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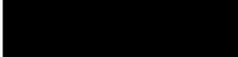
U.S. Citizenship
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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: MAR 26 2007

WAC 00 268 51905

IN RE:

Petitioner:

Beneficiary:



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:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a church of the Presbyterian Church (U.S.A.) denomination. 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 director of religious activities. The director determined that the petitioner had not established: (1) that the beneficiary entered the United States for the purpose of performing religious work; (2) that the beneficiary had the requisite two years of continuous work experience as a director of religious activities immediately preceding the filing date of the petition; (3) the petitioner's ability to compensate the beneficiary; or (4) that the petitioner had made a qualifying job offer to the beneficiary.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Esteime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Esteime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

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).

First, we shall address the issue of the beneficiary's entry into the United States. Section 101(a)(27)(C)(ii) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii), requires that the alien seeking classification "seeks to enter the United States" for the purpose of carrying on qualifying religious work. In this instance, the beneficiary entered the United States under a B-2 nonimmigrant visitor's visa. Thus, the director concluded, the beneficiary did not enter the United States for the purpose of performing qualifying religious work.

This finding is not defensible. The AAO interprets the language of the statute, when it refers to "entry" into the United States, to refer to the alien's intended *future* entry as an *immigrant*, either by crossing the border with an immigrant visa, or by adjusting status within the United States. This is consistent with the phrase "*seeks to enter*," which describes the entry as a future act. We therefore withdraw this particular finding by the director.

We shall now consider the issue of 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 of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on September 18, 2000. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a director of religious activities throughout the two years immediately prior to that date.

In a letter accompanying the initial filing, [REDACTED] identified as Pastor of the petitioning church, states:

From 1995-1998 [the beneficiary] studied at the American Theological Seminary. . . . To fulfill the independent study requirement at the American Theological Seminary, [the beneficiary] undertook a practical training internship at the petitioning church in June 1998

where she worked full-time as a member of the volunteer staff as the pastoral assistant/intern from then to the present time.

The record does not submit any evidence that the beneficiary has any experience at all as a director of religious activities. As of the filing date, the petitioner had not yet paid the beneficiary a salary; the beneficiary was supported by wire transfers from overseas.

The director approved the petition on February 19, 2001. Subsequently, in a letter dated October 29, 2003, [REDACTED] Business Administrator for the Presbytery of San Fernando, has stated that the petitioning "church has informed us that [the beneficiary] has been a full-time employee since November 2001." In a letter dated November 2, 2003, the petitioner's session clerk, Han Il Yu, offered a similar assertion, stating that the petitioner "has been paid, in a full-time capacity from November 2001 to the present."

The director issued a notice of intent to revoke on March 25, 2004, in part because "volunteer activities do not constitute qualifying work experience in [a] religious occupation." The director stated that the petitioner has not explained why the beneficiary received no payment during the 1998-2000 qualifying period, and the director therefore asserted that "the beneficiary has been dependent on supplemental employment or solicitation of funds for support."

Counsel offers several arguments in response to the above assertions. Counsel essentially repeats these same arguments on appeal, and we shall address them in that context. We note, here, that the petitioner has, in fact, accounted for the beneficiary's source of financial support, having demonstrated the beneficiary's receipt of numerous substantial wire transfers of funds from Korea.

The director, in the revocation notice, repeated the finding that the beneficiary lacked continuous experience as a director of religious activities because, prior to the filing date, she had been an unpaid intern and pastoral assistant. On appeal, counsel cites a section of the Foreign Affairs Manual (FAM), specifically 9 FAM 42.32(D)(1) N8, which indicates that "seminary study" is "acceptable for fulfilling the two-year requirement." The cited language is taken from a hypothetical example which presumes the alien to be "a minister," rather than "an aspiring minister" or "a candidate for the ministry." The example also presumes "the alien's activities in the immediately preceding two years were not related to religious functions."

Counsel cites the Foreign Affairs Manual (FAM) as authority. The FAM is not binding upon Citizenship and Immigration Services. See *Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N 125 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

Counsel acknowledges that the beneficiary was not a director of religious activities during the qualifying period; the beneficiary did not begin that position until over a year after the filing date. Counsel, however, states that the beneficiary's unpaid internship as a pastoral assistant should qualify her because "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*" (counsel's emphasis).

