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U.S. Citizenship
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Services

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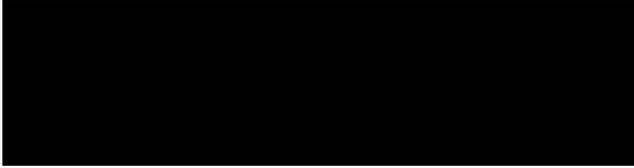
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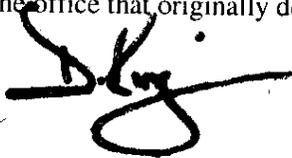
IN RE: Petitioner: 
Beneficiary: 

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 employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The director rejected a subsequent appeal as untimely filed. However, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2), the director treated the rejected appeal as a motion to reconsider, and affirmed his previous decision in a notice of decision dated May 16, 2003. The petitioner's appeal of the director's decision of May 16, 2003 was returned for signature. The properly signed appeal was received by the service center on June 28, 2003, 43 days after the decision was issued.

To properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). Therefore, the petitioner's appeal of the director's decision of May 16, 2003 was untimely filed. However, the director improperly rejected the petitioner's first appeal. The 33rd day of the deadline for the petitioner to file its appeal was on Sunday, a non-work day for the service center. The appeal was received by the service center on the first workday following the 33rd day after proper service to the petitioner. Therefore, the petitioner's first appeal was timely filed and we will consider that appeal on the merits.

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 missionary. The director determined that the petitioner had not established that it qualified as a bona fide nonprofit religious organization. The director further determined that the petitioner had not established that the position qualified as that of a religious worker.

On appeal, counsel submits a brief and copies of previously submitted 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 regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

(3) *Initial evidence.* Unless otherwise specified, each petition for a religious worker must be accompanied by:

(i) Evidence that the organization qualifies as a nonprofit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases, evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organization.

In its April 10, 2001 letter accompanying the petition, the petitioner acknowledged that it had not received a tax exemption letter from the Internal Revenue Service (IRS), as the petitioner was in the process of filing for tax-exemption under section 501(c)(3) of the Internal Revenue Code (IRC). The petitioner submitted a copy of its articles of incorporation and by-laws and a statement from the individual who was assisting the petitioner with its tax exemption paperwork.

To meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(A), a copy of a letter of recognition of tax exemption issued by the Internal Revenue Service (IRS) is required. In the alternative, to meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B), a petitioner may submit such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code (IRC) of 1986 as it relates to religious organizations. This documentation includes, at a minimum, a completed IRS Form 1023, the Schedule A supplement, if applicable, and a copy of the organizing instrument of the organization, which contains a proper dissolution clause and which specifies the purposes of the organization.

As the organization does not have a letter from the IRS granting it tax-exempt status under section 501(c)(3) of the IRC, it can submit evidence to comply with 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting the documentation that the IRS would require to determine that the entity is a religious organization.

In a request for evidence (RFE) dated October 23, 2001, the director instructed the petitioner to submit evidence of its tax-exempt status under section 501(c)(3) of the IRC. In her cover letter accompanying the response, counsel outlined the IRS requirements to receive a tax-exemption under section 501(c)(3), and purported to include evidence of how the petitioner met those requirements. Counsel, however, failed to provide all of the evidence required by 8 C.F.R. § 204.5(m)(3)(i)(B).

The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operations for Citizenship and Immigration Services (CIS), *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003):

- (1) A properly completed IRS Form 1023,
- (2) A properly completed Schedule A supplement, if applicable,
- (3) A copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization, and
- (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

The above list is consistent with the regulatory requirement at 8 C.F.R. § 204.5(m)(3)(i)(B), cited above. The memorandum specifically states that the above materials are, collectively, the “minimum” documentation that can establish “the religious nature and purpose of the organization.” Thus, for example, a petitioner cannot meet this burden by submitting only its articles of incorporation. Also, obviously, it is not enough merely for the petitioner to *submit* the documents listed above. The *content* of those documents must establish the religious purpose of the organization.

While we recognize that Mr. Yates’ memorandum is dated after the petitioner’s appeal, the petitioner failed to submit a properly completed IRS Form 1023, which is specifically required by the regulation.

On appeal, counsel asserts that she “thoroughly analyzed the evidence being submitted to show that it met the four-part requirement of the IRS.” Nonetheless, counsel failed to submit the completed IRS Form 1023, required by the IRS and the regulation at 8 C.F.R. § 204.5(m)(3)(i)(B).

The evidence does not establish that the petitioner is a bona fide tax-exempt nonprofit religious organization.

The director also determined that the petitioner had not established that the position qualified 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.

The director determined that, as the position of missionary within the petitioning organization does not require completion of specific religious training, it cannot qualify as a religious occupation for purposes of this visa preference classification. We withdraw this statement by the director, as the regulation does not require specific religious training for qualification in this religious occupation.

However, counsel’s assertion that because the position is that of “missionary,” it is, by the terms of the regulation, a religious occupation, is without merit. Merely because a position carries a certain job title does not mean that it necessarily qualifies as a religious occupation within these proceedings. We must look at the duties of the position to determine if the position meets the statutory and regulatory definition of a religious occupation.

