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U.S. Citizenship and Immigration Services

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JAN 27 2005

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 01 178 52118

IN RE: Petitioner: [redacted]
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:

[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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office 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), in order to classify her as an Assistant to the Pastor for Women's Affairs and Counseling.

The director denied the petition on June 12, 2003, finding that the petitioner failed to establish that the beneficiary had the requisite two years of continuous work experience in a qualifying religious occupation immediately preceding the filing of the petition in the same position as being offered by the petitioner. The director further found that the beneficiary did not have the educational or training credentials needed for her proposed position and that she did not enter the United States solely for the purpose of carrying on a religious occupation or vocation. Finally, the director found the petitioner failed to establish its ability to pay the beneficiary the proffered wage.

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)(1) echoes the above statutory language, and states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file an 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 year period 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."

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 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 an Assistant to the Pastor for Women's Affairs and Counseling in the petitioner's denomination throughout the two years immediately prior to that date; from April 30, 1999 to April 30, 2001. The petitioner must also show that the beneficiary's work constitutes work in a qualifying religious occupation.

The record reflects that the beneficiary last entered the United States on December 21, 1995 as a B-2 nonimmigrant, with permission to remain until June 20, 1996. Accordingly, all of the beneficiary's qualifying work experience was obtained in the United States while working without authorization.

The initial submission, of the petitioning church, states the petitioner's "desire to have [the beneficiary] *assume* duties as quickly as her status is recognized." further states:

> [The beneficiary] obtained her service training as indicated by the attached certificate. Her involvement in evangelism, Prison ministries and Women's Ministries is outstanding. Her duties *will include* visitation of new believers, and individuals who desire to become members. As well as our prison ministries counselor. She *will also* co-ordinate activities and programs which accentuate Women's needs, along with any other assignment that may be given by the senior Pastor.
>
> [The beneficiary] *will be offered* a starting salary of $1,500 per month and travel expenses of $250. She will not be solely dependent on Supplement employment or solicitation of funds for her support.

[emphasis added].

The statement that the beneficiary will "assume" duties once her status is recognized, that her duties "will include" visitation of new believers, that she "will coordinate activities and programs," and that she "will be offered a starting salary," implies that these terms cover future employment, rather than terms already in effect.

The director instructed the petitioner to submit evidence of the beneficiary's past experience, including "duties, hours and compensations . . . such as copy of pay stubs or checks, W-2s or other evidence . . . [to] include the two years preceding the filing" of the petition.

In response, states that he is "looking forward to having [the beneficiary] continue her good work with [the] Church which she began as a volunteer in 1995." further states that throughout "the years [the beneficiary's] responsibilities have grown and since 1999 she has become a dedicated employee as a Bible Worker/Instructor assisting th responsible for spreading the church's message to many in the community.

Despite initial description of the beneficiary's duties as a "Bible Worker/Instructor, then states, "[u]pon approval of the application, [the beneficiary] will continue to be employed as an Assistant to the Pastor for Women's Affairs and Counseling. does not indicate when the beneficiary ended her duties as "Bible Worker/Instructor" and began performing the duties as "Assistant to the Pastor for Women's

Affairs and Counseling." Without such evidence it is impossible to determine whether the beneficiary had the requisite two years experience as an Assistant to the Pastor for Women's Affairs prior to the filing of the petition.

The evidence contained in the record related to the beneficiary's remuneration does not help to establish that the beneficiary was employed during the requisite two-year period. First, though the record contains several copies of paychecks showing the beneficiary received a wage from the petitioner, the evidence does not cover the entire two-year period prior to filing. The earliest paycheck is dated February 25, 2000. The fact that there is no evidence of the beneficiary's remuneration prior to February 2000 calls into question the petitioner's claim that the beneficiary has been employed since 1999.

The record also contains copies of the beneficiary's 2000 and 2001 W-2 Form, Wage and Tax Statements, showing earnings of $6,791.26 and $1,923.96 respectively. Notably, however, the record is devoid of evidence related to the beneficiary's 1999 W-2 Form. The fact that the beneficiary's 1999 W-2 form is not contained in the record, further calls into question the petitioner's claim of the beneficiary's employment beginning in 1999.

On appeal, counsel argues that the director erred in his determination that the beneficiary did not demonstrate two years paid prior experience. Specifically, counsel asserts that the beneficiary "submitted several pay stubs from the period of time in question, April 8, 1999, to April 8, 2001." The evidence contained in the record does not support counsel's contention. As noted previously, the record fails to account for more than 10 months of the qualifying period, from April 8, 1999 to February 25, 2000. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In the alternative, counsel argues that the regulations do not require the beneficiary's experience to have been either full-time or paid and that the director's imposition of such a requirement was erroneous.