We disagree with counsel's interpretation of the phrase "other work." If "other work" is, as counsel contends, a mere catch-all phrase, then the statutory references to "the vocation" and "professional work" would be redundant, or at best random (and thus irrelevant) examples. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). If Congress were unconcerned about the nature of the prior religious work, then Congress could simply have required the petitioner to show that the alien "has been carrying on religious work" or "qualifying religious work" for two years. Instead of this, however, Congress singled out "the vocation" and "professional work." We find these choices of terminology to be significant because section 101(a)(27)(C)(ii) of the Act divides religious work into three categories: "the vocation of a minister," "a professional capacity in a religious vocation or occupation," and finally, omitting the phrase "professional capacity," "in a religious vocation or occupation." The statutory reference to "the vocation, professional work, or other work" respectively mirrors this three-way division. For this reason, we do not take the phrase "other work" to mean a generic reference to "some other work."

Furthermore, the statute does not require experience in "a vocation . . . ," but rather "the vocation. . . ." indicating a reference to a single vocation or occupation, the article "the" effectively referring back to the position offered (discussed earlier in the statutory language). See *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209 (1997); *Bailey v. U.S.*, 516 U.S. 137, 145 (1995). The statute, which was modified from an earlier statute "to prevent abuse,"¹ offers no obvious indication that the special immigrant religious worker provisions are structured to facilitate the entry of an alien who has no experience whatsoever in his or her intended position.

We note that, with regard to the beneficiary's work as an intern, counsel states: "Internship constitutes 'advanced religious studies' when preparing for ordination. . . . The call to ministry . . . is a call from God." Counsel, here, seems to imply that the beneficiary seeks to become an ordained minister. If that is the case, then the beneficiary must have already been qualified as an ordained minister as of the petition's filing date, as required by 8 C.F.R. § 204.5(m)(3)(ii)(B).

Subsequent to the filing of the appeal, the petitioner has submitted letters from various church and presbytery officials, dated late 2005, indicating that the beneficiary has been the petitioner's "full time salaried employee . . . for the past six years," i.e., approximately since late 1999. The officials produce no evidence to support this new claim. The lack of evidence is particularly significant because this new claim contradicts previous letters from [REDACTED] which both specifically stated that the petitioner hired the beneficiary in "November 2001." We can afford no credibility to the petitioner's last-minute revision of this assertion. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho* at 586.

For the above reasons, we concur with the director's finding that, as of the date of filing, the beneficiary lacked the continuous experience required by the statute and regulations.

¹ H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

The next issue concerns the petitioner's ability to pay the beneficiary's salary of \$1,500 per month, or \$18,000 per year. 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.

As noted above, the petitioner has paid the beneficiary's proffered wage, but only since November 2001. The petitioner must submit the evidence enumerated above, and thereby establish that it was able to pay this same wage from September 2000 up until the beneficiary's actual hiring date. The director, in revoking the approval of the petition, found that the petitioner had failed to do so. On appeal, counsel says little about this ground for revocation, except to assert that the petitioner has submitted sufficient evidence of its ability to compensate the beneficiary. Consideration of this evidence will decide this issue one way or the other.

The petitioner's initial submission includes a table showing the petitioner's 1999 budget, actual 1999 income and expenses, and 2000 budget. Apart from the fact that this document does not meet the basic evidentiary requirements, even on its face it seems to suggest cash flow problems. The document indicates that the petitioner's actual 1999 revenues fell short of the projected amount by more than \$17,000. There is no line item on the petitioner's 2000 budget to indicate that the petitioner anticipated the expense of the beneficiary's salary. The petitioner has also submitted bank statements from June through September 2000 showing a balance ranging between about \$12,000 and about \$18,500, ending at \$14,890.04 at the end of September, an amount that would pay roughly ten months of the beneficiary's salary.

Subsequently, the petitioner has submitted copies of "Income Statements" from 2001 and 2002. There is no evidence that these statements have been audited. Both statements show revenues tens of thousands of dollars below what was anticipated in the budget for the corresponding year. The petitioner has also submitted further bank statements, which are not among the acceptable types of evidence listed in the regulations.

In the notice of intent to revoke, the director stated that the petitioner "has not established that they have [*sic*] continuously had the ability to pay the beneficiary's wage from the time of filing to the present." In response, counsel states: "The petitioner has maintained the ability to pay the proffered wage at all times." Counsel quotes part of 8 C.F.R. § 204.5(g)(2), but stops before reaching the section that lists the acceptable evidence. No new evidence accompanied this response. On appeal, counsel states: "It is undisputed by the Service that the petitioning church demonstrated this ability to pay and does not dispute the finances of the church." The director, however, clearly did dispute this conclusion, having specifically said so in the notice of revocation.

The above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." 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).

