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U.S. Citizenship
and Immigration
Services

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MAY 03 2005

FILE:

SRC 04 002 51505

Office: TEXAS SERVICE CENTER Date:

IN RE:

Petitioner:

Beneficiary:

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: In a decision dated May 24, 2004, the Director, Texas Service Center, denied the employment-based immigrant visa petition. 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 education minister of youth. The director determined that the petitioner had not established that the position qualified as that of a religious worker, that the beneficiary was qualified for the position, that it has extended a qualifying job offer to the beneficiary, or that it has the ability to pay the beneficiary the proffered wage.

The petitioner previously filed an I-360 petition on the beneficiary's behalf on April 30, 2001, which the director denied on April 15, 2003 (SRC 01 180 57765).

On appeal, counsel submits a letter and additional documentation.

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 to be addressed is whether the petitioner established that the beneficiary came to the United States at the request of the religious organization to work as a religious worker pursuant to 8 C.F.R. § 204.5(m)(1).

In its letter of September 24, 2003, the petitioner stated that, in the proffered position, the beneficiary's duties involve:

planning, and organizing Sunday school program and afternoon sports program, providing spiritual and moral guidance and assistance to members, ministering by designing and developing the recreational and sports programs as part of Sunday school and church training program, counsel those in spiritual need and comfort bereaved, oversee religious education programs for youth, teaching Sunday School Bible Study classed [sic] for young members, develop Christian Programs, research in the field of Christian doctrines and theories.

According to the evidence in the record, the beneficiary entered the United States on January 12, 1999 as a F-1 nonimmigrant student. The petitioner stated that the beneficiary served in the position as a volunteer from January 1999 to May 2001. There is no evidence that the position existed within the petitioning organization prior to the beneficiary assuming the duties in 1999, and there is no evidence that the position exists elsewhere within the petitioner's denomination.

The petitioner also included a copy of its bylaws, which list the officers of the church. The position of education minister of youth is not identified as a position within the petitioning organization; however, section 3 of article III of the bylaws authorizes the church to add ministers as needed. The bylaws do not specify whether these additional positions would be as lay or ordained ministers.

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.

In his letter responding to the director's request for evidence dated October 31, 2003, counsel outlined the beneficiary's typical workweek in the proffered position. However, counsel submitted no evidence to substantiate his statements. 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 Obaighena*, 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).

According to the petitioner, the beneficiary's "significant contributions" to the church included the following: served as a "shepherd and leader" of a home-based cell church; church yearly activities planner and organizer; community service; homeless care; physical exercise for youth; bible study, recreation and cell group meeting at the church's annual retreat; bible study and recreation at the church's vacation bible school; bible study, Korean language and Korean culture at the Saturday Korean school; and other sports related activities.

While it appears that some of the duties of the proffered position involve religious work, the majority of the duties, such as the recreation and sports activities, are entirely secular in nature. Although the petitioner stated that the duties also included overseeing the religious education programs for youth, developing Christian programs, and researching in the field of Christian doctrines and theories, it provided no evidence that these duties are included in the position as the beneficiary has performed them in the past and no evidence that the position has been extended to include these specific duties.

The evidence does not establish that the position is a religious occupation within the meaning of the regulations.

The second issue to be addressed is whether the petitioner established that it has extended a qualifying job offer to the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(4) states, in pertinent part, that:

Job offer. The letter from the authorized official of the religious organization in the United States must state how the alien will be solely carrying on the vocation of a minister, or how the alien will be paid or remunerated if the alien will work in a professional capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support.

The evidence does not establish that the beneficiary will be employed as a religious worker within the meaning of the regulations, and therefore does not establish that the petitioner has extended a qualifying job offer to the beneficiary.

The third issue is whether the petitioner established that the beneficiary was qualified for the position within the organization.

The director determined that the petitioner failed to submit evidence that the beneficiary had met all of the required training, as established by the denomination's governing body, for the proffered position. The AAO will withdraw this determination. In review, the beneficiary is not qualified as an ordained minister; however, the proffered position is for a lay minister, i.e., education minister for youth.

The record indicates that the beneficiary has a background in education. The petitioner does not indicate that the position requires specific qualifications or training. The evidence sufficiently establishes that the beneficiary is qualified for the position within the organization.

The fourth issue to be addressed in this proceeding is whether 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.

In denying the petition, the director determined that the petitioner had failed to submit satisfactory evidence to show ability to pay the beneficiary's proffered wage. The petitioner stated that it would pay the beneficiary a salary of \$1,500 per month. On appeal, the petitioner submits copies of canceled checks indicating that it paid the beneficiary \$1270.50 from January 2003 to September 2003. The petitioner also submitted copies of unaudited financial statements.

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. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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.