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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUN 02 2006

WAC 05 023 52498

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, Chief
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 missionary. 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 a brief 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 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 November 3, 2004. Therefore, the petitioner must establish that the beneficiary was continuously working as a missionary throughout the two-year period immediately preceding that date.

With the petition, the petitioner submitted a January 5, 1998 "certificate of employment," signed by the petitioner's pastor, indicating that the beneficiary had worked for the petitioner from March 1, 1995 to the "present time." The petitioner did not allege, and submitted no evidence of, any work performed by the beneficiary during the qualifying period.

In a request for evidence (RFE) dated April 18, 2005, the director instructed the petitioner to:

Provide evidence of the beneficiary's work history beginning November 3, 2002 and November 3, 2004 only. 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, [and] remuneration . . . 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 (and family members, if any) during the two-year period or what other activity the beneficiary was involved in that would show support.

In response, the petitioner's pastors [REDACTED] stated in an unsigned and undated letter that the beneficiary had been a "valuable member" of the petitioner's "praise team" since 2002. The pastors further stated that the beneficiary's specific duties included:

- Conducted the Bible Study as a study group leader and . . . participated in the mission for Senior Citizens.
- Was and is missionary for Homeless and Senior Citizens in our neighborhood.
- Participated [in] mission as a hair stylist to trim and cut Senior Citizens' hair voluntarily.
- Participated and led the Homeless mission in downtown area . . .
- Served the Lord's Praise Team as a guitarist.
- Also participated and led the Youth and High School Group Bible Study on every Sunday.
- Participated as a member of Homeless Mission Team.

The petitioner indicated that the beneficiary volunteered her services five days a week "between 5 to 8 hours a day." The letter further stated, "As far as I [am] concerned, [the beneficiary] has been and is CA licensed hair stylist, and repairs traditional Korean clothing. Her dedication to [the] church is solely based on [a] voluntary basis." The petitioner submitted no evidence such as authenticated work schedules or other similar evidence to corroborate the beneficiary's employment during the qualifying period. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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).

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.

In the rare case where volunteer work might constitute prior qualifying experience, the petitioner must establish that the beneficiary, while continuously and primarily engaged in the traditional religious occupation, was self-sufficient or that his or her financial well being was clearly maintained by means other than secular employment.

The petitioner acknowledged that the beneficiary’s primary occupation is that of a beautician. The petitioner submitted a copy of the beneficiary’s 2003 Form W-2, Wage and Tax Statement, reflecting that she was paid \$17,189 in wages from B&F Management. Further, the petitioner submitted no evidence of how the beneficiary incorporated her work schedule as a beautician into the full-time schedule that she allegedly maintained with the petitioner.

On appeal, Pastor [REDACTED] stated that “most of our missionaries are based on voluntary work without pay from the church,” and that “[m]any of our missionaries are full or part-time professionals dedicat[ing] their time and money to serve [the] community and to guide others to start to grow in relationship with Jesus.” The petitioner submitted a list of persons that it states were helped by the beneficiary and a list containing “personal testimonies” of the beneficiary’s assistance. Neither of these documents, however, is sufficient to

establish that the beneficiary devoted full-time service to her work with the petitioner, and was paid for that work.

The petitioner also submits a November 18, 2005 letter from [REDACTED] who states that the beneficiary is his aunt, and that family members support the beneficiary "with a lot of donations." The petitioner submitted no evidence of any financial support received by the beneficiary from family members. *Matter of Soffici*, 22 I&N Dec. at 165

On appeal, counsel cites *St. John the Baptist Ukrainian Catholic Church v. Novak*, No. 00CV-745 (N.D.N.Y. 2000), the unpublished decision of a federal district court in New York. Counsel asserts that the Bureau conceded that an alien's "voluntary employment" would satisfy the requirement that he or she has performed the work for the two-year period prior to the filing of the petition. Counsel's assertion is not supported by the record as counsel has not provided a copy of the court's decision. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

The evidence does not establish that the beneficiary has received any support from family members. Further, the evidence indicates that the beneficiary is a licensed beautician and supports herself through her secular work in that occupation.

The evidence does not establish that the beneficiary was continuously engaged in a qualifying religious vocation or occupation for two full years prior to the filing of the visa petition.

Beyond the decision of the director, the petitioner has not 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 petitioner states that the proffered position is unsalaried and that the beneficiary supports herself with income received from her job as a beautician and, allegedly, with donations from family members. Therefore, the petitioner has not established that the beneficiary will not be solely dependent on supplemental employment or the solicitation of funds for her support. Accordingly, the record does not establish that the petitioner has extended a qualifying job offer to the beneficiary. This deficiency constitutes an additional ground for denial of the petition.

Further, beyond the director's decision, the petitioner has not established that it has the ability to pay 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.

Although the petitioner stated that the proffered position is uncompensated, the regulation requires the petitioner to establish that it has the ability to compensate the beneficiary. The petitioner submitted no evidence of this regulatory requirement.¹ 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 submitted does not establish that the petitioner has the continuing ability to pay the proffered wage as of the date the petition was filed. This is an additional ground for denial of the petition.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.

¹ All of the petitioner's financial documentation is dated prior to the filing date of the petition.