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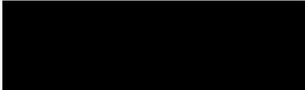
**U.S. Citizenship
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Office: CALIFORNIA SERVICE CENTER

Date: JUN 21 2005

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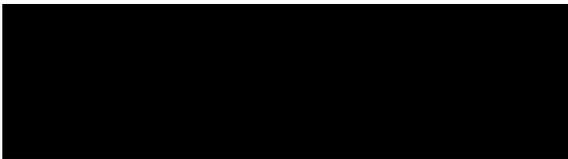
Petitioner:



Beneficiary:

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:



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, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied this employment-based immigrant visa petition on June 21, 2004. The petition 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 lay pastor. 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 or that it had the ability to pay the proffered wage.

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 was continuously engaged in a qualifying vocation or occupation for two full years immediately preceding 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 August 12, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a lay pastor throughout the two-year period immediately preceding that date.

In its letter of August 7, 2003, the petitioner stated:

In 1997, [the beneficiary] received a position at the Arizona Korean Presbyterian Church as the Music Director, where he served through May 2001. In June 2001, as a result of his dedicated service and his professional experience, he was given a promotion to the Minister of Music. As the Minister of Music, [the beneficiary] was given the opportunity to get [sic] become involved with the traditional religious functions of ministering the Word of God. It was in this capacity that [he] developed into a fine religious counselor, leader and teacher. [The beneficiary] has been serving at the Arizona Korean Presbyterian Church in valid R-1 status through July 2003 when he became a member of our church staff . . . It is on the basis of this professional experience that we extend our invitation to [him] to continue to serve as a Lay Pastor for our Christian Music Ministries Department.

The petitioner submitted a copy of a year 2002 Form W-2, Wage and Tax Statement, issued to the beneficiary by the Arizona Korean Presbyterian Church, reflecting that it paid the beneficiary \$24,000 in wages. The petitioner also submitted copies of checks made payable to the beneficiary by the Arizona Korean Presbyterian Church in the amount of \$1,847 for January through June 2003, and by the petitioner in the amount of \$1,600 for the month of July 2003. With the petition, the petitioner submitted no evidence from the Arizona Korean Presbyterian Church explaining the nature of the job that the beneficiary performed with that organization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In a request for evidence (RFE) dated August 19, 2003, the director instructed the petitioner to “[p]rovide a breakdown of duties performed in the religious occupation for an average week. Include the employer’s name, specific job duties, [and] the number of hours worked.” The director also requested the petitioner to “differentiate[] the beneficiary’s proffered position as ‘Lay pastor’ from a Head Pastor in terms of work

duties, minimum education, training and experience necessary to do the job.” The director also questioned whether the position of “lay minister” required ordination.

In response, the petitioner stated:

Beneficiary worked as the Minister of Music in August 12, 2001, and continued in this capacity through the end of June 2003. In July 2003, the beneficiary received valid R-1 status from the Petitioner and has continued in the capacity of a [REDACTED] through August 12, 2003 . . . Since joining our church in July 2003, [the] beneficiary has been our [REDACTED]. He has preached before our congregation, and has maintained regular worship service throughout the week. In addition, he has led Bible group studies . . . [and] has also assisted with the main worship service every week by leading the main prayer.

In response to the director’s request to distinguish between a lay pastor and head pastor and whether ordination is required for the lay position, the petitioner stated:

[REDACTED] [sic] do not require ordination; however, they do require [sic] to be commissioned by the Presbytery . . . When a presbytery . . . determines that its strategy for mission in a local church requires it, and after additional instruction deemed necessary . . . a presbytery may authorize a commissioned lay pastor to perform any or all of the following functions . . .

- (1) Administer the Lord’s Supper.
- (2) Administer the Sacrament of Baptism
- (3) Moderate the session of the congregation under the supervision of and when invited by the moderator of the session appointed by the presbytery.
- (4) Have a voice in meetings of presbytery.
- (5) Have a vote in meetings of the presbytery . . .
- (6) Perform a service of Christian marriage . . . when allowed by the state.

In response to the RFE, the petitioner submitted a copy of a weekly schedule outlining the beneficiary’s duties as minister of music with the Arizona Korean Presbyterian Church. The document is unsigned, and it is unclear who prepared it. The schedule reflects that, while the beneficiary apparently performed some counseling, his primary job responsibilities were music preparation, performance and composition.

The petitioner also submitted a daily schedule of the duties of the proffered position with the petitioning organization. These duties include leading worship, visiting church members and holding cell group leadership meetings. The primary duty identified is a generic category of “performing the tasks set forth by Sr. Pastor.” The schedules clearly reflect that the duties performed by the beneficiary as a lay pastor with the petitioner are significantly different from those performed by the beneficiary as a music minister with the Arizona Korean Presbyterian Church.

