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**U.S. Citizenship
and Immigration
Services**

01

FILE:

[REDACTED]
EAC 03 266 54991

Office: VERMONT SERVICE CENTER

Date: **SEP 19 2005**

IN RE:

Petitioner
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)

ON BEHALF OF PETITIONER:

[REDACTED]

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Acting Director, Vermont Service Center, and 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 its executive director of Fundamental Baptist Ministries - India. 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.

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 issue on appeal is whether the petitioner established that the beneficiary had been continuously employed in a qualifying religious vocation or occupation for two full years prior to 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 September 30, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as an executive director of Fundamental Baptist Ministries - India throughout the two-year period immediately preceding that date.

The evidence reflects that Fundamental Baptist Ministries – India is a subordinate ministry of the petitioning organization. In a letter to the beneficiary dated September 22, 2003, the petitioner stated:

Because the majority of the work of Fundamental Baptist Ministries – India is done amongst the poor and lower caste peoples the financial support raised to minister to these less fortunate folk needs to have someone here spending more time fund-raising.

[W]e can think of no one more suited to do these duties as an Executive Director of Fundamental Baptist Ministries – India than you.

With the petition, the petitioner did not indicate the nature of the beneficiary's prior work experience and submitted no evidence of any work performed by the beneficiary during the qualifying two-year period.

In response to the director's request for evidence (RFE) dated June 21, 2004, the petitioner submitted a September 8, 2004 letter from the [REDACTED] Church in India. The letter indicated that the beneficiary served as an ordained minister with the [REDACTED] Church; however, the date that the beneficiary began working for the church is illegible in the letter.¹ The letter indicated that the beneficiary's duties included preaching and teaching the Bible, motivating and involving the church in the outreach ministry, and conducting weddings, funerals and baptismal services. The letter also indicated that the beneficiary "was instrumental in starting various churches and mission stations, and that he had founded the [REDACTED] and serves as its president."

In his letter accompanying the petitioner's response to the RFE, counsel stated that the beneficiary would be working in the same religious field for which he had been trained. However, the petitioner submitted no documentary evidence of work performed by the beneficiary during the qualifying two-year period. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N

¹ Counsel indicated that the date is 1990.

Dec. 503, 506 (BIA 1980). Further, 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)).

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.

On appeal, counsel submits letters from the pastors of [REDACTED] in Clarion, Iowa, and the First Baptist Church of [REDACTED] who both state that their churches have supported the beneficiary in his ministry in India, and that they have personally visited India and can attest to the beneficiary's full-time ministry there. The petitioner also submitted letters from pastors of three other churches in the United States, who state that they can confirm that the beneficiary has served as a minister for at least two years.

The petitioner also submits a letter from the secretary of the [REDACTED] Church, who states that the beneficiary has been minister of the church since 1988, and receives monthly support of 20,558 rupees. A letter from the beneficiary's bank reflects that he receives a monthly support of 20,558 rupees.

Nonetheless, the statute and the regulation require that the two years experience must be in the same position for which the alien seeks entry into the United States. According to section 203(b)(4) of the Act and 8 C.F.R. § 204.5(m)(1), the beneficiary must have two years continuous experience in the occupation for which he or she is seeking entry into the United States. The evidence does not establish that the proffered position is that of a minister but that of executive director of the petitioner's Indian ministry, responsible for raising funds for the organization.

The evidence does not establish that the beneficiary was continuously engaged as executive director of the petitioner's Indian ministry for two full years preceding the filing of the visa petition.

Beyond the decision of the director, the petitioner has not established that the position qualifies 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. Section 204.5(m)(2) defines religious occupation as:

[A]n 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*. [Emphasis added.]

In its letter to the beneficiary, the petitioner indicated that the proffered position involved fund-raising for the petitioner's Fundamental Baptist Ministries – India. The petitioner did not indicate any other duties associated with the position. The regulation cited above specifically excludes fundraisers from the definition of religious workers.

The evidence does not establish that the position qualifies as that of a religious worker within the meaning of the regulation. For this additional reason, the petition may not be approve.

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 submitted copies of "fiscal reports" for the Fundamental Baptist Ministries-India for the 2000 through 2003. These reports reflect donations by various individuals and organizations and reflect zero expenses. The petitioner also submitted unaudited copies of its financial statements for April 2000 through March 2003, and copies of its proposed budgets for the period April 2001 through March 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 primary evidence.

The evidence does not establish that the petitioner has the continuing ability to pay the beneficiary the proffered wage as of the date the petition was filed. This deficiency constitutes an additional ground for which the petition may not be approved.

Another issue beyond the director's decision is that 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.

In this case, the petitioner has not identified the terms of remuneration or shown that the alien would not be dependent on supplemental employment. Further, as discussed above, the proffered position is not a religious occupation or vocation within the meaning of the statute and regulations. Therefore, the petitioner has not tendered a qualifying job offer. For this additional reason, the petition may not be approved.

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.