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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 17 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

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 on appeal. The appeal will be dismissed.

The petitioner is described as "a religious charitable organization . . . dedicated to teaching the Sikh religion and serv[ing] Sikhs living in the area." It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(4), to perform services as a position originally identified as "temple custodian." The director found that the petitioner had failed to establish that the position of temple custodian constitutes a qualifying religious occupation.

On appeal, the petitioner submits a brief from counsel and a witness 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 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 in this proceeding is whether the petitioner has made a qualifying job offer. 8 C.F.R. § 204.5(m)(4) states that each petition for a religious worker must be accompanied by a job offer from an authorized official of the religious organization at which the alien will be employed in the United States. 8 C.F.R. § 204.5(m)(2) offers the following definition of a "religious occupation":

> *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, fund raisers, or persons solely involved in the solicitation of donations.

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 must complete prescribed courses of training established by the governing body of the denomination and their services are 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. Persons in such positions must be qualified in their occupation, but they require no specific religious training or theological education.

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 specific prescribed religious training or theological education is required, 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 petitioner's original submission includes two uncertified copies of Form ETA-750, an application for labor certification, although the classification sought does not require the submission of this form. Part A of the Form ETA-750 includes several sections relative to the job duties and minimum requirements:

> 9. Name of Job Title
> TEMPLE CUSTODIAN
>
> 13. Describe Fully the Job to be Performed *(Duties)*
> Temple custodian, responsible for maintaining temple building, include cleaning, maintenance, etc... Responsible for cus[t]ody of Holy Books, arrange special functions, weedings [sic], anniversaries, funerals, etc.... Maintain and update library[,] supervise cooking function. Job is 7 days a week from Monday thru Saturday, 5 hours a day and Sunday 10 hours. He also re-orders supplies.

> 14. State in detail the MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties described in item 13 above.
> EDUCATION
> [left blank]
> TRAINING
> [left blank]
> EXPERIENCE
> Job Offered: 2 years
> Related Occupation: [left blank]
>
> 15. Other Special Requirements
> Must be Sikh, believe and respect Sikh religion. Able to speak, write, and read Punjabi.

Part B of Form ETA-750 concerns the beneficiary's qualifications. Asked for "Names and Addresses of Schools, Colleges and Universities Attended," the beneficiary indicated that he studied at "RS KHALSA" until April 1963 (at which time the beneficiary was eight years old). The beneficiary did not list a starting date; April 1963 more plausibly suggests a starting date rather than a finishing date. Under "Field of Study," the beneficiary indicated "GENERAL." Under "Additional Qualifications and Skills," the beneficiary wrote "FARMER, SILK, CUSTODIAN OF SIKH TEMPLE." Instructed to list his past experience, the beneficiary indicated that he worked as a farmer from December 1991 to December 1998, and as a "TEMPLE CUSTODIAN" from December 1998 onward, first at Gurdwara Sahib of Bakersfield, and then at the petitioning temple beginning December 2001.

In a letter submitted with the petition [redacted] president of the petitioning entity, states:

> [I]t is my opinion that [the beneficiary] is amply qualified as a Temple Custodian. [The beneficiary] is a Sikh [who] believes in the teaching of our Gurus. He is capable of reading Punjabi. He reads, understands and interprets our holy book with ease.
>
> He knows how to assist the Priest, he can organize the Guru's birth days, weddings and Sikh historical events. He has good knowledge in how to manage Langer (free food). He can maintain religious books and keep record of them in the Temple library. . . .
>
> With his training, background and knowledge of Sikhism, he is a worthwhile addition as Temple Custodian to our Gurdwara.

In a letter dated March 15, 2001, Mohinder Singh Sidhu, president of Gurdwara Sahib of Bakersfield, offers the following description of the beneficiary's work at that temple:

> [The beneficiary] has been working for our Temple as a custodian from December 1998 to February 2001.
>
> He was working forty hours per week. His duties as a custodian were to maintain the Temple Buildings. Such as cleaning, plumbing, lighting, and furnishings, etc.
>
> In addition to these duties, he maintains custody of Holy Scripts. He made arrangements of various function[s], with our Priest and public, such as birthdays ceremonies of our Holy Gurus, wedding functions, anniversaries, and also he was coordinating all events as per Sikh rites and tenants [sic].
>
> He also maintained [the] library. He was responsible for over seeing the langer (Free Food) to [the] public after every ceremony.

The director requested "a detailed description of the work to be done" and instructed the petitioner to "explain how the duties of the position relate to a traditional religious function." In response, Shinda Upple has provided the following list of duties:

1) Maintaining physical Temple Building on a daily basis.
2) Supervising cooking [on a] daily basis.
3) Ordering supplies for food for building – daily basis.
4) Coordinating Holy Functions and special functions which includes: re-arranging physical facilities, arranging accommodations and food for visiting VIP's including: speakers, singers, performers and their support personnel as needed.
5) Supervising and physical[ly] re-arranging physical facilities on each Sunday.
6) Ordering and distributing books.
7) Other jobs as needed and directed.

