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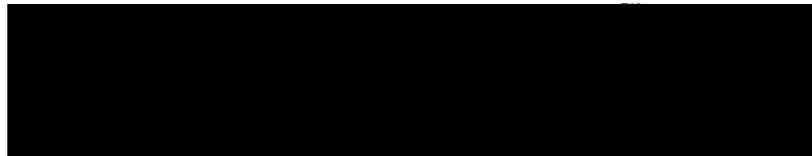
U.S. Citizenship
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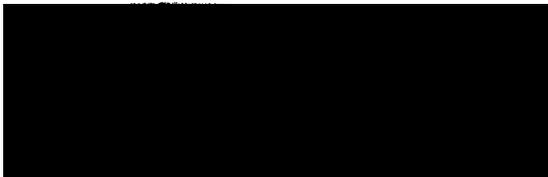
IN RE: Petitioner:
Beneficiary:



MAR 11 2005

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)

IN 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.

Mai Jensen

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a Buddhist temple. 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), in order to classify him as a Buddhist instructor.

The director denied the petition on January 29, 2004, finding that the petitioner failed to establish the beneficiary had been performing full-time work during the two-year period immediately preceding the filing of the petition. The director further determined that the beneficiary was not working for the petitioner in a professional capacity and that his position did not qualify as a religious occupation.

The petitioner files a timely appeal.

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
- (ii) 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) echoes the above statutory language, and states, in pertinent part, that “[a]n alien, or any person in behalf of the alien, may file an 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 year period 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.”

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 December 16, 2002. Therefore, the petitioner must establish that the beneficiary was continuously working as a Buddhist instructor in the petitioner’s denomination throughout the two years immediately prior to that date, from December 16, 2000 through December 16, 2002.

The Form I-360 reflects that the beneficiary entered the United States in July 1996 as a B-2 nonimmigrant. The beneficiary subsequently received an extension of his B-2 nonimmigrant status with authorization to remain in the United States until June 15, 1997 and has not left the United States. Such information indicates the beneficiary was in the United States for the entire two-year period.

With the original filing, the petitioner describes the beneficiary’s qualifications and remuneration:

[THE BENEFICIARY’S] QUALIFICATIONS

[The beneficiary] is well qualified for the position. He is a graduate of the Lotus America Buddhist College, where he studied the Buddhist Leader < Dharma Teacher> course . . . [The beneficiary] has been employed as a Buddhist Instructor since his graduation.

[THE BENEFICIARY’S] TWO YEARS PAID EXPERIENCE IN THE OCCUPATION

We certify that [the beneficiary] has been employed at our temple as a full-time Buddhist Instructor for over two years. He has been paid \$1,000 per month. As proof of his employment, we submit copies of his monthly paychecks since August 2000 to the present. Throughout this period, he has performed all the duties described above on a full-time basis.

The evidence contained in the record does not support the petitioner’s assertion that it has been paying the beneficiary \$1,000 per month since August 2000. Instead, the record contains copies of the beneficiary’s paychecks covering the period from November 15, 2001 through October 15, 2002. There is no evidence of payment at the time of filing in December 2000 to November 2001, nor is there evidence of payment for the remaining two months of the requisite period, November and December 2002.

On July 9, 2003, the director requested further evidence of the beneficiary’s work history and remuneration.

In response, the petitioner submitted a new letter confirming that the beneficiary “was employed by [the petitioner] as a full-time Buddhist Instructor in a full-time position, 40 hours a week and was supervised by Head Priest, [REDACTED] from November 1998 to present.” The petitioner reiterated that the beneficiary has received \$1,000 per month. The petitioner also submits copies of the beneficiary’s 2001 and 2002 federal income tax returns and W-2 Wage and Tax Statements which reflect the beneficiary received \$12,000 from the petitioner.

In his decision, the director noted that the amounts earned by the beneficiary were not indicative of full-time employment. Accordingly, the director determined that the evidence was insufficient to establish that the beneficiary was continuously performing full-time work for the two-year period immediately preceding the filing of the petition.

On appeal, counsel argues the director’s determination regarding the beneficiary’s full-time employment “violates the pertinent statute, [CIS’] own regulations, and the religion clauses of the Constitution.” Counsel asserts that CIS “cannot determine how much a religious worker should be paid” and cannot “make a determination that a specific amount is full-time pay and anything below that amount is not.” Counsel further argues, “there is no requirement in the statute or the regulations that the employment be full-time.” Finally, counsel states that the record of proceeding “clearly establishes that [the beneficiary] has been . . . discharging the duties of the religious occupation since November 1998.” Counsel refers to the petitioner’s letter in which the petitioner states that the beneficiary has been employed as a Buddhist instructor for over two years and has been paid \$1,000 per month. Counsel asserts that the petitioner’s claims of paying the beneficiary \$1,000 since 1998 have been “corroborated,” that the “record of proceeding further includes copies of [the beneficiary’s] paychecks for the requisite two-year period,” and that “these facts are uncontradicted.”

We are not persuaded by counsel’s arguments. 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 the 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 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. Com. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Com 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 salaried. To hold otherwise would be contrary to the intent of Congress.

