



U.S. Citizenship
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: AUG 17 2005
WAC 03 207 54701

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.

Mari Johnson

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 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 its "Director of Christian Education/Pastoral Assistant." 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 visa petition, that the petitioner had the ability to pay the proffered wage or that it had extended a qualifying job offer to the beneficiary.

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 first issue 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 July 8, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a "Director of Christian Education/Pastoral Assistant" throughout the two-year period immediately preceding that date.

In its letter of June 29, 2003, the petitioner stated that the beneficiary has been working as director of Christian education/pastoral assistant with the petitioning organization since January 1999 pursuant to an R-1 visa and has been pursuing his master's degree in divinity at the KPCA Presbyterian Theological Seminary since August 1998. The petitioner submitted copies of Forms W-2, Wage and Tax Statements, reflecting that it paid the beneficiary \$14,400 in 2001 and \$16,200 in 2002. The petitioner also submitted copies of the beneficiary's Forms 1040A, U.S. Individual Income Tax Returns, for 2001 and 2002; however, these forms are not signed or dated and do not reflect that they were filed with the Internal Revenue Service (IRS).

In response to a request for evidence (RFE) dated August 28, 2003, the petitioner stated that the beneficiary worked 38-40 hours per week and that he received a monthly salary of \$1,500. His duties, according to the petitioner, included "teaching Bible study classes and cell groups, assisting with worship services, selecting and developing Christian education curriculums and materials, coordinating worship ministry and organizing special praise services, and assisting the pastor with pastoral care and congregational visitations." The petitioner submitted a weekly work schedule, which reflects that the beneficiary worked approximately 36 hours per week. The petitioner also submitted unsigned and undated copies of California Employment Development Department (EDD) Forms DE-6, Quarterly Wage Reports, for the quarters ending December 2002 through September 2003, reflecting that it paid the beneficiary \$4,050 in wages in each of the reported quarters.

In response to a second RFE dated April 29, 2004, the petitioner reiterated that it paid the beneficiary \$1,500 per month for his services. The petitioner also submitted copies of statements from the IRS verifying that the beneficiary filed his 2001 and 2002 income tax returns reporting the wages reflected on the Forms W-2 received from the petitioner. Counsel stated that although the director also requested an official record of a tax return filed in 2003, the IRS would not have the records available until August of 2004, therefore the petitioner was unable to comply with the director's request. Although the record does not contain a statement by the IRS regarding the availability of the 2003 tax return, it reflects that the beneficiary completed a Form 4506, Request for Copy or Transcript of Tax Form, requesting this return along with his 2001 and 2002 returns. Nevertheless, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). There is nothing in the record demonstrating that the petitioner sought to obtain or submitted the certified IRS tax record after August 2004.

In its letter of November 19, 2003, responding to the director's August 28, 2003 RFE, the petitioner stated that it employed 13 full-time and part-time employees. The petitioner submitted a copy of its year 2000 Form 990, Return of Organization Exempt from Income Tax. Part V of the tax return reflects that the petitioner reported it

employed two full-time employees (the pastor and assistant pastor), one part-time employee (preacher), and six part-time uncompensated directors designated as "officers, directors, trustees and key employees." The director determined that, based on this Form 990 and a copy of the 1999 return submitted in support of a previous petition filed by the petitioner on behalf of the beneficiary (WAC 98 109 50629), that the beneficiary's "alleged" compensation in the proffered position was comparable to that of the part-time preacher and reflected that the beneficiary was not engaged full-time as the petitioner's "Director of Christian Education/Pastoral Assistant."

The director's determination is without a substantive basis. Nothing in the record suggests that the petitioner considered the position of "director of Christian education/pastoral assistant" as equivalent to that of a minister and therefore deserving of comparable pay. We do note however, that Part II of the Form 990 reflects "Other salaries and wages" of only \$9,300.

Additionally, although the petitioner stated that the beneficiary's salary was \$1,500 per month, or \$18,000 per year, the record reflects that it has never paid the beneficiary more than \$16,200 per year. The beneficiary's 2001 W-2 and Form 1040A reflect that the petitioner paid him \$14,400. The petitioner submitted no evidence to explain this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the work schedule showing that the beneficiary worked 36 hours per week, a salary of \$18,000 per year is approximately \$9.62 per hour. Based on reported wages of \$14,400 in 2001 and \$16,200 in 2002 and 2003, the beneficiary worked approximately 29 hours per week in 2001 and 32 hours per week in 2002 and 2003. Assuming that the beneficiary worked the 38 to 40 hours per week that the petitioner indicated, his wages reflect that he worked approximately 30 to 32 hours in 2001 and 34 to 36 hours in 2002 and 2003.