Further, while the determination of an individual's status or duties within a religious organization is not under CIS's purview, the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests with 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).

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.

In its April 10, 2001 letter, the petitioner stated that the position of missionary is a traditional religious position within its organization.

Traditionally the Christian church has carried the religious message as well as medical and educational aid to non-christian lands in a wide effort to convert people. Such a need exists within our own country to spread the religious message of Jesus the Christ, as well as feed and provide medical aid to the needy. As such, we have added specific duties to our Missionary position. This will ensure that our objectives, (as espoused by Jesus in the feeding of the five thousand), to feed not only the soul but also the body is realized. In this regard, our Missionary goes to various programs to help feed the hungry as well as minister to their souls.

The petitioner submitted a copy of a what it describes as its Easter program, showing that the beneficiary participated in the program by giving the welcoming remarks. With the petition, the petitioner submitted no other evidence of the duties of the proffered position.

In response to the director's RFE, the petitioner stated that the duties of the missionary are as follows:

The Missionary assists in the setting up and operation of a soup kitchen as well as a health fair . . . The Missionary conducts religious house to house and hospital/nursing home worship services . . . She also performs spiritual practices such as prayer, meditation, fasting and other practices that our religious beliefs practice. She prepares and delivers sermons, tells people how to become saved, counsels the sick and the shut-in, as well as teaches others about the Christian life.

The petitioner's articles of incorporation indicate that one of its purposes is to ordain ministers, deacons and missionaries in accordance with the ordinances of the church. The record also reflects that the beneficiary was ordained as a missionary within the petitioning organization in June 1996.

The petitioner submitted no evidence, however, that it has traditionally employed missionaries within its organization on a full-time and salaried basis. The petitioner submitted no evidence that it has compensated the beneficiary for her services with the organization.

The evidence is insufficient to establish that the proffered position is a religious occupation within the meaning of the statute and regulations.

Beyond the decision of the director, the petitioner has not established that the beneficiary was continuously employed in a qualifying religious occupation for two full years immediately preceding the filing of the visa petition. This deficiency constitutes an additional ground for denial of the petition and dismissal of the appeal.

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 April 30, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as a missionary throughout the two-year period immediately preceding that date.

In its letter accompanying the petition, the petitioner stated that the beneficiary had worked as a missionary with the petitioning organization for the past five years. As evidence of the beneficiary's work, the petitioner submitted a copy of the Easter service program as noted above. The petitioner submitted no further evidence that the beneficiary was employed by the petitioner or any other organization during the two years prior to the filing of the visa petition. 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).

In response to the director's request for evidence, the petitioner, in a letter dated December 20, 2001, stated:

For the immediate past 2 years [the beneficiary] has been working continuously with [redacted] which merged with the petitioner] as a Missionary. Her duties are the same as those explained earlier, except for the food program which was only added last year. She has been a member of this organization since 1996, and a Missionary since that time. She is a committed worker and has spend[sic] more than 30 hours a week performing her job.

As evidence of the beneficiary's employment, the petitioner submitted a copy of her missionary identification card and copies of her certificates of ordination. The petitioner also submitted a copy of an August 22, 1995 letter from the [redacted], informing the beneficiary that she has been nominated for her "voluntary Humanitarian Services." As the letter falls outside the two-year qualifying period, it has no evidentiary value in these proceedings.

In her letter accompanying the RFE, counsel stated that the petitioner has no evidence of salaries paid to its workers, and stated that workers received "compensation as the need arose." The petitioner submitted no evidence that the beneficiary was compensated for her services, and submitted no evidence such as verified work schedules or similar documentation, to substantiate the beneficiary's work with the petitioning organization. *Id.*

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.

The record does not establish that the beneficiary was ever compensated for her services to the petitioner and does not establish that she was not dependent upon secular employment for her support during the qualifying two-year period. The petitioner submitted no evidence to indicate how the beneficiary supported herself financially while working for the petitioner.

The evidence does not reflect that the beneficiary was continuously employed in a qualifying religious occupation for two full years prior to the filing of the visa petition.

Further beyond the decision of the director, 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 indicated that it will pay the beneficiary \$250.00 per week. The petitioner submitted copies of unaudited financial statements for the periods ending calendar years 1999, 2000 and 2001.

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. Further, the evidence submitted reflects monetary balances of less than \$3,000 for each of the years for which documentation was provided.

The evidence does not establish that the petitioner has the ability to pay the beneficiary the proffered wage. This constitutes an additional ground for denial of the petition and dismissal of the appeal.

Additionally beyond the decision of the director, the petitioner has not 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 record does not establish that the petitioner has compensated the beneficiary or any other worker within its organization. According to counsel, those who provide their services to the petitioner are compensated “as the need arises.” The record also does not establish that the petitioner has the financial ability to compensate employees with a livable wage. Therefore, the record does not establish that the beneficiary will not be dependent upon supplemental employment or the solicitation of funds for her support.

The petitioner has failed to establish that it has extended a qualifying job offer to the beneficiary, and this failure is another ground for denial of the petition and dismissal of the appeal.

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.