

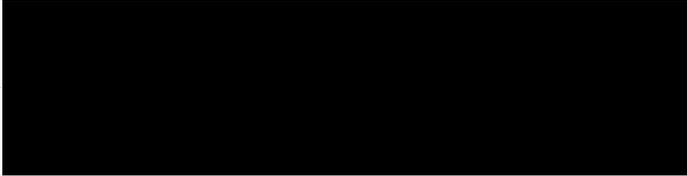
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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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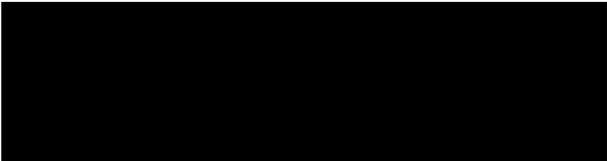
FILE: [Redacted]
WAC 03 052 54469

Office: CALIFORNIA SERVICE CENTER Date:

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.

for

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 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 cantor. 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 or that the position qualified as that of a religious worker.

On appeal, counsel 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 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 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 December 3, 2002. Therefore, the petitioner must establish that the beneficiary was continuously working as a cantor throughout the two-year period immediately preceding that date.

With its letter accompanying the petition, the petitioner submitted a copy of a letter from the Very Reverend Father [REDACTED] pastor of the Holy Cross Armenian Catholic Church [REDACTED] who "certified" that the beneficiary had been serving as the cantor of the church on a full-time basis since February 1984. Father Granian stated that in the position:

[The beneficiary] conducts the Choir of the Church and accompanies it at the organ at the performance of the choir during mass, religious rites, services, ceremonies, ordinances and various functions of the Church. She arranges musical selections and hymns, and participates in group performances, as well as a soloist with the Choir.

Also among her main duties are organizing, conducting, and directing of our Church's youth choir groups, as well as teaching vocal music and religious hymns.

The petitioner submitted no evidence such as canceled checks, pay vouchers, or other documentary evidence to corroborate the beneficiary's employment with the Holy Cross Armenian Catholic Church. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In a request for evidence dated August 12, 2003, the director instructed the petitioner to:

Provide evidence of the beneficiary's work history beginning August 1, 2001 [sic] and ending August 2003 [sic]. Provide a breakdown of duties performed in the religious occupation for an average week. Include the employer's name, specific job duties, the number of hours worked, remuneration, level of responsibility and who supervised the work. Ideally, this evidence should come in a way that shows monetary payment, such as W-2 forms, pay stubs, or other items showing the beneficiary received payment. Documentation showing the withholding of taxes is good evidence. However, you may also show payment through other forms of remuneration. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported him or herself (any family members, if any) during the two-year period or what other activity the beneficiary was involved in that would show support.

Although the director misstated the qualifying period, the petitioner's response purported to include evidence of the beneficiary's employment since 1984. Therefore, the director's error did not adversely affect the petitioner's ability to respond to the RFE.

With its response, the petitioner submitted another copy of a September 24, 2003 letter from Father [REDACTED] who reiterated that:

[The beneficiary has worked] in the full-time, uninterrupted employment . . . as the Cantor of our church. She has been working in this position since February of 1982 continuously. Her employment at our Church . . . continues as of this date. She works forty eight hours per week under our direct supervision as the Pastor of the Church and is compensated on a monthly basis in cash payment equivalent to 1,500 U.S. Dollars.

Dear Sir, please be advised that in Lebanon we do not have the documentation that you had requested (w-2, pay stub). Our taxation system is not comparable with the U.S. and therefore we are not familiar with "withholding of taxes" as you had referred to in your letter.

Father [REDACTED] also restated the beneficiary's job duties. However, the petitioner again failed to submit documentary evidence to corroborate the beneficiary's employment. *See Id.* Although the American system of tax withholding or reporting may be foreign to [REDACTED] as noted by the director in his RFE, the petitioner was not limited to that form of evidence to document the beneficiary's employment.

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.

On appeal, counsel asserts that the director "totally disregarded" Father [REDACTED] "explanatory letters," in which he stated that the beneficiary worked forty-eight hours a week at a monthly salary comparable to \$1,500 (U.S.), and that employers in Lebanon are not required to issue proof of tax-withholding.

Nonetheless, the petitioner submitted no evidence, such as pay receipts, pay vouchers, verified work schedules or time sheets, or any other documentary evidence to substantiate the beneficiary's employment. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

The evidence is insufficient to establish that the beneficiary was continuously employed in a qualifying religious occupation for two full years prior to the filing of the visa petition.

The director determined that as the petitioner had not established that the beneficiary had worked continuously as a cantor for two full years immediately preceding the filing of the visa petition, it had also failed to establish that the proffered position qualified as that of a religious worker.

We withdraw this determination by the director. The petitioner stated that in the proffered position:

[The beneficiary] shall direct and train our church choir and shall teach vocal music to church youth groups and shall direct youth choir groups. She shall chant and read portions of ritual during religious services, and shall direct congregants in musical activities. She shall arrange musical portions of religious services in consultation with Pastor of the Church. [She] shall chant or recite religious texts during worship services or other observances and shall train and lead congregants in musical responses.

The petitioner stated that the position is full time and that it will compensate the beneficiary at the rate of \$35,000 per year. The beneficiary is not yet filling the position. The evidence sufficiently establishes that the proffered position is that of a religious worker within the meaning of these proceedings.

Beyond the decision of the director, the petitioner has not established that it qualifies as a bona fide nonprofit religious organization. This deficiency constitutes an additional ground for dismissal of the appeal.

The regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

(3) *Initial evidence.* Unless otherwise specified, each petition for a religious worker must be accompanied by:

- (i) Evidence that the organization qualifies as a nonprofit organization in the form of either:
- (A) Documentation showing that it is exempt from taxation in accordance with § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases, evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or
 - (B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organization.

The petitioner must either provide verification of individual exemption from the Internal Revenue Service (IRS), proof of coverage under a group exemption granted by the IRS to the denomination, or such documentation as is required by the IRS to establish eligibility as a tax-exempt nonprofit religious organization. Such documentation to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code includes: a completed IRS Form 1023, a completed Schedule A attachment, if applicable, and a copy of the articles of organization showing, *inter alia*, the disposition of assets in the event of dissolution.

With the petition, the petitioner submitted a copy of its articles of incorporation containing the dissolution clause required by the IRS for section 501(c)(3) tax exemption and a copy of a letter from the California state franchise board, exempting the petitioner from state franchise and income tax.

In response to the director's RFE, the petitioner submitted a copy of excerpts from the 2003 Catholic Directory of the Archdiocese of Los Angeles, in which it is listed. However, the petitioner submitted no evidence that it is exempt from taxation under an individual exemption granted to it by the IRS or under a group exemption granted to the Archdiocese of Los Angeles or the Catholic Church. The petitioner also failed to submit a copy of a completed IRS Form 1023 pursuant to 8 C.F.R. § 204.5(m)(3)(i)(B).

Additionally, beyond the director's decision, the petitioner has not 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 indicates that it will pay the beneficiary \$35,000 per year. As evidence of its ability to pay this wage, the petitioner submitted copies of unaudited financial statements for the year 2001.

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 evidence. For this additional reason, petition must be denied.

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.