The temple president indicated that there was "[n]o minimum education required, [although the] person should have at least 2 years experience as custodian of Temple." Clearly, a Sikh can work as a temple custodian with no experience or training, even if this particular employer requires two years of experience. Otherwise, no new workers could enter the occupation because, by definition, they lack experience.

A new work history prepared by Mohinder Singh Sidhu indicates that two hours per day are dedicated to "daily chores" such as "helping in cleaning, light repairs, ordering supplies"; another two hours per day (four to five hours on Sundays) are devoted to "supervising cooking and ordering supplies for food." Furniture arranging occupies three to four hours every Sunday and four to ten hours "on special occasions," and library maintenance takes two to three hours per week. Finally, Mohinder Singh Sidhu indicates that "[t]here are 10-12 holy occasions per year in addition to weddings, death[s] and births. The function planning arrangement is done over months in advance and custodian spends 10-20 hours per week per function." The beneficiary's total work week is stated to occupy 40 hours.

If "[t]here are 10-12 holy occasions per year," each of which requires "planning arrangement over months in advance," it is not clear that the beneficiary would have any time for anything else during a 40-hour work week. At any given time, the beneficiary would be planning for several upcoming occasions, devoting 10-20 hours per week to each one.

The petitioner has also submitted several photographs of activities at a temple. The name of the temple is not shown in any photograph but the name "Gurdwara Sahib" has been handwritten on the reverse of some of the pictures. Despite the assertion that the beneficiary devotes between three and ten hours each day arranging furniture, there is no furniture visible in any of the photographs, and several of the pictures show the congregation seated on the floor inside or on the ground outside.

The director denied the petition, noting the nature of the beneficiary's duties and concluding that the petitioner has not shown that those tasks constitute a traditional religious function. On appeal, counsel states that the petitioner's use of the term "custodian" was "incorrect and misleading. The petition should have listed the position as that of Temple Sevedar/Langry. The position of Sevedar/Langry is thought of by the temple as that of a temple 'Trustee' which is a trustee in charge of the Temple Building." Counsel states:

> According to the Sikh rehat Marayda (Sikh code of conduct), the Sevadar Langry Trustee must be a baptized Sikh. His duties, aside from the physical maintenance of the temple, include but are not limited to:
>
> 1. Making sure that all Temple visitors are given a Rumalas, which is a religious cloth which must be worn on the head of all those who enter the Temple.
> 2. Making sure that all who read the "Holy Book" cover it with the silk cloth which drapes the table when they are finished reading the Holy Book.
> 3. The Temple Sevedar/Langry Trustee must observe and wear the 5 "K's" at all times.
> 4. When preparing religious food in the kitchens, certain prayers must be recited.
> 5. Serving of the food must also be done according to certain spiritual guidelines.
> 6. The Temple Sevedar/Langry is also counseling congregation members on every day's religious programs.
> 7. The Temple Sevedar/Langry must coordinate various religious rituals and activities such as baptisms, weddings, etc. Due to their religious nature, it is necessary that the Temple Sevedar/Langry Trustee be extremely familiar with aspects of the Sikh religion.
> 8. It is also the Temple Sevedar/Langry Trustee's overall responsibility to ensure that all persons within the temple at any time observe temple and Sikh religion ritual requirements.
>
> All of the above are in addition to the physical responsibilities of keeping the temple clean and maintained, which must be performed by a baptized Sikh.

Counsel further asserts "the Temple Sevedar/Langry is responsible for performing numerous functions specifically required and related to the Sikh religion" and that the position "involves substantially more than that of a mere janitor or maintenance worker." The petitioner submits a letter from Nazar Singh Khalsa, who corroborates counsel's claims regarding the duties of a "Sevedar/Langry," although he spells the term "Sevadar" rather than "Sevedar" and omits the slash (/).

The statements from Nazar Singh Khalsa and counsel are not consistent with Mohinder Singh Sidhu's letter, which stated that the beneficiary's "duties as a custodian were to maintain the Temple Buildings. Such as cleaning, plumbing, lighting, and furnishings, etc." The letter also described more ceremonial functions, but the letter gave priority to the typical secular duties of a "custodian" as that term is generally understood. Some of the duties named in the list submitted on appeal do not appear in earlier descriptions of the beneficiary's job duties.

In separate documents executed months apart, the presidents of two different temples and the beneficiary himself all used the terms "custodian" and/or "temple custodian" not only as a general description but also as the beneficiary's formal job title. We are not persuaded by counsel's claim on appeal that all three individuals used those terms by accident.

More significantly, while Nazar Singh Khalsa corroborates counsel's description of a "Sevadar Langry," he never states that the beneficiary worked as a Sevadar Langry, nor does he ever mention the beneficiary at all. Given this omission, and the equally significant fact that the term "Sevadar Langry" never appeared anywhere in the petition prior to the appeal, we cannot find that the materials submitted on appeal are sufficient to overcome the director's decision.

