

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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: SEP 19 2005
WAC 03 130 54833

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 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 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 granthi (minister). 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.

On appeal, counsel submits 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 issue presented 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 March 19, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a granthi throughout the two-year period immediately preceding that date.

In a November 1, 2002 letter accompanying the petition, the petitioner's president stated that the beneficiary has worked as a granthi/kirtankar (religious folk singer) since approval of his R-1 nonimmigrant religious worker visa since 1998, first for its parent organization and then for the petitioning organization. The petitioner submitted a copy of a weekly work schedule, reflecting that the beneficiary worked approximately 42 hours per week. The petitioner also submitted copies of the beneficiary's Forms W-2, Wage and Tax Statements, for the relevant years of 2001 and 2002. The year 2001 Form W-2 indicates that the petitioner paid the beneficiary \$3,500 and the Maharishi Valmik Sabha, which the petitioner identifies as its parent organization, paid the beneficiary \$2,500. The beneficiary's year 2002 Form W-2 indicates that the petitioner paid him \$5,000. The petitioner also submitted copies of the beneficiary's Form 1040, U.S. Individual Income Tax Returns, for the relevant years of 2001 and 2002.

In a request for evidence (RFE) dated March 23, 2004, the director requested additional information regarding the petitioner's organization, including the frequency and location of its religious services. In response, the petitioner stated that it had "scheduled weekly religious services, as well as services throughout the week at parishioner's homes." The petitioner further stated:

Our current church membership numbers around 120. We do not have a permanent church location at this time, but meet at private residences, different and specific Gurdwaras and other locations requested. We have various worship times in order to accommodate all of the church membership.

The director noted that the address on the June 12, 2001 IRS tax-exemption letter to the petitioner [REDACTED] in San Francisco, California, the same address that the petitioner uses on the Form I-360, Petition for Amerasian, Widow or Special Immigrant. The director also stated that the beneficiary's Forms W-2 list an address of [REDACTED] California, the same address as that shown for the beneficiary. We note that the only Form W-2 that contains an address for the petitioner reflects the post office box in San Francisco. The director determined that, although the petitioner claims that its expenditures include rent, utilities and phone services, the evidence did not establish that the petitioner had a physical address where the beneficiary could perform the duties as outlined for the position or where he could be employed on a full-time basis for the petitioner.

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).

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).

On appeal, counsel states:

The petitioner . . . was recently formed in 2000. They are a member of their parent organization [REDACTED] which was established in August 1994 . . . Thus the petitioner is a young organization, in the process of establishing a more permanent physical presence in the Bay Area near San Francisco, California.

In the meantime, the petitioning organization has been using a home at 390 Cimarron Drive, Vallejo, California. This is where the members meet and pray. It is also where the petitioner provides food, housing to the beneficiary and another minister.

This pattern is typical for start-up or new churches for other religious organizations. For example, a Christian church that is newly formed, will begin meeting at a family home for services and prayer, then, as growth occurs, meetings may expand to several homes, before a more permanent facility may be secured. The petitioning organization wants to move to a larger location in the future, but their current location is meeting their needs for now.

[T]his is a real religious organization that is in it's [sic] infant stage. They are growing, but currently meet at 390 Cimarron Drive, Vallejo, California for prayer and services. This is also the home where the ministers are provided food and housing by the petitioning organization.

The petitioner's president submits on appeal a January 11, 2005 letter, in which she states:

Although the prayer location is 390 Cimarron Drive, the mailing address was always in San Francisco. This was more for personal convenience as I worked and conducted most of my work in San Francisco, and the fact that mail would not get lost, as there are so many different people that come to pray at 390 Cimarron Drive.

Even though the location of the teaching and preaching of [the petitioner] most likely could not house 120 all at once, the members all come to pray and worship at different times and days. Therefore there is most an even flow of people in and out.

The petitioner submits copies of photographs, many of which are dated in 1998, which it claims are of the house at [redacted]. The petitioner also submits copies of photographs that it labels "event in Yuba City;" a copy of a "list of other meeting places," which contains three addresses, including the Cimarron Drive address and a statement "at the residences of other members list enclosed;" a copy of a January 13, 2005 permit to use the North Vallejo Community Center on June 26, 2005; and a January 13, 2005 statement from [redacted] owner/manager" that the petitioner had used its facilities "once or twice a month as they needed for religious events or gatherings." This organization is apparently a restaurant.

We note that the petitioner's constitution lists the registered address of the organization as [redacted] Oakland, California and the organization's bank statement lists an address [redacted] in Vallejo, California. The Form I-129, Petition for Immigrant Worker, submitted by the petitioner on behalf of the beneficiary indicates the work address for the beneficiary as [redacted]. The beneficiary's Forms W-2 for the years 1998 through 2001 issued by the [redacted] which the petitioner states is its parent organization formed in 1994, lists as its address [redacted] California.

The evidence of record does not corroborate counsel's statement that the petitioner provides the beneficiary's housing and living expenses at Cimarron Drive, particularly as the beneficiary claimed this as his address as early as 1998, prior to the establishment of the petitioning organization in 2000. 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).

Accordingly, based on the conflicting information, it is unclear from the record where the petitioning organization is located and whether it is a bona fide organization and exists at all. As the petitioner does not appear to be providing the beneficiary with room and board, as claimed, the evidence does not establish that the beneficiary worked continuously in a full-time position during the two years immediately preceding the filing of the visa petition.

Beyond the decision of the director, 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.

In its letter of November 1, 2002, the petitioner stated that it had paid the beneficiary \$500 per month plus housing and food, and that his compensation had been approved to be increased to \$650 per month plus housing and food. The petitioner submitted no evidence that it has paid the beneficiary the proffered wage or \$500 per month that it allegedly paid prior to the authorized pay increase. The beneficiary's year 2002 Forms W-2 and 1040 indicate that he was paid \$4,800 in wages for the year. Other evidence submitted by the petitioner are copies of its "Income & Expenses Statement," reflecting balances as of December 31, 2002; December 31, 2003; and May 31, 2004. The petitioner also submitted copies of its January 2003 and May 2004 monthly bank 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 primary evidence.

Accordingly, the evidence does not establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage as of the filing date of the petition. This deficiency constitutes an additional ground for which the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.