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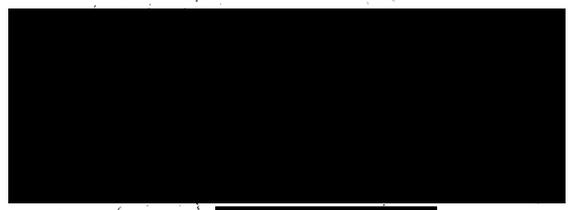
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

CI



FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **JAN 21 2005**
WAC 97 217 52318

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:



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.

Maui Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Orthodox Jewish religious institute. 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 as a congregational assistant immediately preceding the filing date of the petition.

On appeal, the petitioner submits copies of previously submitted documents and a brief from counsel.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

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--

* * *

(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 August 11, 1997. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a congregational assistant throughout the two years immediately prior to that date. Part-time work, or work interrupted by secular employment, is not continuous. See *Matter of B*, 3 I&N Dec. 162 (CO 1948), and *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

In an introductory letter submitted with the initial filing of the petition, [REDACTED] Block of the petitioning entity states that the beneficiary "has served in the role of congregational assistant for more than two years" but did not elaborate on the nature or details of this work.

The director approved the petition on September 15, 1997, and the beneficiary filed a Form I-485 application to adjust status on June 3, 1998. As part of that application, the beneficiary submitted Form G-325A, Biographic Information. The form instructs the alien to list his "employment [over the] last five years," and provides five lines to list that information. The beneficiary indicated that he had been "unemployed" from September 1992 to the date of the Form G-325A (September 29, 1997). Nevertheless, on Form 9003, submitted with Form I-485, the beneficiary answered "yes" to the question "During the last three years did you receive income from sources in the United States?"

In a subsequent submission, [REDACTED] reiterated that "we are offering [the beneficiary] a permanent position." [REDACTED] does not indicate whether or not the petitioner has ever paid the beneficiary for his work. The record contains the beneficiary's tax returns and Form W-2 Wage and Tax Statements for the period from 1997 to 2000, although the 1997 and 1998 tax returns were not prepared until January 2001. All of the beneficiary's tax returns identify the beneficiary's occupation as "self service," and the 1997 and 1998 returns report business income from Top Star Auto Sales. According to notes taken during his adjustment interview on June 7, 2000, the beneficiary indicated that "he works as a salesman selling cars. He has never worked for petitioner. He only helps in free time. He does not receive any salary."

On August 29, 2003, the director issued a notice of intent to revoke, stating that the available evidence indicates that the beneficiary has never been employed as a religious worker, but rather that he is a volunteer who derives all of his income from secular employment. The director noted that the petitioner has provided no evidence or details regarding the beneficiary's claimed religious work from 1995 to 1997.

In response, counsel states that, to establish prior experience, the regulations require only a letter from an official of the prospective employer. Counsel observes that the petitioner provided such a letter, and a new declaration accompanies the petitioner's response to the notice of intent to revoke. In this new declaration,

states that the beneficiary "has been rendering his unlimited service to our Institute since 1995 until the present. [The beneficiary's] full-time service as a Congregational Instructor to our Institute is truly appreciated by the members and students." does not indicate that the beneficiary has ever received any compensation for this work.

The beneficiary asserts that "during my past employment with [the petitioner], I did not possess a valid work authorization. Hence, the temple was not able to place me under their payroll. This explains the unavailability of W-2 Wage and Tax Statements." The beneficiary subsequently received work authorization, however, and the beneficiary began reporting income from other employers, but not from the petitioner. The beneficiary's tax documents are *prima facie* evidence that the beneficiary's prior lack of work authorization was not the only reason that the petitioner did not pay him. The beneficiary does not explain his earlier comments during the adjustment interview.

Counsel contends that the beneficiary's secular employment is irrelevant because "[t]he legal consequence of the Immigrant Petition does not take effect immediately from the moment the petitioner files the petition," but only upon completion of adjustment of status. The statute and regulations clearly mandate the two-year experience requirement, which necessarily must predate the filing of the petition if that requirement is to have any meaning during the initial adjudication of the petition. The beneficiary's employment after the filing date does not bear on the two-year experience requirement, but the actions of the beneficiary and the petitioner during that period have obvious relevance when determining their intentions. If the petitioner does not implement the promised job offer, despite the absence of any legal obstacle, it is not unreasonable to examine the *bona fides* of that job offer.

It is true that 8 C.F.R. § 204.5(m)(3)(ii)(A) calls for "[a] letter from an authorized official of the religious organization in the United States which . . . establishes . . . [t]hat, immediately prior to the filing of the petition, the alien has . . . the required two years of experience in the . . . religious work." Nevertheless, the regulations do not indicate that such a letter will always, under all circumstances, serve as incontrovertible proof of the required experience. 8 C.F.R. § 204.5(m)(3)(iv) states: "[i]n appropriate cases, the director may request appropriate additional evidence relating to the eligibility . . . of . . . the alien." In this instance, the alien himself has asserted that he was "unemployed" from 1992 to 1997, volunteering for the petitioner "in his free time," and there is no evidence that the petitioner has ever paid the beneficiary, even after the beneficiary was legally allowed to work in the United States. This evidence does not readily indicate that the petitioner has ever employed the beneficiary, or intends ever to do so.