In another RFE dated March 2, 2004, the director instructed the petitioner to:

Explain how the beneficiary's former work as a Minister of Music differs with [sic] the position of Lay Pastor in terms of description of the work to be done, specific job duties, level of responsibility, number of hours per week performing the work duties and the minimum education, training, and experience necessary for the job.

In response the petitioner stated:

The Minister of Music role differs from the role of a Lay Pastor in the emphasis of the vehicle within which the Word of God is proclaimed. The vehicle used by the Minister of Liturgy is music i.e. vocals and instrument based, while the vehicle used by the Lay Pastor is through the spoken word. The second difference is that a Lay Pastor is commissioned by the Presbytery and the commission allows the Lay Pastor to administer sacraments. The commissioned Lay Pastor can perform a service of Christian marriage when invited by the session or other responsible committee, and when allowed by the State. The Minister of Music is not allowed to perform this function. Other than this difference, the duties are similar.

The director determined that the petitioner had not established that the beneficiary had worked continuously in "the same type of work as the proffered position" for the two years immediately prior to the filing of the visa petition.

Counsel takes issue with this determination on appeal, arguing:

This is impermissible rulemaking on the part of the Service. The statute is silent as to requiring that the continuous experience be in [the] same position. The statute makes reference to performing the vocation, professional work, *or other work* [Emphasis added by counsel]. Adding a requirement of the occupation being the same position would be plainly inconsistent with this regulation.

Counsel's argument is without merit. The statute clearly states that the alien must be seeking entry into the United States in order to work for the organization in a religious vocation or occupation and "has been carrying on *such* vocation, professional work, or other work continuously for at least the 2-year period" [Emphasis added] immediately preceding the filing of the visa petition. The regulation at 8 C.F.R. § 204.5(m)(1) states that the religious worker "must have been performing *the* vocation, professional work, or other work continuously . . . for at least the two-year period immediately preceding the filing of the petition." [Emphasis added].

Counsel further states:

The only reading of the statute that would allow for the enforcement of the rule the Service is intending to enforce would be if the statute had read "performing the vocation, professional or other work." Read this way, the statute [sic] would suggest that the experience would be required to come from a singular position. However, the language of the statute specifically

carves out an exception for other work relating to the religious position. A plain reading of the statute suggests that the work performed prior to the date the petition was submitted, must only be related to the religious position.

Once counsel rereads the requirements of the statute and regulation, she will realize her argument is unfounded as she clearly agrees that the CIS interpretation of the governing law comports with the plain language of both the statute and regulation.

Counsel further asserts that the beneficiary's prior work experience has been in "the same religious position" as the proffered job, and that he has merely been "promoted to a higher position." However, the evidence does not support counsel's assertions. While the beneficiary may have been promoted, the promotion was to a different position altogether. The evidence does not reflect that a prerequisite for being a lay pastor is service as a music minister nor does it reflect that any lay pastor can serve as music minister. And while the beneficiary's experience as a music minister may have given him some of the necessary experience for which to qualify for and receive the position of lay pastor, the evidence indicates that more is required than simply excelling at the position of music minister. These additional requirements include obtaining a commission and, if necessary, additional training.

The evidence is insufficient to establish that the beneficiary was continuously employed as a lay pastor for two full years prior to the filing of the visa 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.

The petitioner indicates that it will pay the beneficiary \$1,700 per month. As evidence of its ability to pay this salary, the petitioner submitted a copy of its January 2003 monthly checking account statement and a copy of a July 27, 2003 check made payable to the beneficiary in the amount of \$1,600. In response to the director's RFE of August 19, 2003, the petitioner submitted copies of a "Statement of Revenues and Expenses" and a financial report for the year 2002, and for the period ending August 3, 2003. Although the petitioner stated the documents were audited, the evidence does not reflect when they were allegedly audited or by whom.

On appeal, the petitioner submits copies of its monthly checking account statements for the period June 2003 through May 2004.

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.

Counsel asserts on appeal that the petitioner’s “ability to pay is evident in the fact that the beneficiary continues to receive his salary as he is in [a] valid R-1 status through the petitioning church.” However, the petitioner submitted no evidence that it has continued to pay the beneficiary the proffered salary as of the filing date of the petition. The petitioner submitted a copy of a single check made payable to the beneficiary in July 2003, which did not reflect that it had been canceled by the bank. The copy of the August 2003 bank statement submitted by the petitioner on appeal reflects that a check with that number and in that amount was cashed in August 2003. The petitioner did not, however, submit similar evidence subsequent to July 2003. The petitioner submitted no evidence of a Form W-2 that it issued to the beneficiary to reflect wages paid by it in 2003.

The evidence submitted is insufficient to establish that the petitioner had the continuing ability to pay the proffered wage as of the filing date of the visa petition.

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.