actually took place.

Applicable case law relating to religious workers indicates 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). By extension, if the alien received no salary in the *past*, then the alien must have derived support from some other source. If an alien earns his or her income from some secular source, and merely volunteers at his or her church, then that church work cannot reasonably be called an "occupation."

The petitioner also cites a summary of a United States district court case, in which "the INS conceded that voluntary employment was acceptable for the two-year period prior to the filing of the Special Immigrant petition." In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value. The summary submitted by the petitioner acknowledges that the cited decision is not a "judicial precedent" binding in other cases.

The petitioner's response leaves unanswered the question of how the beneficiary supported herself while working, unpaid, for the petitioner.

Regarding the description of the beneficiary's duties, the petitioner lists the following functions:

Visit newcomers to invite them to the Church (14 hrs.)
Visit patients and shut-ins (10 hrs.)
Lead prayer meetings with eleven cell groups (10 hrs.)
Teach Baptism and Confirmation classes (13 hrs.)
Teach Bible Studies (2 hrs.)
Consultation with Pastor (1 hr.)

The petitioner provides no information about the beneficiary's work as visiting assistant pastor at [REDACTED] which took place over nearly half of the two-year qualifying period. There is no indication that the beneficiary performed essentially the same major duties throughout the qualifying period. The regulations at 8 C.F.R. §§ 204.5(m)(1) and (3)(ii)(A) require that the beneficiary must have carried on *the* vocation or occupation, rather than *a* vocation or occupation, indicating that the work performed during the qualifying period should be substantially similar to the intended future religious work. The underlying statute, at section 101(a)(27)(C)(iii), requires that the alien "has been carrying on such . . . work" throughout the qualifying period. An alien who seeks to work in occupation A has not been carrying on "such work" if employed in occupation B during the qualifying period.

The petitioner also submits documentation showing that the beneficiary has enrolled in a four-year course of study in theology at Atlanta Bible School and Seminary.

The director denied the petition, stating that the petitioner has not established that the beneficiary possesses the required experience. The director also noted that the beneficiary appears to be a full-time seminary student, and that seminary studies do not constitute qualifying experience. On appeal, the petitioner submits a new letter from [REDACTED] here spelled [REDACTED] and copies of the beneficiary's bank statements.

The new letter from [REDACTED] states that, from April 1997 to March 2000, the beneficiary worked as a "missionary" for an annual salary of "1,200,000 Korean Won." The petitioner submits a copy of the previous letter from [REDACTED] the translation of which referred to the beneficiary as "visiting assistant pastor." The Korean-language versions of both letters use the same five Korean characters (심방전도사) to describe the beneficiary's job title. The petitioner does not explain why this five-character term was translated first as "visiting assistant pastor," and then as "missionary."

8 C.F.R. § 103.2(b)(3) requires that any translation of a foreign-language document must include the translator's certification that the translation is complete and accurate. The original translation, containing the phrase "visiting assistant pastor," is certified. The new translation, submitted on appeal, is not certified, and even if both translations were certified, the question remains as to why the two translations of "심방전도사" do not agree.

The petitioner still has not established what the beneficiary's duties were at the church in Korea, despite the director's specific request for information regarding the beneficiary's duties throughout the qualifying period.

A new letter from [REDACTED] director of Administration at Atlanta Bible School and Seminary, indicates that the beneficiary has been "enrolled since Feb. 2001 . . . as [a] full time student," taking five to six courses per semester, in addition to the beneficiary's claimed 50-hour work week with the petitioning church.

The record offers no reason to conclude that the beneficiary has continuously performed essentially the same duties throughout the qualifying period. Discrepancies in the record raise overall questions of credibility. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency

of the remaining evidence offered in support of the visa petition. 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, 586 (BIA 1988).

The next issue concerns the petitioner's ability to pay the beneficiary's proffered wage of \$400 per week, which annualizes to \$20,800 per year. 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. 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.

in the initial filing, asserted that the petitioner is able to pay the beneficiary's wage, but no evidence supported that assertion. Pursuant to the above regulation, an officer's attestation of ability to pay, in lieu of documentary evidence, is acceptable only if the employer employs 100 or more workers, and even then the acceptance of such a statement is discretionary. For smaller employers, a statement from an official cannot take the place of documentary evidence of ability to pay.

The director instructed the petitioner to submit documentary evidence of the petitioner's ability to pay the beneficiary's salary. In response, the petitioner submits a copy of its 2002 budget. This document shows what the petitioner intends to spend, but does not establish its *ability* to do so. We note that the budget assumes expenditures exactly equal to income, with no claim of carry-over funds from the previous year. We also note that the budget does not show that any funds have been budgeted to pay the beneficiary's projected \$20,800 salary for the year. Assuming all the figures on the budget to be accurate, the petitioner's budgeted funds would be exhausted before the beneficiary's full salary was paid. A \$10,000 "reserved fund," if used for no other purpose than the beneficiary's salary, would cover less than half of the year's wages.

A series of bank statements from December 2001 through April 2002 show that the petitioner maintains a checking account balance in excess of \$30,000 and a money market fund containing over \$70,000. This documentation does not give a complete picture of the petitioner's finances. Furthermore, these documents do not establish the petitioner's financial situation as of the May 2001 filing date.

The director, in denying the petition, stated that the petitioner had not provided sufficient evidence of its ability to pay the beneficiary's salary from the filing date onward. On appeal, the petitioner submits additional copies of bank statements and budgets. The budgets for 2001 and 2002 (both prepared in November 2002) both include \$6,000 a year for a "missionary" with the same surname as the beneficiary. This surname, however, is a common Korean surname, and \$6,000 is only a fraction of the proffered annual wage. Furthermore, the petitioner had previously asserted that the beneficiary worked without pay in 2001. If this is true, then any 2001 salary figure must apply to someone other than the beneficiary.

A separate list of paid church workers and their salaries does not agree with the budget figures provided; the list does not include any "missionary," nor anyone who receives exactly \$6,000 per year. As with the issue of

the beneficiary's past experience, the discrepancies in the petitioner's evidence do not inspire confidence in the petitioner's claims.

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).

The final issue raised in the director's decision concerns the beneficiary's entry into the United States. Section 101(a)(27)(C)(ii)(III) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii)(III), requires that the alien seeking classification "seeks to enter the United States" for the purpose of carrying on a religious vocation or religious occupation. In this instance, the beneficiary entered the United States as a B-2 nonimmigrant visitor. Thus, the director concluded, the beneficiary did not enter the United States for the purpose of performing religious work.

This finding is not defensible. The AAO interprets the language of the statute, when it refers to "entry" into the United States, to refer to the alien's intended *future* entry *as an immigrant*, either by crossing the border with an immigrant visa, or by adjusting status within the United States. This is consistent with the phrase "*seeks to enter*," which describes the entry as a future act. We therefore withdraw this particular finding by the director, although the remaining grounds for denial still stand, and are sufficient to prevent the approval of the petition.

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.