The director revoked the approval of the petition, on the grounds that the beneficiary has no qualifying experience. The director observed that every documented paying job that the beneficiary has held has been secular, and that the beneficiary indicated that he was unemployed from 1992 to 1997. The director also noted the absence of any contemporaneous record of the beneficiary's claimed work for the petitioner during the 1995-1997 qualifying period.

On appeal, counsel asserts "[t]he beneficiary will be employed in a Conventional Sense of full-time salaried employment for the religious organization as a CONGREGATIONAL INSTRUCTOR" (counsel's emphasis). We note that the petitioner initially referred to the beneficiary as a "congregational assistant," and has repeatedly indicated that it intends to pay the beneficiary \$1,500.00 per month. In subsequent submissions, including the appeal, the petitioner has referred to the beneficiary as a "congregational instructor."

The petitioner, in response to the notice of intent to revoke, had submitted copies of job announcements that it had posted, neither of which refers to a "congregational instructor." The first notice indicates that the position

of "Congregational Assistant" pays \$26.60 per hour, 40 hours per week. This equates to \$55,328.00 per year, or (on average) \$4,610.67 per month. The second notice advertises for a "Teacher Assistant," at \$22,800.00 per year, or \$1,900.00 per month. The petitioner, on appeal, submits a "detailed job description" for the position of "congregational instructor." The description generally conforms to the description listed for the "congregational assistant" in the job notice. The petitioner does not explain why the advertised salary is more than triple the wage it continues to offer the beneficiary, or why it apparently has never paid the beneficiary any salary at all, even years after the beneficiary received employment authorization.¹ Given these significant issues, we cannot accept counsel's assertion that the petitioner's claims "should be taken on face value, and should therefore not be questioned."

Counsel maintains "[i]t is only right and logical to presume that [the beneficiary] will not seek other sources of income when in reality, the petitioner . . . affords to compensate him. *To conclude that [the beneficiary] shall depend on supplemental income despite the clear establishment of petitioner's ability to pay and its legitimate intention to pay the offered wage is purely subjective and is therefore baseless*" (counsel's emphasis). The beneficiary has had legal employment authorization since at least 1998, and yet the petitioner never claims to have paid the beneficiary for his work at the church, and certainly there is no evidence of such remuneration. Instead, the record conclusively proves that the beneficiary has been relying on outside, secular employment. Counsel's assertion that the record clearly establishes the petitioner's intent to pay the beneficiary is entirely baseless. The petitioner purports to have publicly posted an announcement for the beneficiary's job, promising in excess of \$55,000 per year. The petitioner has offered the beneficiary less than a third of that amount, and apparently has never paid him even that substantially reduced amount.

We conclude that the director was justified in determining that additional evidence, beyond the petitioner's own attestation, would be necessary to establish the beneficiary's qualifying experience. The regulation at 8 C.F.R. § 204.5(m)(3)(iv) clearly grants the director the discretion to request such additional evidence. Rather than providing actual evidence of the beneficiary's qualifying experience, the petitioner responded by submitting materials (such as those described above) that raise more questions than they answer. The petitioner has failed to establish that the beneficiary worked continuously (i.e., full-time, without interruption or outside secular employment) for the petitioner throughout the two-year qualifying period. Furthermore, because the petitioner has, for several years, had the opportunity to compensate the beneficiary for his work, but evidently has never done so, we are not persuaded that a *bona fide* job offer exists.

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.

¹ Although the director, in the revocation notice, did *not* call into question the petitioner's ability to pay the beneficiary's proffered wage, counsel argues the issue on appeal, noting that, pursuant to 8 C.F.R. § 204.5(g)(2), a letter from the company is sufficient if the company employs 100 or more workers. Counsel asserts "the petitioner operates with more than 150 subordinates." In an earlier letter, Rabbi Block had indicated that the petitioner and its "affiliate academy" "are being manned by twenty (27) [sic] individuals. . . . We are composed of more than one hundred fifty (150) active members/subordinates and still growing." In context, the 150 "members/subordinates" are clearly members of the congregation, and not paid employees; there is not even any indication that the 20 or 27 persons who "man" the petitioner and its academy are all paid employees, which they must be to count toward the 100 employee minimum at 8 C.F.R. § 204.5(g)(2). A definitive way to establish the petitioner's ability to pay the beneficiary the proffered wage is to show that the petitioner actually *has paid* the beneficiary that wage, but the petitioner never claims to have compensated the beneficiary at all.