We note that the petitioner had previously submitted a bank statement containing the name "Nazar Singh Kooner." It is not clear whether or not this is the same individual as Nazar Singh Khalsa. If the two individuals are indeed one and the same, then the letter submitted on appeal is from a financial officer of the petitioning entity rather than an independent source. Both counsel and Nazar Singh Khalsa refer to the "Sikh code of conduct" but the record contains no independent documentation of this code of conduct, nor any other documentation to show that Sikh temples generally employ a full-time, salaried temple custodian or Sevadar Langry. If the Sevadar Langry is typically part-time and/or a volunteer member of the congregation, then the very existence of such a position cannot suffice to establish eligibility.

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 salaried. To hold otherwise would be contrary to the intent of Congress.

Counsel states "[t]he right to practice a religion according to the rules of the religious organization are protected by the first amendment of the United States Constitution." Counsel is quite correct in this assertion, but the issue in contention here is not the beneficiary's right to practice the Sikh religion, but rather his eligibility for an immigration benefit. Immigration to the United States is a privilege, granted at the discretion of the government, rather than a constitutional right guaranteed to the beneficiary or to any other alien. The AAO lacks jurisdiction to rule on constitutional questions, but it is not readily apparent that the denial of a special immigrant religious worker petition amounts to an infringement of an alien's free exercise rights under the First Amendment. The director did not deny the petition simply because the beneficiary is a Sikh.

Further, while the determination of an individual's status or duties within a religious organization is not under CIS's purview, the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests with 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).

Beyond the above issue, review of the record raises further questions of eligibility. The regulation at 8 C.F.R. § 204.5(m)(1) 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) 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 August 22, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as a temple custodian throughout the two-year period immediately preceding that date.

The beneficiary claimed to have worked at Gurdwara Sahib of Bakersfield from December 1998 to December 2001 ("12/01"). This claim cannot be correct because the document containing that claim was submitted in August 2001. Mohinder Singh Sidhu had initially indicated that the beneficiary left Gurdwara Sahib of Bakersfield in February 2001. Mohinder Singh Sidhu's letter, which consistently refers to the beneficiary's work there in the past tense, is dated March 15, 2001.

The director instructed the petitioner to "[p]rovide evidence of the beneficiary's work history beginning August 30, 1999 and ending August 30, 2001." The petitioner responded with the "work history" from Gurdwara Sahib of Bakersfield, described above. Mohinder Singh Sidhu states that the beneficiary performed the listed duties from August 30, 1999 to August 30, 2001, although in March 2001 he indicated that the beneficiary worked only until February 2001. If the beneficiary was still working at the temple as of mid-March 2001, there is no readily apparent reason for the temple president to specify that the beneficiary worked there until February 2001. Therefore, absent contemporaneous documentary evidence and a persuasive explanation for the reference to February 2001, the subsequent claim that the beneficiary worked at Gurdwara Sahib of Bakersfield until August 2001 lacks credibility.

The record does not indicate, with any consistency, where the beneficiary was working throughout the 1999-2001 qualifying period and therefore we cannot find that the petitioner has satisfactorily established the beneficiary's continuous employment as a temple custodian during that period.

Another issue pertains to the regulation at 8 C.F.R. § 204.5(g)(2), which 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 $1,000 per month plus room and board. The director instructed the petitioner to submit documentation regarding the beneficiary's past compensation and the petitioner's ability to continue to pay the beneficiary. In response, the petitioner has submitted copies of the beneficiary's Form W-2 Wage and Tax Statements, indicating that the petitioner paid the beneficiary $1,000.00 in 2001. This amount reflects only one month of the proffered wage, not including the cash value of room and board. Therefore, the Form W-2 casts further doubt on the claim that the beneficiary has been employed full-time continuously since August 1999.

The petitioner has also submitted a copy of a bank statement, reflecting a balance of $122.18 as of May 24, 2002. The statement reflects that the bank levied an "insufficient funds fee" after the petitioner's balance reached -$112.80.

The above-cited regulation at 8 C.F.R. § 204.5(g)(2) 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. What little evidence the petitioner has submitted does not establish that the petitioner has sufficient funds on hand to pay the beneficiary's salary and expenses. The Form W-2 reflects only a fraction of the proffered annual wage and does not show that the petitioner paid, or was able to pay, that wage from August 22, 2001 onward. Because of the deficiency reflected on the Form W-2, there is no reason to conclude that the activity reflected on the petitioner's bank statement includes payment in full of the beneficiary's salary and food and housing expenses. That same bank statement shows a very low balance, dipping at times into negative numbers. From the available evidence, we cannot conclude that the petitioner has been able to pay the beneficiary's proffered wage since the petition's filing date.

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.