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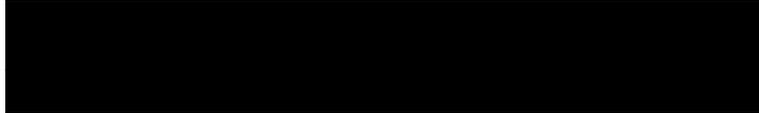
Office: CALIFORNIA SERVICE CENTER

Date:

AUG 24 2005

IN RE:

Petitioner:
Beneficiary:



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:



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.

Ma Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a Hindu center and temple. 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 priest. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a priest immediately preceding the filing date of the petition, that the petitioner made a qualifying job offer to the beneficiary and that the petitioner has the ability to pay the beneficiary.

The petitioner, through counsel, submits a timely appeal.

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 concerns the beneficiary's employment during the requisite two-year period. 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 experience in the religious vocation, professional religious work, or other religious work. The petition was filed on February 27, 2003. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a priest throughout the two years immediately prior to that date.

The Form I-94, Arrival and Departure Record, indicates that the beneficiary initially entered the United States on August 26, 2001 as an R-1 nonimmigrant with authorization to remain in the United States until August

25, 2004. Thus, it appears that the beneficiary's experience in the United States alone is insufficient to establish his eligibility.

In a letter from [REDACTED] president of the petitioning center, Mr. [REDACTED] describes the beneficiary's employment prior to coming to the United States. He states:

[The beneficiary] is a fully ordained Hindu Priest or "Pandit" as they are called in the Hindu language. He was the Priest of the Nawda Para Parishad Temple, in the Ariadaha district of Kolkata, India, from June 1996 to August 2001, before joining us at the Hindu Temple, here in Chatsworth, California.

The petitioner also submitted a letter dated September 15, 2001, from [REDACTED] on untranslated letterhead, which indicates that the beneficiary was the "purohit" since June 5th 1996. It is not clear from the record whether [REDACTED] is associated with the Nawda Para Parishad Temple, the petitioner's previous employer in India. Without a proper translation of the letterhead¹ or other evidence to establish that [REDACTED] is an official at the Nawda Para Parishad Temple, this letter cannot be considered as evidence of the petitioner's employment in India during the requisite period. We further note that neither statement gives any indication that the beneficiary's employment was full-time and that the beneficiary was compensated for his work. As it relates to the beneficiary's employment with the petitioner, the petitioner also fails to indicate whether the beneficiary's work in the United States during the requisite period was full-time and compensated.

On November 25, 2003, the director requested the petitioner to submit further evidence to establish that the beneficiary had the continuous two years of full-time experience as a priest for the period immediately prior to the filing of the petition. In response, the petitioner provided copies of the beneficiary's 2001, 2002, and 2003 Form 1099-MISC and Form 1040 which indicate that the beneficiary earned \$2,100, \$7,250, and \$11,768.22, respectively, for his work for the petitioner. However, although the petitioner resubmitted the previous letter from [REDACTED] as well as a new letter from [REDACTED] regarding the beneficiary's ordination, the petitioner failed to submit any documentation related to the beneficiary's full-time, paid employment prior to September 2001.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary had the required two-years of qualifying experience prior to filing the petition. The director specifically noted that the petitioner failed to establish that the beneficiary's experience in India as a "[p]urohit is analogous to the proffered position of '[p]andit,'" and that the petitioner failed to establish the beneficiary's full-time paid employment during the requisite period.

On appeal, counsel states that the "petitioner failed to explain . . . that the Hindi word 'Purohit,' is the same as 'Pandit,' or Priest. The word can be used interchangeably, and means exactly the same thing." To support his statement, counsel provides a copy of a definition from *The Concise Dictionary of the English Language (Anglo-Hindi Edition)* and an affidavit from Mr. [REDACTED] who is identified on appeal as the Secretary of

¹ The regulation at 8 C.F.R. § 103.2(b)(3) states that any document containing foreign language shall be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

² The translator appears to have translated the signature on this document as "[REDACTED] For the sake of consistency, we refer to the author as [REDACTED]

Nowdapara Hindu Parishad Temple, attesting to the fact that the terms "Priest," "Pandit," and "Purohit," all refer to the same position. We find the affidavit and the definition provided by counsel, in addition to evidence we have taken notice of on appeal,³ sufficiently establishes that the beneficiary's prior experience in India as a "purohit," is the same position as the position being offered by the petitioner and performed by the beneficiary during the requisite period in the United States. However, although we withdraw the director's finding in this regard, the petitioner has failed to overcome the director's finding regarding the issue of whether the beneficiary has worked in a full-time, compensated position, and whether the petitioner has established its ability to pay the proffered wage.