Consistent with the requirements of the U.S. Department of Labor's Bureau of Labor Statistics and other regulations pertaining to employment-based visa petitions, Citizenship and Immigration Services (CIS) holds that employment of less than 35 hours per week is not full time employment. Part-time employment is not qualifying experience for the purpose of this employment-based visa petition.

The evidence does not establish that the beneficiary was engaged in full-time employment as a director of Christian education/pastoral assistant throughout the two years immediately preceding the filing of the visa petition.

On appeal, counsel asserts that neither the statute nor the regulation require that prior work experience must be full-time and paid employment, and that such a rule established by CIS requires compliance with the Administrative Procedures Act (5 U.S.C. § 555, *et seq.*) and was specifically rejected by the House of Representatives during hearings on the bill.

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 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.

On appeal, the petitioner submitted no other evidence of the work performed by the beneficiary during the qualifying two-year period.

The evidence is insufficient to establish that the beneficiary was continuously engaged in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition.

The second issue on appeal is whether the petitioner 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.

As evidence of its ability to pay the proffered wage of \$1,500 per month, the petitioner submitted a copy of its 2000 Form 990. However, as this tax return precedes the date the petition was filed, it has no probative value of the petitioner's ability to pay the proffered wage as of July 8, 2003, the filing date of the petition. The petitioner also submitted copies of its January to July 2003 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.

On appeal, counsel asserts that, as it has paid the beneficiary in the past, the petitioner has demonstrated its ability to pay the proffered wage. However, as discussed previously, the evidence does not indicate that the petitioner has ever paid the beneficiary the proffered wage of \$1,500 per month. Evidence that the petitioner has paid the beneficiary in a lesser amount does not satisfy the requirements of the regulation.

Counsel asserts on appeal that CIS used "a general regulation applicable to all employment-based petitions and failed to recognition [sic] that in the I-360 context requiring of audited financial statements makes no sense. Churches and religious organizations do not need audits." Nonetheless, the regulation at 8 C.F.R. § 204.5(g)(2) does not distinguish between churches and other organizations seeking immigration benefits for employment-based visa petitions.

The evidence does not establish that the petitioner had the continuing ability to pay the proffered wage as of the date the petition was filed.

The third issue is whether the petitioner 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 director determined that as the petitioner has not established that it employed the beneficiary on a full-time basis during the qualifying two-year period, it has not established that it has extended a qualifying job offer to the beneficiary. We withdraw this statement by the director. This petition seeks to prospectively employ the beneficiary. If the petitioner does not currently employ the beneficiary on a full-time basis, this does not mean it does not intend to do so.

The record reflects that the petitioner expects the beneficiary to work approximately 38 to 40 hours per week and that it will compensate the beneficiary at the rate of \$1,500 per month. However, as discussed below, the record does not reflect that the petitioner has established that the position qualifies as that of a religious worker. Therefore, the evidence does not establish that it has extended a qualifying job offer to the beneficiary.

Beyond the decision of the director, the petitioner has not established that the position qualifies as that of a religious worker. According to the regulation at 8 C.F.R. § 204.5(m)(1), the alien must be coming to the United States at the request of the religious organization to work as a religious worker.

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 would reasonably be expected to perform services 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. The lists of qualifying and nonqualifying occupations derive from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

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 proffered position is that of director of Christian education and pastoral assistant. As noted above, the petitioner stated in its letter of November 19, 2003, that the duties of the position included "teaching Bible study classes and cell groups, assisting with worship services, selecting and developing Christian education curriculums and materials, coordinating worship ministry and organizing special praise services, and assisting he pastor with pastoral care and congregational visitations." The weekly schedule provided by the petitioner does not indicate any duties that relate to selecting and developing Christian education curricula or materials. Further, the beneficiary's role in "assisting" and "coordinating" worship service is unclear. The record does not reflect that the position existed with the petitioning organization prior to the beneficiary assuming the role.

Further, the petitioner submitted no evidence that the position of director of Christian education or pastoral assistant is defined and recognized by its governing body, that the position is traditionally a permanent, full-time, salaried occupation within its denomination.

The record does not establish that the proffered position qualifies as that of a religious worker within the meaning of the statute and regulation. 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.