

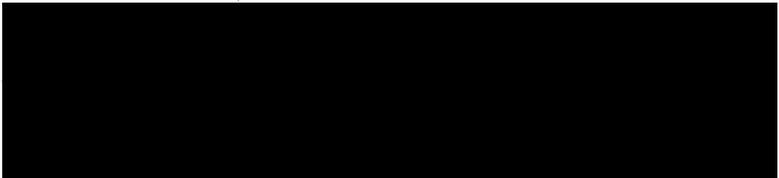
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 13 2005
WAC 03 186 50774

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

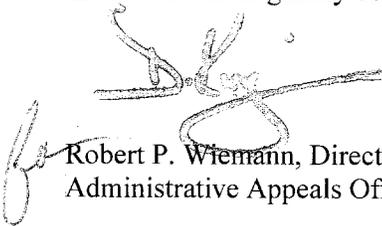
PETITION: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. On further review, the director determined that the petitioner was not eligible for the visa preference classification. Accordingly, on October 21, 2004, the director properly served the petitioner with a Notice of Intent to Revoke the approval of the preference visa petition (NOIR) and his reasons therefore. The petitioner's response consisted of a letter notifying the director that the petitioner had new counsel and requesting an extension of 30 days in which to submit a response. The petitioner submitted no additional documentation in response to the NOIR. The director subsequently exercised his discretion to revoke the approval of the petition on December 6, 2004, indicating that the basis for the revocation was set forth in his NOIR of October 21, 2004, and noting that the petitioner had submitted no substantive response to the NOIR. The matter is now before the Administrative Appeals Office (AAO) 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 its director of religious music and education. The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition, that the position qualified as that of a religious worker, or that the petitioner had the ability to pay the proffered wage.

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department of Homeland Security "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 Esteime*, . . . 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 unrebutted, 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 Esteime*, 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. *Id.*

On appeal, the petitioner submits a letter.

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 first issue on appeal is whether the petitioner established that the beneficiary had been continuously employed in a qualifying religious vocation or occupation for two full years prior to the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m)(1) 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 June 5, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a director of religious music and education throughout the two-year period immediately preceding that date.

In its letter of March 30, 2003, the petitioner stated that, as the director of religious education and music, the beneficiary would be in charge of directing the youth education programs and coordinating the religious music for church services. In his cover letter, counsel stated that the beneficiary had worked for the petitioning organization in an R-1 status since July 13, 1999. According to the beneficiary’s résumé, she

worked in the proffered position from "1999-present." Copies of pay stubs for payments issued to the beneficiary by the petitioner indicate that her position was that of "minister of music" and her Forms 1040, U.S. Individual Income Tax Returns, reflect that her position was that of "accompanist."

In response to the director's request for evidence (RFE) dated August 7, 2003, counsel stated that the beneficiary served in the capacity of director of religious music, and that in the position:

She reviews the week's musical selections to coordinate with the pastor's theme for Saturday service . . . [She] also provides musical support for both the morning-prayer services as well as the 3 main services held on Saturdays. She holds 2 hour church choir rehearsals on Tuesday and Thursday nights as well as conducts rehearsals for the Youth Ministry band on Wednesday and Friday afternoons. In addition, the beneficiary coordinates special outreach functions to the elderly and homeless by organizing parishioners for visits to the convalescent hospital . . . She is also in charge of coordinating the church's efforts to feed the homeless.

Counsel also stated that the proffered position was that of director of religious education, and that the duties would require that the beneficiary, among other things:

Plan, coordinate and direct the activities of various religious education programs designed to promote the religious education of our youth members. These duties will involve the selection of catechism texts suited for elementary and junior high-school children, review of education program curriculum and categorize students according to age groups and special needs. [The beneficiary] will determine the religious subject for the week's classes and coordinate with teachers to implement on a daily basis. She will also be in charge of coordinating special youth outreach functions such as visits to the elderly at convalescent hospitals, monthly street cleanings . . . and feeding the homeless on Thanksgiving and Christmas. In addition, [the beneficiary] will work directly with children in producing the Easter Pageant, Christmas Chorale, and coordinating youth summer retreats and religious missions overseas. It is expected that these duties will require approximately 25 hours per week.

[The beneficiary] will also teach religious music to the Youth Ministry band members . . . These duties will include meeting with the members of the church band and conduct bi-weekly practice sessions for the Sunday worship. Coordinate the English Ministry band ensemble for youth worship services and participate as the pianist for our church services . . . [She] will teach new sheet music to be performed the youth band and church choir for functions such as the Easter Pageant and Christmas Chorale.

While counsel's summation of the duties of the proffered position are in accordance with those enumerated by the petitioner, there is no evidence in the record that corroborates counsel's statement regarding the beneficiary's prior work experience. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, counsel's summation of the beneficiary's prior duties raises doubts that the beneficiary worked in the same religious occupation for which she seeks entry into the United States. The beneficiary's duties as summarized by counsel do not indicate that they are similar to those of the proffered position.

