

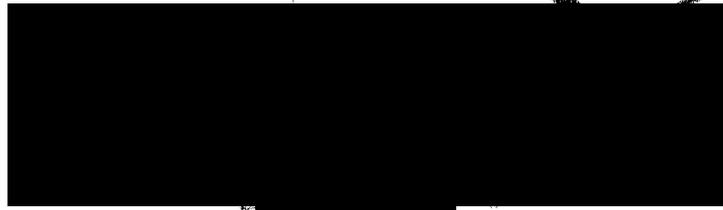
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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship and Immigration Services



FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: JUL 20 2004

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:
[Redacted]

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas 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 minister of music. 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. The director further determined that the petitioner had failed to establish that it had extended a valid job offer to the beneficiary, or that it had the ability to pay the beneficiary a wage.

On appeal, counsel submits a brief.

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 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 April 28, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as a minister of music throughout the two-year period immediately preceding that date.

The petitioner states that the beneficiary began his employment with the petitioning church in February 1999, after receiving authority to work in the United States. The record reflects that the beneficiary entered the United States in April 1999 on an F-1 visa, and according to the petitioner, volunteered his services to the petitioner while attending school to obtain his master's degree in music. The petitioner states that the beneficiary became its minister of music after receiving an R-1 visa in May 2000. The record does not reflect whether or not the beneficiary is still pursuing studies leading to a master's degree.

In his letter accompanying the petition, counsel stated that the minister of music is "responsible for and in charge of all church related music activities, directing and conducting the church choir during rehearsals and performances at services, and any other related activities." The job description, which the petitioner states reflects the duties the beneficiary performed during the two-year qualifying period, basically corroborates counsel's statement. The petitioner provided a work schedule, which it stated, reflected a 42-hour workweek for the beneficiary. The schedule shows that the beneficiary was scheduled to work ten hours on Sunday, with four of those hours devoted to "Young Adult Group Bible Study;" on Monday through Friday from 1:00 p.m. to 5:00 p.m. (20 hours), with all hours devoted to "work at church office;" from 6:00 p.m. to 9:00 p.m. on Wednesday, with the hours devoted to "visitation;"¹ and on Saturday from 9:00 a.m. to 12:00 p.m., 2:00 p.m. to 5:00 p.m. and from 6:00 p.m. to 10:00 p.m., with four of those hours devoted to "visitation with pastor."²

The director determined that the petitioner did not provide sufficient evidence of the duties performed by the beneficiary to establish that the majority of the hours he worked were related to the music ministry. The director determined that only ten hours of the beneficiary's work week were devoted to the music ministry and therefore the petitioner had not established that the beneficiary worked "continuously" in a qualifying religious occupation for the two years immediately preceding the visa petition.

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

¹ The petitioner lists total hours worked on Wednesday as six hours. However, counting the four hours accounted for in the Monday through Friday routine, the total hours alleged to have been worked by the beneficiary on Wednesday would be eight hours.

² The petitioner lists the total hours worked on Saturday as six hours; however, the scheduled hours total nine hours. No explanation is given regarding the difference in the hours.

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 beneficiary provides music selections and directs the choir during the bible study and provides "spiritual encouragement through music" during his visitations. Counsel also asserts that the beneficiary's time during the 20 hours of office work is spent, among other things, selecting music, accepting invitations, ensuring that the instruments are ready for performances, and auditioning and selecting members for the choir. Counsel provides no evidence to support his statements. 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). Neither counsel nor the petitioner identifies the musical "instruments" that the minister of music is responsible for. The petitioner provides no evidence that bible study or "visitations" in its denomination include presentation of music selections. The job duties of the music minister at the petitioning church submitted with the petition describe those of a choral director for church services and not those of a full-time staff musician.

We note that in a previous petition, the petitioner's pastor, in a letter dated December 29, 1999, stated "[s]ince [the beneficiary] obtained employment authorization [in February 1999]. . . he has been employed at the church for fifteen (15) hours per week. He works for eight (8) hours on Sundays, four (4) hours on Saturdays and three (3) hours on Wednesdays." The facts of this letter indicate that for at least ten months of the qualifying period in

the current petition, the beneficiary was working 15 hours per week for the petitioner and not 42 hours per week as later claimed by the petitioner. The director of the Texas Service Center denied that petition, filed on June 16, 1999, on February 25, 2000. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582. (Comm. 1988).

The record contains a copy of the beneficiary's 1999 and 2000 Form 1040, U.S. Individual Income Tax Return. On each, the beneficiary indicates that he is a "student/minister." The 1999 Form 1040 contains a Form W-2, Wage and Tax Statement, issued by B & U Enterprises Group, Inc., in the amount of \$4,468. The beneficiary reported another \$3,600 in self-employment income, and reported self-employment income of \$15,200 in 2000. On appeal, counsel asserts that the amounts listed as self-employment income were the beneficiary's wages paid by the petitioner. However, the petitioner provided no evidence of wages or salaries paid to the beneficiary during the years 1999 and 2000.

On appeal, counsel asserts that with his degrees and resume, it is obvious that the beneficiary's "principal business" is music. However, the statute and regulations require that, for purposes of this visa classification, that the alien be continuously engaged in the religious occupation for which he seeks entry during the immediate two years prior to the filing of the visa petition.

The evidence does not establish that the beneficiary worked continuously in the religious occupation during the two-year period immediately prior to the filing of the visa classification preference petition.

The petitioner must also demonstrate that a qualifying job offer has been tendered.

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.

As noted above, the petitioner has not adequately established that the needs of the petitioning entity will provide permanent, full-time religious work for the beneficiary in the future. Part-time participation in church activities does not qualify as work experience in a religious vocation or occupation, and is not a qualifying job offer for the purposes of this employment-based visa petition.

A petitioner must also demonstrate its ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part, that:

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 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 annual reports, federal tax returns, or audited financial statements.

The petitioner submitted a copy of its 2000, 2001 and 2002 budgets, letters from two banks indicating that the petitioner is a customer and has maintained its accounts satisfactorily, and a copy of a February 2000 real property settlement statement indicating that the petitioner had qualified for a \$300,000 loan. On appeal, counsel asserts that the fact that the petitioner qualified for this loan indicates its economic stability and its ability to pay the proffered salary.

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 budgets are simply representations of management. As budgets are subject to change, they carry no indicia of reliability and very little evidentiary value. The letters from the banks offer no evidence of the petitioner's financial standing, and the settlement statement evidences no ability to pay beyond that required by the lenders. The record contains a copy of a 2001 Form 1099-Misc, Miscellaneous Income, issued by the petitioner to the beneficiary in the amount of \$19,200, the proffered wage. However, the petitioner submitted no substantive evidence of its ability to pay the proffered wage in 1999 and 2000, as required by the regulation.

Beyond the decision of the director, the petitioner has not established that the proffered position qualifies as that of a religious worker. The regulation at 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 perform services that 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.

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.

The petitioner submitted no evidence of the role of a "minister of music" within its denomination. The evidence submitted does not establish that the position is a traditional, full-time salaried position, or that it qualifies as that of a religious occupation within the denomination within the meaning of this visa classification provision. This deficiency constitutes an additional basis for dismissal of the appeal.

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.