Counsel’s assertion that it is “uncontradicted” that the record contains evidence of the beneficiary’s remuneration during the two-year period is unfounded. Though the record contains copies of several paychecks issued to the beneficiary during the requisite period, the record remains absent any evidence to show the beneficiary was remunerated for more than half of the requisite period. Specifically, the record contains no evidence of the beneficiary’s remuneration for the following months: December 2000, January 2001, February 2001, March 2001, April 2001, May 2001, June 2001, July 2001, August 2001, September 2001, October 2001, November 2002 and December 2002. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The 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).

Though we agree with counsel’s argument that the regulations do not mandate a specific amount of remuneration, and acknowledge that the determination of an individual’s status or duties within a religious organization is not under the purview of CIS, the determination as to the individual’s qualifications to receive benefits under the immigration laws of the United States rests within CIS. Authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States. *Matter of Hall*, 18 I&N Dec. 203 (BIA 1982); *Matter of Rhee*, 16 I&N Dec. 607 (BIA 1978).

As the record lacks evidence of the beneficiary’s employment, full-time or otherwise, for at least thirteen months of the 24-month period, we find the director was justified in finding that the petitioner failed to establish the beneficiary had been performing the work continuously for at least the two-year period immediately preceding the filing of the petition.

The next issue is whether the beneficiary is working for the petitioner in a professional capacity or whether the beneficiary’s position can be considered a qualifying religious occupation for the purpose of special immigrant classification.

The regulation at 8 C.F.R. § 204.5(m)(2) offers the following pertinent definitions:

Professional capacity means an activity in a religious vocation or occupation for which the minimum of a United States baccalaureate degree or a foreign equivalent degree is required.

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fundraisers, or persons solely involved in the solicitation of donations.

In his decision, the director noted that the record did not establish the beneficiary had a United States baccalaureate degree or a foreign equivalent. Counsel does not dispute this finding on appeal.

The director further determined that the beneficiary's position did not qualify as a religious occupation, based in part on the determination that the beneficiary's position does not require any "specific religious training or theological education."

On appeal, counsel argues the fact that the beneficiary's position is one listed in the regulation as a qualifying occupation automatically qualifies the beneficiary's for eligibility. We do not agree. The mere fact that the beneficiary is given a title that is found in the regulation as a qualifying occupation, is not sufficient to secure benefits. Instead, we must consider the actual duties of the position and whether the particular occupation is recognized by the petitioner's denomination. To hold otherwise would permit religious organizations to sidestep immigration law simply by giving qualifying job titles to all their employees.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position it is offering qualifies as a religious occupation as defined in the regulation. 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 reflects that non-qualifying positions are those whose duties are primarily administrative or secular in nature.

Thus, we interpret 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 regulations specify that religious occupations involve activities that relate to traditional religious functions. The nature of the activity performed must embody the tenets of the particular religion and have religious significance. Their service must be directly related to the creed of the denomination.

Counsel also argues that the director erred in finding that a religious worker employed in a religious occupation must meet particular educational requirements. We agree with counsel's argument and find that although the beneficiary must be qualified for his occupation, the regulation requires no specific religious training or theological education.

Finally, counsel argues that the director failed to take into account the substantial amount of evidence that highlights the religious nature of the beneficiary's work, including the description of the position and duties. The petitioner provided the following description:

THE POSITION AND JOB OFFER

As a Buddhist Instructor, [the beneficiary] will prepare Dharma lessons and will conduct Dharma teaching. He will train missionaries. He will conduct Mahayana doctrine study to groups of various ages. He will also be responsible for teaching Zen meditation and for giving lectures on the principles of Buddhism and on the individual Sutras. He will teach Buddhist chants and will counsel and teach new converts.

Upon consideration of the available evidence, we find counsel's claim regarding the religious nature of the beneficiary's work, combined with the evidence in the record to be credible and persuasive in this regard. The context of the beneficiary's work appears to be central to Buddhist identity, rather than general enrichment; the teaching of Buddhism to Buddhists at a Buddhist school can be differentiated from the teaching of French or Spanish to students at a public school. We, therefore, withdraw the director's finding that the beneficiary's position is not a religious occupation.

Beyond the decision of the director is the issue of the petitioner's ability to pay the beneficiary the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of the 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 on *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. *See* 8 C.F.R. § 103(b)(2)(i).

The petitioner has submitted documents, including bank statements and "forecasted financial statements." These documents, however, are not considered audited financial statements or annual reports. We note that the forecasted statements indicate that the statements are based on the "representation of management," and that "[m]anagement has elected to omit[sic] substantially all of the disclosures ordinarily included in financial statements." As such, these financial statements are clearly not a reliable source of the petitioner's financial status.

Regardless, as both the bank statements and financial statements cover only a portion of the requisite two-year period, such evidence is insufficient to demonstrate that the petitioner had the ability to pay the

beneficiary from the time of filing in December 2002 in accordance with 8 C.F.R. § 205.4(g)(2). For this additional reason, the petitioner may not be approved.

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.