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)(2)(C)(iii), requires that the alien "has been carrying on such . . . work" throughout the qualifying period. While the proffered position does have some duties involving music, the musical responsibilities are not as expansive as the duties that the beneficiary allegedly performed during the qualifying two-year period. Additionally, the petitioner submitted no evidence that the beneficiary performed the other duties in the proffered position during the qualifying two-year period.

The petitioner indicated in its letter of March 30, 2003, that the duties relating to religious education director would encompass approximately 20-25 hours of the beneficiary's workweek, and that the duties of music director would encompass approximately 15-20 hours per week. According to the petitioner, administrative duties would encompass another 5-10 hours per week. The director noted that the duties listed for the position of music director did not demand full-time employment, and that the petitioner actually sought two different positions for the beneficiary, which is not permitted under current statutory and regulatory guidance. We also note that in March 2000, the petitioner filed a petition on behalf of the beneficiary (WAC 00 123 52433) as director of religious music, which was denied, in part, because it did not offer full-time employment to the beneficiary.

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.

The director determined that the petitioner had, in effect, petitioned for the beneficiary for two separate occupations, and determined that this was impermissible. On appeal, the petitioner states, "We did not offer two different religious occupations. She was hired solely as a religious worker including church music department, religious education and Sunday language school."

Nonetheless, the petitioner has not established that the beneficiary performed similar duties as those of the proffered position for two full years immediately preceding the filing of the visa petition.

The second issue on appeal is whether the petitioner established that the position qualifies as that of a religious worker.

The alien must be coming to the United States at the request of the religious organization to work as a religious worker. 8 C.F.R. § 204.5(m)(1). 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 would reasonably be expected to perform services 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. The lists of qualifying and nonqualifying occupations derive from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

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 states on appeal that the beneficiary "was hired solely as a religious worker including church music department, religious education and Sunday language school." The petitioner stated that the position is that of director of religious music and education. However, the petitioner submitted no evidence that this position exists within the petitioning organization, or that it is defined and recognized by the Seventh-day Adventist Church. As discussed above, the petitioner submitted no evidence that the beneficiary performed the duties of

this position prior to the filing of the visa petition. Further, the petitioner submitted no evidence that the proffered position is traditionally a permanent, full-time, salaried occupation within the denomination.

On appeal, the petitioner states that the beneficiary "was working for the church as a general church employee and we filled out her application listing her as a 'church worker'. We tried to explain how [the beneficiary] worked for the church as a general employee filling the church's general needs in many different areas."

The petitioner's statement on appeal implies that the proffered position is that of a "general" church worker who performs work as needed. The petitioner submitted no evidence that such a position is directly related to its religious creed, that it is defined and recognized by the Seventh-day Adventist Church, or that it is traditionally a permanent, full-time, salaried position within the Seventh-day Adventist Church organization.

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

The third issue on appeal is whether the petitioner established that it has the ability to pay the beneficiary the proffered wage.

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 stated that it would pay the beneficiary \$2,000 per month. To establish its ability to pay the proffered wage, the petitioner submitted with the petition copies of its monthly bank statements for the period January 2003 through March 2003. It also submitted copies of Forms W-2, Wage and Tax Statements, that it issued to the beneficiary, reflecting that it paid her \$19,200 in 2000, 2001 and 2002. The petitioner also submitted copies of pay stubs reflecting that it paid the beneficiary \$800 bimonthly from January 2003 to April 15, 2003.

In the NOIR, the director informed the petitioner that, although the evidence reflected that it paid the beneficiary \$19,200 per year, the proffered wage was \$24,000. The director instructed the petitioner to submit evidence of its ability to pay the additional \$4,800 of the proffered salary. The petitioner submitted no evidence in response to the NOIR.

On appeal, the petitioner states that it has paid the beneficiary \$1,600 per month because the petitioner and the beneficiary "mutually agreed" upon that salary, as the beneficiary and her husband did not "have any children yet," and felt they could survive financially on \$1,600 monthly. The petitioner stated, "Had we known that the proffered wage was \$2,000.00 as recommended by the INS, we would gladly have paid [the beneficiary]

\$2,000.00 per month . . . But unfortunately, we did not realize that the proffered wage by the INS was \$2,000.00 until we received [the NOIR].” The petitioner stated that, in December 2004, the church board decided to pay the beneficiary an additional \$4,800 to make up the difference for 2004, and that beginning January 2005, the salary would be \$2,000 per month.

Nonetheless, the petitioner submitted no evidence that it paid the beneficiary this new salary, and submitted no evidence that it could have paid the proffered salary in 2003, the year the petition was filed.

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 primary evidence.

Further, CIS has no “recommended” wage for the position. The petitioner itself set the proffered salary. However, it submitted no evidence that it could meet this obligation.

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

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.