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01

FILE: [REDACTED]
SRC 01 174 54405

Office: TEXAS SERVICE CENTER

Date: DEC 15 2005

IN RE: Petitioner: [REDACTED]
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 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner filed an appeal, which the director rejected as untimely. The petitioner filed a motion to reopen, which the director dismissed. The petitioner then filed a motion to reconsider. The director also dismissed this second motion, and certified the matter to the Administrative Appeals Office for review. The denial of the petition will be affirmed.

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 a youth director. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a youth director immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established its ability to pay the beneficiary's proffered wage.

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 experience in the religious vocation, professional religious work, or other religious work. The petition was filed on April 27, 2001. Therefore, the petitioner must establish that the beneficiary was

continuously performing the duties of a youth director throughout the two years immediately prior to that date.

██████████ pastor of the petitioning church, states that the beneficiary "has been working in the capacity of Youth Director since November 1998. We have been paying him a salary of \$150.00 per week and will increase it to \$225.00 per week." A photocopy of a "Certificate of Appointment," naming the beneficiary to the youth director position, is dated November 8, 1998. This certificate from 1998 cannot serve as first-hand evidence of the beneficiary's activities from 1999 to 2001, because it existed prior to the qualifying period and therefore its existence was not contingent on the beneficiary's completion of duties during that time.

On August 8, 2002, the director instructed the petitioner to provide "evidence of compensation," including pay stubs and Form W-2 Wage and Tax Statements, to establish the beneficiary's experience during the 1999-2001 qualifying period. In response, ██████████ states that the beneficiary "has been earning \$150.00 per week in the form of cash. [The beneficiary] has not been paying taxes, as he does not have a Social Security number. He will obtain one after he gets his employment authorization."

The petitioner submits no evidence to show that the claimed cash payments were, in fact, made. The petitioner submits copies of unaudited financial statements, indicating that the petitioner paid \$43,200 for "Salaries" in 2001 and \$46,800 for the same purpose in the first three quarters of 2002.

On March 24, 2003, the director denied the petition, in part based on a finding that the petitioner had produced no evidence that it had employed the beneficiary as claimed. The petitioner's untimely appeal, which the director treated as a motion pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2), did not address this finding. Counsel had indicated that a brief would be forthcoming within 30 days.

On September 25, 2003, the director dismissed the petitioner's motion, stating that the petitioner had not provided any supplemental arguments or evidence. In response, the petitioner filed another motion, stating that the petitioner had, in fact, submitted a supplement within 30 days of the previous filing. The petitioner submits a copy of this supplement.

The supplement includes a May 16, 2003 letter from ██████████, but this letter includes no discussion of the beneficiary's claimed salary except for the assertion that the beneficiary's salary was included in the financial statements submitted previously. The supplement also includes a brief from counsel, which we shall discuss further below.

On November 13, 2003, the director dismissed the petitioner's motion. The petitioner filed a motion to reconsider on December 11, 2003. On September 21, 2005, the director dismissed the latest motion and certified the matter to the AAO for review. The record contains no further submission from the petitioner, and we therefore consider the record of proceeding to be complete as it now stands. The petitioner has offered substantive arguments of law and fact and, therefore, it appears that the director erred in dismissing the motions (as opposed to affirming the previous findings). We hereby consider the merits of counsel's arguments.

In the brief, counsel argues that the regulations do not require the beneficiary's past employment to have been compensated. We need not debate the merits of this argument, because it is moot in light of the petitioner's own claim that the church has paid the beneficiary \$150.00 per week. It remains that the petitioner has been either unable or unwilling to produce any specific evidence to show that these payments were, in fact, made. Thus, the critical issue at hand is not whether the petitioner was required to pay the beneficiary, but rather, whether the petitioner's specific claims about such payments have any evidentiary support or basis in fact.

Counsel contends that the petitioner's failure "to substantiate that the beneficiary did, indeed, receive remuneration during the two year pre-filing period, is irrelevant. . . . Failure to adequately prove something that does not need to be proven can not be used as a reason for denying the benefit sought." We reject this reasoning. The two-year experience requirement is very much something that needs to be proven. The petitioner has offered no documentary evidence at all to show that the beneficiary has ever worked at the petitioning church. The petitioner claims to have paid the beneficiary a weekly salary, and by signing the Form I-360 petition, the petitioner has attested under penalty of perjury to the accuracy of the claims set forth in the petition. Section 204(b) of the Act, 8 U.S.C. § 1154(b), permits approval of a petition only if the facts claimed in the petition are found to be true. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner has claimed that the beneficiary received a salary; we are under no obligation to ignore the total lack of evidence to support that claim. The financial statements are alleged to include the beneficiary's salary payments, but there is no evidence in the record to confirm this claim.

The record is devoid of any specific evidence to show that the petitioner paid the beneficiary as it claims to have done. The record also contains no alternative, contemporaneous evidence that would serve to establish that the beneficiary continuously worked for the petitioner, as the statute and regulations require. An unaudited financial statement that generically refers to "salaries" does not compel the conclusion that part of this amount was paid to the beneficiary.

We find that the director was justified in finding that the petitioner has not adequately documented the beneficiary's claimed employment during the qualifying period. We therefore affirm the director's finding on this point.

The other issue in contention regards the petitioner's ability to pay the beneficiary's salary of \$225.00 per week. 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 petitioner's initial submission included no financial documentation. The director instructed the petitioner to "submit evidence such as copy of bank letters [sic], recent audits, church membership figures, payroll tax return copies, and other appropriate evidence."

As noted above, the petitioner has submitted copies of unaudited financial statements, labeled "FOR INTERNAL MANAGEMENT PURPOSES." The reports indicate that the petitioner began 2001 with a balance of \$6,257.44, and that, over the course of the year, the petitioner's expenses exceeded its income by \$684.10, resulting in a year-end balance of \$5,573.34. In the first three quarters of 2002, the reports state that the petitioner's income exceeded its expenses by \$6,870.

The director asked the petitioner how many paid workers were on staff, and how many religious worker petitions the petitioner had filed. The petitioner responded by stating that it had three salaried employees, and had filed eight petitions.

In the March 24, 2003 notice of denial, the director stated: "the petitioner claims to have 3 employees, 8 religious workers and the instant petition. . . . Yet the financial statement shows a salary of \$43,200. [REDACTED] correctly observes that the petitioner did not claim to have twelve paid workers. The beneficiary is said to be one of the three employees currently on staff. Also, the reference to eight petitions refers to every petition ever filed by the petitioner, which does not necessarily mean that all of those individuals worked at the church at the same time. We concur with the petitioner's assertion that the director misinterpreted the petitioner's comments. This misunderstanding, however, was not the sole basis for the director's findings.

In various notices, the director has repeatedly quoted the regulatory requirement at 8 C.F.R. § 204.5(g)(2), that evidence of ability to pay "shall be," i.e., must 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, nor accounted for the unavailability of that evidence as required by 8 C.F.R. § 103.2(b)(2)(i).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the petitioner has not overcome the grounds for denial.

ORDER: The director's denial of the petition is affirmed.