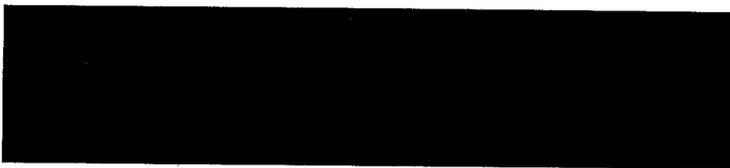




U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: OCT 26 2005
EAC 02 281 54356

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

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 petitioner treated the petitioner's untimely appeal as a motion to reopen, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2), and reaffirmed the denial of the petition. The petitioner filed a timely appeal to this second decision, and the appeal is now before the Administrative Appeals Office (AAO). The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

We note that the record contains a Form G-28, Notice of Entry of Appearance as Attorney or Representative, naming [REDACTED] the petitioner's representative. There is no indication, however, that [REDACTED] is an attorney or that [REDACTED] Consultants is an accredited organization recognized by the Executive Office of Immigration Review. Therefore, there is no provision under 8 C.F.R. § 292 to allow for recognition of [REDACTED] as the petitioner's representative. While we shall consider [REDACTED] statements, we consider the petitioner to be without formal representation.

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 the beneficiary's position qualifies as a religious occupation.

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 sole issue raised by the director is whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The regulation at 8 C.F.R. § 204.5(m)(2) defines "religious occupation" as an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature. Citizenship and Immigration Services 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 director denied the petition because the petitioner "failed to establish that the duties required specific religious training above the level of a congregation member." The director articulated no other basis for denial.

After careful and prolonged consideration of this issue, the AAO finds that the "training" issue has received a disproportionate amount of weight in adjudications of special immigrant religious worker petitions. Obviously, when a given position clearly requires specific training, 8 C.F.R. § 204.5(m)(3)(ii)(D) requires the petitioner to show that the alien possesses that training; but the issue of training should not be a primary factor when considering the question of whether that position relates to a traditional religious function. Of greater importance is evidence showing that churches or other entities within a given denomination routinely employ paid, full-time workers in comparable positions, and that those positions do not embody fundamentally secular tasks, indistinguishable from positions with secular employers.

We note that 8 C.F.R. § 204.5(m)(2) specifically includes missionaries in the list of examples of qualifying religious occupations. Obviously, eligibility cannot hinge on job title alone; otherwise, a secular worker could receive an undeserved visa simply by using a job title chosen from the list of qualifying titles. Nevertheless, the director ought to explain why the beneficiary is not a qualifying missionary. The decision, as it is now written, cannot stand. The director must allow the petitioner the opportunity to demonstrate that the petitioner's denomination routinely employs full-time, compensated missionaries, whose duties generally match those assigned to the beneficiary.

Beyond the above, materials submitted on appeal raise a new question of eligibility. 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 experience in the religious work. The petition was filed on February 9, 2002. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a missionary throughout the two years immediately prior to that date.

On appeal, [REDACTED]

Any missionary employed by [the petitioner] must complete an extensive education and training program consisting of various courses, for a period of not more than 30 months, and not less than 24 months. Upon the successful completion of said education & training, the sponsoree is then employed as a religious worker – in particular, the post of missionary, as in the case of the above named beneficiary.

Elsewhere on appeal, [REDACTED] states “[t]he beneficiary was required to complete her education and training in order to qualify for the job assigned to her.” Thus, [REDACTED] has repeatedly indicated that the beneficiary was not eligible to work as a missionary until after she had completed the course of training. A transcript submitted on appeal indicates that the beneficiary completed the training program on July 5, 2001, and graduated two days later. Thus, the beneficiary completed the program only seven months before the petition’s February 2002 filing date.

Three possibilities arise from the above statements and evidence:

1. If the beneficiary had already been performing essentially the same duties as a missionary before July 2001, then the training obviously was not necessary for the position, and the petitioner raises serious credibility issues by claiming otherwise on appeal.
2. If the beneficiary did not begin working as a missionary until July 2001, then she cannot meet the two-year experience requirement as of the February 2002 filing date.
3. If the beneficiary had been working as a missionary, but was performing limited or different duties before July 2001, then as of February 2002 she did not have two years of experience performing the duties of the position offered.

Because the petitioner has submitted the claim that the above training is required for missionaries, the petitioner has assumed the burden of establishing the truth of that claim. If no proof exists that missionaries require such training, then the question arises as to how [REDACTED] had the knowledge to make such a claim on the petitioner’s behalf.

Furthermore, review of the record reveals an additional issue not raised by the director, concerning the petitioner’s ability to pay the beneficiary’s wage. The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 a case where the prospective employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes

the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

states: "Our financial records reflect the ability to compensate this worker on a weekly basis through the minimum wage." There is no evidence that the petitioner employs 100 or more workers, and therefore Pastor Jones' personal statement cannot suffice to establish the petitioner's ability to pay.

An unaudited "statement of assets and liabilities" indicates that the petitioner had a fund balance of \$241,861.00 as of December 31, 2000. This document contains minimal detail and does not conform to the evidentiary requirements set forth at 8 C.F.R. § 204.5(g)(2).

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. 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. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

We note that the petitioner has filed several special immigrant worker petitions, and in each instance the petitioner has claimed that the alien beneficiary has worked as an unpaid volunteer, supporting himself or herself through "odd jobs" for which no documentation exists. The petitioner must therefore establish its ability to pay multiple beneficiaries, rather than only one.

The AAO may raise additional issues not discussed in the Service Center decision under appellate review. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.