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[Redacted]

FILE:

EAC 02 280 50920

Office: VERMONT SERVICE CENTER

Date: OCT 26 2005

IN RE:

Petitioner:
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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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

We note that the record contains a Form G-28, Notice of Entry of Appearance as Attorney or Representative, naming [REDACTED] as the petitioner's attorney. We have been notified, however, that [REDACTED] is deceased. There is no more recent Form G-28 from any other attorney or accredited representative. Therefore, while we will consider [REDACTED] arguments on appeal, we consider the petitioner to be without representation; the term "former counsel" shall refer to [REDACTED].

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 deaconess/missionary. The director determined that the petitioner had not established: (1) that the beneficiary's position qualifies as a religious occupation; (2) that the beneficiary had the requisite two years of continuous work experience as a deaconess immediately preceding the filing date of the petition; (3) its ability to pay the beneficiary's wage; or (4) its status as a qualifying tax-exempt religious organization.

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 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 beneficiary's activities for the petitioning organization require any religious training or qualifications." Former counsel's statement on appeal is devoted entirely to this issue. Former counsel argues that the position of a missionary requires "tactical training" and "extensive research" beyond the expertise of a typical member of the congregation.

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.

The director's finding in this regard cannot stand. Nevertheless, several issues remain, each of which is by itself sufficient grounds for denial of the petition and dismissal of the appeal.

The next ground for denial concerns the beneficiary's past experience. 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 September 7, 2002. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a deaconess/missionary throughout the two years immediately prior to that date.

The petitioner's initial submission shows that the beneficiary has been in the United States for several years, having never departed following her 1986 entry as a B-2 nonimmigrant visitor. It also includes a certificate, signed by Pastor John Jones, indicating that the beneficiary serves "as Honorary Deaconess & Missionary." The certificate is dated October 4, 2001, less than a year prior to the filing date. The term "honorary" seems to imply that the title is an honor rather than an occupation.

The director instructed the petitioner to “[s]ubmit evidence that establishes that the beneficiary has the continuous two years full-time experience in the . . . religious work” immediately prior to the filing date. In response, former counsel states:

[The beneficiary] has always observed the laws set forth by the United States of America, and has refrained from accepting employment which would incur taxes, etc. without employment authorization. She therefore agreed to work for the Church in a manner, which was legal for both employer and employee. Deaconess/missionary is fortunate enough to have accepted odd jobs in her neighborhood for financial support of herself.

Overstaying a visa for nearly two decades is not “observ[ing] the laws set forth by the United States,” and “odd jobs” are not exempt from taxation or federal law regarding employment of aliens. Remaining in the United States without a valid visa is not “legal for [the] employee,” whether or not the overstaying alien accepts remuneration for her work. Even if everything former counsel claims is true, the beneficiary simply violated those laws in a manner that was more difficult to trace and thus less likely to reveal her continuing unlawful presence. Therefore, the assertion rings hollow that the beneficiary refused payment in order to avoid violating immigration and tax law.

In a new letter, pastor Jones reaffirms that the beneficiary “has worked consistently in the capacity of a Deaconess/missionary,” but he does not state how long she has done so. Therefore, the petitioner’s response to the request for evidence fails to establish the two years of continuous employment required by the statute and regulations.

The director, in denying the petition, specifically stated that the lack of information regarding the beneficiary’s past work was one of the grounds for denial. The petitioner’s submission on appeal does not even acknowledge this finding, let alone address it. The re-submission of previously submitted documents adds nothing of substance to the record.

The next issue concerns 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.

Pastor Jones 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). Therefore, the director instructed the petitioner to submit additional financial evidence. While the petitioner did respond to the request for evidence, that response neither included financial documentation, nor accounted for its omission. The director cited this deficiency as a basis for the denial. The petitioner's appeal contains no argument or new evidence to overcome this finding.

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). The petitioner has never contested the director's finding that the petitioner has failed to establish its ability to pay the beneficiary's proffered wage.

The final issue in the director's decision concerns the petitioner's tax status. 8 C.F.R. § 204.5(m)(3)(i)(A) requires the petitioner to submit documentation showing that it is exempt from taxation in accordance with section 501(c)(3) of the Internal Revenue Code of 1986.

The petitioner's initial submission includes a letter from the Internal Revenue Service, establishing a group exemption for the General Conference of Seventh-day Adventists, and a letter from a denominational official, verifying that the petitioning church is covered by that group exemption. The director did not discuss this evidence at all, much less explain why it is not adequate to establish the petitioner's qualifying tax-exempt status. We therefore withdraw this particular finding by the director.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.