



U.S. Citizenship
and Immigration
Services

cl

[Redacted]

FILE: [Redacted]

Office: NEBRASKA SERVICE CENTER

Date: SEP 29 2004

IN RE: Petitioner: [Redacted]
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 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.

Mari Johnson

60 Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner describes itself as "an educational ministry of City Bible 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 religious student advisor. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a religious student advisor immediately preceding the filing date of the petition.

On appeal, counsel protests that an earlier request for information did not mention this ground for denial. Counsel also contests the director's interpretation of the "professional" nature of the position.

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 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)(ii)(A) requires the petitioner to demonstrate 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 October 12, 2001. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a religious student advisor throughout the two years immediately prior to that date.

Ken Malmin, dean of the petitioning college, states:

Position is a Religious Occupation and of a Professional Capacity

Our Religious Student Advisor (Bible College) will be engaged in activity that relates to a traditional religious function and one that requires at a minimum the completion of a U.S. bachelor's degree or its equivalent in Theology or a related field. . . . [T]he person filling the position of Religious Student Advisor (Bible College) must be intimately familiar and educated in Christian discipline and evangelism. We feel that a bachelor's degree in Theology or a related field will sufficiently prepare the successful applicant for the rigors and professional and religious demands of the position.

8 C.F.R. § 204.5(m)(2) defines "professional capacity" as an activity in a religious vocation or occupation for which the minimum of a United States baccalaureate degree or a foreign equivalent degree is required. The above description is consistent with this definition.

As cited above, 8 C.F.R. § 204.5(m)(1) requires that the beneficiary "must have been performing the . . . professional work" during the two-year qualifying period. In other words, the beneficiary must have been engaged in the same occupation, in a professional capacity (requiring a bachelor's degree), throughout that period.

Regarding the beneficiary's past work, Dean Malmin states:

[The beneficiary] is currently working for [the petitioner] in this professional capacity under an R-1 Religious Worker visa valid from May 22, 2001 until May 21, 2004. Prior to the approval of her R-1 status, [the beneficiary] also worked for [the petitioner] under her F-1 student optional practical training from May 22, 2000 until May 21, 2001 and during the school year as part of her F-1 student program from August 1999 until graduation. Accordingly, in light of [the beneficiary's] cumulative period of work for [the petitioner], she meets the requisite two year period of professional work in the religious occupation immediately preceding the filing of this immigrant petition.

In a separate letter [redacted] states that the petitioner has employed the beneficiary "as our Religious Student Advisor since August 1999." A copy of the beneficiary's diploma shows that the petitioning institution awarded her a Bachelor of Theology degree on May 21, 2000.

The director requested further evidence to demonstrate that the position truly requires, at a minimum, a bachelor's degree. In response, the petitioner has submitted posted job announcements for positions which, according to the petitioner, are comparable to the position offered to the beneficiary. These announcements (from secular educational institutions) indicate that the positions require a bachelor's degree; some require a master's degree.

The director denied the petition, stating: "the beneficiary received a Bachelor of Theology degree on May 21, 2000. As this occurred after October 21, 1999, the beneficiary could not have been serving in a professional capacity for two years prior to the filing of this petition."

On appeal, counsel states "[t]he stated ground for denial was never addressed in the request for evidence issued by the Service Center and thus, the beneficiary was never provided notice and opportunity to respond and rebut the ground for denial." The regulation concerning requests for evidence is 8 C.F.R. § 103.2(b)(8), which states, in pertinent part:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. . . . Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence.

Thus, a request for evidence is required when "initial evidence . . . is missing," but not if the record contains *prima facie* "evidence of ineligibility." Here, the record shows, on its face, that the beneficiary received her bachelor's degree less than two years before the petition's October 2001 filing date. This is not a question of missing or insufficient evidence, which would require a request for evidence. If the beneficiary did not have a bachelor's degree two years prior to the filing date, she could not possibly have been employed in a professional capacity at that time, and submission of additional evidence cannot overcome this basic ground of ineligibility. Furthermore, even if submission of additional evidence could resolve the issue, nothing has prevented the petitioner from offering such evidence on appeal. The appeal, however, contains no new evidence, only arguments from counsel. Therefore, it is not clear what additional evidence the petitioner would have supplied in response to an earlier notice.

Counsel argues:

Although the beneficiary did not graduate from her bachelor's program until May 2000, the school had already offered her the position the summer before her senior year in anticipation of beneficiary's graduation from their program. . . . Indeed, during most of the beneficiary's senior year, the petitioner had already begun requiring beneficiary's services and beneficiary already started working in a *paid*, part-time capacity as the school's Religious Student Advisor (Bible College).

Counsel adds "nothing in the regulations require that the previous two years of experience must all completely be in a full-time capacity." Counsel cites "a May 8, 1992 letter by [Lawrence] Weinig, Acting Ass. Comm. Adjudications," who "found that studying in the U.S. under F-1 may be considered carrying on the vocation if it can be demonstrated that such study is consistent with the . . . ministerial vocation and provided that the [minister] continues to perform the duties of a minister of religion." According to the cited letter, the alien's studies must not interrupt the alien's continued religious duties. 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). Thus, an alien student, whose studies prevent full-time work in the vocation or occupation, is not *continuously* carrying on the vocation or occupation.

We find no conflict between Mr. Weinig's letter and the precedent set by *Matter of Varughese*. Even if there were some conflict, letters written by the Office of Adjudications do not constitute official Citizenship and Immigration Services (CIS) policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000). Hence, when interpreting policy, binding precedent decisions carry greater weight than letters from immigration officials.

Counsel continues:

Although it may be said that the beneficiary could not be considered a "professional" yet during the nine month period she was working as a Religious Student Advisor (Bible College) prior to her graduation, the regulations only require that the beneficiary 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] does *not* state that the beneficiary must have already been a "professional," . . . only that the beneficiary has been performing "professional work" for the past two years.

As noted above, the regulations define "professional capacity" as requiring a bachelor's degree. When asked for clarification, the petitioner reaffirmed the assertion that the position requires, at a minimum, a bachelor's degree. This assertion conflicts irreconcilably with the claim that the beneficiary performed the same duties (including setting the curriculum for her then-fellow students) before she received her bachelor's degree.

If the beneficiary was not performing the same duties before she received her degree, then she was not performing those duties throughout the entire qualifying period. If the beneficiary was performing those same duties, then the position demonstrably does *not* require a bachelor's degree, notwithstanding the petitioner's repeated assertions to the contrary. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

Counsel's *ad hoc* contention that "professional work" does not require a bachelor's degree, because it is not work in a "professional capacity," is neither corroborated nor credible. This contention requires one to presume that the beneficiary performed exactly the same duties from 1999 to 2001, and that these duties did not require a bachelor's degree until the moment that the beneficiary obtained that degree, at which time the degree became necessary for her to continue the work that she had already been doing. Either the beneficiary was not qualified for the position in 1999, or else the petitioner initially misrepresented the necessary minimum qualifications for that position (counsel apparently favoring the latter interpretation).

Counsel asserts that, even if the proffered position does not qualify as "professional," the beneficiary still qualifies as a worker in a religious occupation. This does not resolve the above credibility issues raised by the petitioner's previous insistence that the position is, in fact, "professional," nor does it take into account the fact that, in 1999 and early 2000, the petitioner worked only part-time, her studies interrupting the continuity of her work.

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.