Finally, we come to the issue of the job offer. 8 C.F.R. § 204.5(m)(4) and other regulations require the prospective employer to set forth the terms of the job offer and establish that such offer is valid. Rev. Ryu states: "We extend to [the beneficiary] the position of Director of Religious Activities at a salary of \$1,500.00 per month on a full-time, permanent basis." Counsel adds: "The beneficiary has been receiving support in the amount of approximately \$4,500.00 per month from her family in Korea since she first entered the United States." Bank documents confirm that the beneficiary has received numerous wire transfers from Korea.

In the notice of intent to revoke, the director questioned the petitioner's intent and ability to employ the beneficiary. The director observed: [REDACTED] has no [lawful] immigration status," and concluded therefore that "he is not in a position to offer permanent employment to the beneficiary. Since the petitioner's status is neither permanent, settled, or stabilized, any offer of employment made by him is without any basis of permanency." The director cited *Matter of Sun*, 12 I&N Dec. 800 (BIA 1968).

In response, counsel argues that [REDACTED] was not petitioning as an individual on the beneficiary's behalf, but rather was acting in an official capacity as the senior pastor of the petitioning church. Counsel repeats this argument on appeal.

As noted above, the director cited *Matter of Sun* in finding that the petitioner was not in a position to offer permanent employment to the beneficiary. In a later decision, the Commissioner of the Immigration and Naturalization Service observed that, with regard to a given petitioner's ability to offer permanent employment, different constraints apply when that petitioner is an organization rather than an individual. See *Matter of A. Dow Steam Specialties, Ltd.*, 19 I&N Dec. 389, 390 (Comm. 1986). Here, as counsel has observed, the petitioner is not [REDACTED] as an individual, but rather the church as an organization. Therefore, the proper focus of inquiry is not whether [REDACTED] as an individual, is in a position to employ the beneficiary, but rather the church as an organized entity is in such a position. The record shows that the petitioning church was incorporated in 1976, and Rev. [REDACTED] was the petitioner's pastor for barely a year. The continued existence of the petitioning church is, therefore, not contingent on [REDACTED] involvement. Thus, the minister's lack of proper immigration status is not grounds for revocation.

More appropriately, the director has explored the issue of the petitioner's *bona fide* intent to employ the beneficiary. Evidence that the petitioner lacked such intent would be valid grounds for revocation. We must, therefore, consider what led the director to that conclusion.

The director observed that the petitioner did not compensate the beneficiary before the filing date, and concluded: "It is not reasonable to assume that the petitioning church, or any employer, could place the same responsibilities . . . on an unpaid volunteer as it could on a salaried employee. . . . The petitioner failed to establish the intent to engage the beneficiary in accordance with the terms of the job offer." As we have already discussed, it is undisputed that the petitioner did not, in fact, "place the same responsibilities" on the

beneficiary as an intern as she later assumed in November 2001; her title and functions were different during those two periods.

Furthermore, the petitioner has indicated that it has employed the beneficiary since November 2001. Tax documents, including an income tax return and an IRS Form W-2 Wage and Tax Statement, show that the petitioner paid the beneficiary \$18,000 in 2002. This is consistent with the petitioner's assertion that the beneficiary would earn \$1,500 per month. For obvious reasons, the beneficiary's actual employment is *prima facie* evidence of the petitioner's intent to employ the beneficiary. The director, in the notice of intent to revoke, cited no evidence that would cast doubt on the authenticity of the documentation of the beneficiary's ongoing employment, or that would show that the petitioner has hired the beneficiary solely to help the beneficiary obtain immigration benefits; and revocation must rest solely on factors enumerated in the notice of intent to revoke. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988). Therefore, we cannot affirm the director's finding that the petitioner has failed to establish that it has extended a valid job offer. While the petitioner has clearly contradicted itself by claiming, first, that it employed the beneficiary in November 2001, and then claiming in 2005 that the beneficiary had drawn a salary for six years, this contradiction does not negate the *bona fides* of the job offer; indeed, one could argue that the petitioner made these contradictory statements in a misguided effort to ensure the beneficiary's continued presence at the petitioning church.

The most recent addition to the record is a submission from the beneficiary, including letters, photographs, church publications and other documents. These materials establish that the beneficiary remains active at the church, but they do not overcome the findings set forth above.

The petitioner has overcome some of the stated grounds for revocation. Of those that remain, neither are permanent barriers to eligibility. We note that, at this point, it has now been over five years since the petitioner first hired the beneficiary as a paid employee, and therefore, provided the beneficiary's employment and salary payments have not been interrupted, the requirements regarding ability to pay and two years of experience should not be at issue in a newly filed petition. Every petition requires reliable evidence, but given the petitioner's contradictory eleventh-hour statements in this proceeding, the claims and evidence accompanying any new petition filed on the beneficiary's behalf should be subject to particular scrutiny.

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.