As discussed previously, because evidence submitted in support of the petition did not adequately document that the beneficiary's work for the petitioner and his work prior to coming to the United States was full-time and compensated, the director, in his request for evidence, instructed the petitioner to submit "remuneration... monetary payment, such as W-2 forms, pay stubs, or other items showing the beneficiary received payment...you may also show payment through other forms of remuneration." In response, the petitioner submitted evidence related to the beneficiary's work for the petitioner, but did not submit any documentation related to the beneficiary's full-time, paid employment prior to September 2001 when the beneficiary resided in India.

With respect to the director's finding that the beneficiary has not continuously worked in a full-time, compensated position during the requisite period, on appeal the petitioner submits tax and salary information related to the beneficiary's employment in India during the requisite period. The petitioner also submits an affidavit from the petitioner's prior employer indicating the salary amounts paid to the beneficiary from 1998 to July 2001. Because the director had given the petitioner the opportunity to submit this evidence prior to the decision, the key question is not whether such evidence exists but whether the beneficiary submitted the evidence when asked; the submission on appeal does not overcome the petitioner's failure to submit the evidence when first requested to do so. We need not consider such evidence on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The remaining issue is whether the petitioner 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.*

In instances where the petitioner has established that it has actually paid the beneficiary, such evidence is prima facie evidence of the petitioner's ability to pay the proffered wage. In this case, however, although the petitioner has submitted evidence on appeal that it has paid the beneficiary, there is no evidence that the petitioner has paid the beneficiary the amount indicated as being the proffered wage. Specifically, while the petitioner indicated that it will pay the beneficiary \$1800 per month (a yearly salary of \$21,600) and will

³ See <http://hinduism.about.com/library/weekly/extra/bl-glossary-p.htm> and <http://members.tripod.com/~tanmoy/glossary.html> which indicate that the term "purohit" means a priest.

provide the beneficiary and his family “with accommodation, pay his utility bills as well as provide him and his family with basic health and life insurance,” the beneficiary’s taxes show he was paid only \$2,100, \$7,250, and \$11,768.22 for his work for the petitioner during 2001, 2002, and 2003, respectively.

Further, the petitioner has not submitted any of the required types of evidence to establish its ability to pay. 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. Although the petitioner is free to submit other kinds of documentation, such submission is considered *in addition to*, rather than *in place of*, the types of documentation required by the regulation. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). On November 25, 2003, the director specifically requested this evidence of the petitioner’s ability to pay. In response, the petitioner submitted a document entitled “Annual Financial Statement” for the period ending December 31, 2003. This financial document is a one-page list of expenditures, has been signed by Mr. Lakhanpal in his capacity as president of the petitioning entity, does not appear to have been prepared or signed by an auditor, and may not be considered an audited statement.

On appeal, the petitioner submits new financial statements for 2003, which appear to have been audited by an independent, certified public accountant. However, as previously noted, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano* at 764; *Matter of Obaigbena* at 533 (BIA 1988). We emphasize that the director did not request some vague class of documentation, but rather specific documents, such as “copies of annual reports, federal tax returns . . . or audited financial statements,” leaving no ambiguity as to what documents were required. Accordingly, we need not consider the pay stubs on appeal. It should be noted that even if we could ignore the precedent set in *Soriano*, the statements submitted on appeal are not sufficient to establish the petitioner’s ability to pay from the time of filing as they only cover the petitioner’s 2003 finances.

While the determination of an individual’s status or duties within a religious organization is not under the purview of Citizenship and Immigration Services (CIS), the determination as to the individual’s qualifications to receive benefits under the immigration laws of the United States rests within 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).

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.