

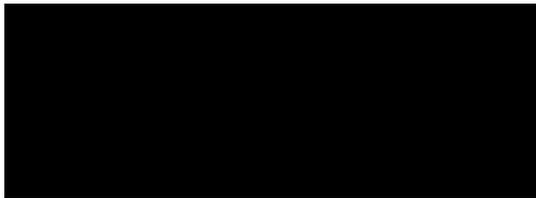
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U.S. Department of Homeland Security
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U.S. Citizenship
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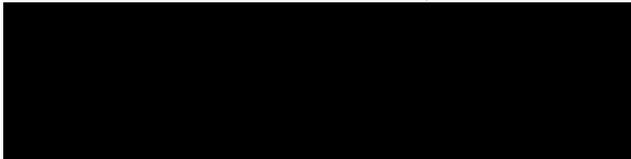
FILE: [REDACTED]
WAC 97 156 53309

Office: CALIFORNIA SERVICE CENTER

Date: FEB 17 2005

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)



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.

Mai Johnson

ca Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. On further review, the director determined that the petitioner was not eligible for the visa preference classification. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke the approval of the preference visa petition and his reasons therefore, and subsequently exercised his discretion to revoke the approval of the petition on July 3, 2002. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen or reconsider. The motion to reopen will be granted; the petition will be denied.

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 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 petition.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

The petitioner's appeal was summarily dismissed for failing to state a basis for the appeal. Counsel indicated on the Form I-290B that a separate brief and/or evidence would be submitted within 30 days of submission of the appeal. At the time of the AAO's previous decision, no further documentation had been received.

On motion, counsel submits evidence that a brief was timely filed and a copy of the brief now appears in the record. This evidence is sufficient to reopen the AAO's decision and consider the appeal on the merits.

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.*

On motion, counsel submits 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 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 May 16, 1997. Therefore, the petitioner must establish that the beneficiary was continuously working as a pastoral assistant throughout the two-year period immediately preceding that date.

In its letter accompanying the petition, the petitioner stated that the beneficiary had been serving in the proffered position on a volunteer basis since December 1994. The petitioner indicated that the beneficiary's duties included developing and writing teaching articles from the pastor's sermon notes, tapes and discussions; assisting in the development of a network of Christian pastors; developing and reporting on the church's mission work; researching and selecting hymns for Sunday services; rehearsing with musicians and singers; leading praise and worship sessions of the services; meeting with the senior pastor to plan services; and preparing materials and supervising the development of the petitioner's music ministry students.

The petitioner submitted a copy of a February 1997 church newsletter; however, the document does not indicate that the beneficiary was involved in its writing or publication. Further, a single document is insufficient to establish that the beneficiary was working for the petitioner on a permanent or full-time basis.

In its October 22, 1997 letter responding to the director's request for evidence (RFE), the petitioner stated that the beneficiary "has been supported by donations of our Church members through our Church Benevolent Fund without any obligation or requirement, as have other Church members . . . She has lived with Church members and with her sister during this time." However, the petitioner submitted no evidence to substantiate this statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner submitted no other documentary evidence to corroborate the beneficiary's work with the church and submitted no documentary evidence of her financial support during the qualifying two-year period.

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.

In response to the director's Notice of Intent to Revoke, the petitioner submitted a statement from the beneficiary in which she stated that she worked full-time with the petitioner beginning at the end of 1994, and that she spends over 40 hours per week performing her job. The petitioner's pastor also stated that the beneficiary worked ten times the number of hours of that of the average volunteer. However, the petitioner submitted no corroborating documentary evidence of the beneficiary's work with the petitioning organization. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

On appeal, counsel asserted that the beneficiary's dedication to her work is on a full-time basis and rises beyond that of an "ordinary volunteer." However, counsel submitted no documentary evidence on appeal or on motion to establish that the beneficiary was not dependent upon secular employment for her support during the qualifying two-year period.

The petitioner has not established that the beneficiary was continuously employed in a qualifying religious occupation or vocation for two full years preceding the filing of the visa petition.

Beyond the decision of the director, and as noted in the AAO's prior decision, the petitioner has not 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.

The petitioner stated that it would pay the beneficiary a salary of \$1,500 per month. To establish its ability to pay this wage, the petitioner submitted copies of its monthly checking account statements for the period of April through September 1997, and copies of its income and expense balance worksheets.

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. On motion, the petitioner submits copies of more recent bank statements and financial worksheets, and copies of Forms W-2, Wage and Tax Statement, for the years 2001 and 2002, reflecting the wages that it paid to the beneficiary. However, the petitioner submitted none of the required types of evidence to establish that it had the ability to pay the beneficiary the proffered wage as of May 16, 1997, the date the petition was filed. This deficiency constitutes an additional ground for denial of the petition.

Additionally, beyond the director's decision, the petitioner has not established that the position qualifies as that of a religious worker. Pursuant to 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 in a religious occupation.

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.

While the duties of the position appear to be religious in nature, the petitioner submitted no evidence that the position existed within the petitioning organization prior to the beneficiary assuming the role. Further, as the

beneficiary served in an unpaid capacity for more than three years, the petitioner has not established that the position is traditionally a permanent, full-time salaried position within the organization. Additionally, the petitioner has not shown that the position of pastoral assistant is defined and recognized by the petitioner's governing body.

The evidence fails to establish that the position is that of religious worker within the meaning of the statute, and this failure constitutes an additional ground for denial of the petition.

Additionally, as the petitioner failed to establish that the proffered position qualifies as that of a religious worker, it also failed to establish that it has extended a qualifying job offer to the beneficiary, as noted in our previous decision. This forms an additional ground for denial of the petition.

In its previous decision, the AAO also stated that the petitioner had not established that the beneficiary was qualified for the position within the organization. We withdraw that statement as the evidence sufficiently establishes the beneficiary's qualifications for the position. However, as the petitioner has failed to establish that the beneficiary worked continuously in a qualifying religious occupation for two full years prior to the filing of the visa petition, that the position qualifies as that of a religious worker within the meaning of the statute, or that it had the ability to pay the beneficiary the proffered wage as of the date the petition was filed, the petition must be denied.

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 decision of the director will be affirmed. The petition is denied.

ORDER: The petition is denied.