We are not persuaded by counsel's argument. 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." H.R. Rpt. 101-723, at 75 (Sept. 19, 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 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 a 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. Clearly, therefore, the qualifying two years of religious work must be full-time and salaried. To hold otherwise would be contrary to the intent of Congress.

The petitioner's assertion that the beneficiary has been employed since 1999 is not supported by evidence in the record. Moreover, though the evidence reflects that the beneficiary began receiving remuneration in February 2000, such evidence does not establish that the beneficiary was employed on a full-time basis. As noted by the director in his denial, the petitioner failed to provide evidence to establish the hours worked by the beneficiary. Moreover, the wages indicated on the beneficiary's W-2 form do not indicate that the beneficiary was employed on a full-time basis. For the above reasons, we concur with the director that the petitioner has not sufficiently established that the beneficiary worked continuously for the petitioner throughout the two-year period ending April 30, 2001.

The next issue is whether the beneficiary's position constitutes a qualifying religious occupation for the purpose of special immigrant classification. In his decision, the director determined that petitioner "failed to submit evidence of the beneficiary's religious training or credentials."

On appeal, counsel argues that the director's "requirement of formal theological training" is erroneous and the petition should not be denied on the basis that the petitioner failed to establish the beneficiary's training and credentials. We find merit in counsel's argument and find that though the beneficiary must be qualified in her occupation, the regulation requires no specific religious training or theological education.

The regulation at 8 C.F.R. § 204.5(m)(2) offers the following pertinent definition:

> *Religious occupation* means 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, fundraisers, or persons solely involved in the solicitation of donations.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position it is offering qualifies as a religious occupation as defined in the regulation. 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. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

Citizenship and Immigration Services (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.

Though we agree with counsel that the director's determination regarding the beneficiary's training and credentials cannot be supported, we concur with his ultimate determination. Upon review of the record, we are not persuaded that the petitioner's denomination regards the beneficiary's position as a traditional religious function, with such "Assistant[s] to the Pastor for Women's Affairs and Counseling" being routinely employed full-time at the denomination's churches. The petitioner offered nothing to show that the religious denomination considers the beneficiary's duties to be a traditional religious function, routinely assigned to a full-time paid employee, rather than tasks usually delegated to a part-time worker or a volunteer from the congregation. Instead, the record reflects that the petitioner is the first person to serve in this position and that she did not begin receiving any salary until February 2001. Further, the wages paid to the beneficiary are not commensurate with full-time employment. The fact that the petitioner was able to provide services and operate as a church without the beneficiary or any other person serving in a full-time capacity, does not support the petitioner's assertion that the beneficiary's position is considered a traditional religious function by the petitioner's denomination.

The next issue is whether the petitioner has the ability to pay the beneficiary the proffered wage. The petitioner claims it will pay the beneficiary a salary of $1,500 per month and travel expenses of $250. Though the evidence reflects that the petitioner began providing the beneficiary with a wage in February 2000, such a wage cannot be considered *prima facie* evidence of the petitioner's ability to pay, as the wage paid to the beneficiary is not commensurate with the proffered wage.

In an attempt to demonstrate it has the financial resources to pay the beneficiary's salary, the petitioner submits two bank statements, dated December 2001 and September 2002, respectively. On appeal, counsel argues that the "bank statement from the Bank of America for the month of September 2002, which showed a beginning balance of $78,428.90 and an ending balance of $74,014.06" is sufficient evidence of the petitioner's ability to pay. Counsel further argues that a "bank statement for a business checking account is an official record showing the organization's cash on hand from an accredited, regulated, independent third party.

We are not persuaded by counsel's arguments. 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.*

[Emphasis added].

Contrary to counsel's assertion, a bank statement is not the kind of document required by regulation, and thus, does not satisfy the regulatory requirement. Though the petitioner is free to submit other kinds of documentation, such submissions must only be *in addition to*, rather than *in place of*, the type of documentation required by 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).

Moreover, the petitioner must establish the ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." Even were we to accept the petitioner's bank statements as evidence of the petitioner's ability to pay, there is no evidence of the petitioner's ability to pay at the time the petition was filed in April 2001.

The remaining issue concerns 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 pursuing a religious vocation or religious occupation. In this instance, the beneficiary entered the United States as a B-2 nonimmigrant visitor. Thus, the director concluded, the beneficiary did not enter the United States solely for the purpose of working in a religious occupation or vocation.

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 or entering the United States 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 the director's finding in this regard.

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.