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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted] N 21 2005

File: WAC 03 174 53052 Office: CALIFORNIA SERVICE CENTER Date:

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)

IN 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Buddhist temple. 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 him as an Instructor/Evangelist.

The director denied the petition on September 17, 2003, finding that the petitioner failed to establish the beneficiary had been performing full-time work or been compensated as a religious worker for the two-year period immediately preceding the filing of the petition.

The petitioner files a timely appeal.

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,
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> (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
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> (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
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> (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 May 20, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as an Instructor/Evangelist in the petitioner's denomination throughout the two years immediately prior to that date, from May 20, 2001 to May 20, 2003.

With the original filing, the petitioner submits the following statement to establish the proffered position:

> On a weekly basis, the Buddhist Instructor/Evangelist will lead early morning prayer meetings, will teach Buddhist chants and Zen meditation, will conduct Dharma teachings, will give lectures on the principles of Buddhism, will teach Buddhism and Buddhist Dharmas and Mahayana doctrine, will train missionaries to spread Buddhism in America, and will edit tapes for Buddhist broadcasting.
>
> The Buddhist Instructor/Evangelist will also be responsible for preparing for and attending the annual leader's conference, for preparing and conducting celebrations for Buddha's birthday, for preparing graduation ceremonies for Buddhist students, conducting Buddhist Baptismal Ceremonies, and preparing and conducting ceremonies to mark different events in the Buddhist religious calendar.
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> * * *
>
> Our Temple and our congregation would like to extend the Beneficiary's employment as our Buddhist Instructor/Evangelist indefinitely. To that end, we are offering her a monthly salary of $1,000. She will not be dependent upon supplemental employment or solicitation of funds.

In his denial, the director noted that the beneficiary was "enrolled at the [redacted] for English Studies . . . during the qualifying period, form March 25, 2001 to March 24, 2002, and March 25, 2002 to March 24, 2003." Given that the beneficiary's classification as an F-1 nonimmigrant required her to be attending school on a full-time basis, the director concluded that the beneficiary could not have also been employed by the petitioner on a full-time basis in order to qualify for special immigrant classification.

On appeal, counsel argues that the beneficiary could be employed on a full-time basis with the petitioner and also be a student. To support this assertion, counsel provides an affidavit detailing the fact that counsel was able to work full-time while also attending school full-time. The fact that counsel was able to attend school on a full-time basis while also working full-time does not shed any light on whether the beneficiary was working full-time for the petitioner while also attending school full-time.

The nature and time spent by the beneficiary performing her duties for the petitioner is a legitimate subject of inquiry. Though counsel has submitted an affidavit and his own creation of the beneficiary's possible schedule of time spent involved in working for the petitioner and attending school, there is no specific assertion from the petitioner as to beneficiary's actual work hours.

Counsel provides a schedule of ESL courses offered by the International College for English Studies according to the level of courses and argues that "full-time study at each of the three levels leaves more than ample time for one to work." While we agree that it is possible for the beneficiary to both work and study on a full-time basis, given that the beneficiary's "work is of such a nature that it can be performed on weekends, early mornings, afternoons, etc.," there is no evidence to show that the beneficiary did, in fact, work on weekends, early mornings, and afternoons in order to meet the full-time employment requirements of the regulation. Counsel's claims are vague and unsubstantiated. Further, the assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1,3 (BIA 1983); *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 request for evidence, issued by the director on August 11, 2003, the director requested the petitioner to provide "a properly completed Form I-20 A-B/ I-20ID and a letter from the school stating that the beneficiary is currently attending the school." The requested evidence was not submitted in the petitioner's response to the director's request. 8 C.F.R. § 103.2(b)(13).

Further, we find there are discrepancies between the salary purportedly paid to the beneficiary and the beneficiary's actual salary. The petitioner submitted copies of the beneficiary's 2001, 2002, and 2003 income tax returns and W-2 Wage and Tax Statements. According to the beneficiary's returns and W-2 forms, the beneficiary earned $12,000 for each of these years. The petitioner has also submitted copies of canceled checks, always issued in the amount of $918, issued to the beneficiary for the period covering February 1, 2003 to June 1, 2003. Given that every paycheck shown to have been issued to the beneficiary is in the amount of $918, it is not clear how the beneficiary's total earnings can equal $12,000. One year at a monthly salary of $918 equals a total of $11,016. The petitioner's tax returns and W-2 forms, therefore, are inconsistent with the canceled checks. The petitioner provides no explanation for the discrepancy between the beneficiary's purported wage and what she appears to have actually received. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Given these discrepancies and the lack of evidence related to the petitioner's claims that the beneficiary was working full-time while also attending school full-time, or even attending school at all, we find the director was justified in finding that the petitioner had not established that the beneficiary's work during the qualifying period amounted to full-time employment.

Beyond the decision of the director is the issue of the petitioner's ability to pay the beneficiary the proffered wage.

The regulation at 8 C.F.R § 204.5(g)(2) states that evidence of the 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 on *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 of presumption of ineligibility. *See* 8 C.F.R. § 103(b)(2)(i).

The petitioner has submitted documents, including bank statements, a "forecasted statement of assets, liabilities, and equity," and a "forecasted statement of revenues, expenses, and retained earnings." However, these documents are not considered audited financial statements or annual reports. We note that the forecasted statements indicate that the statements were based on the "representation of management," and that "[m]anagement has elected to omit[sic] substantially all of the disclosures ordinarily included in financial statements." As such, these financial statement are clearly not a reliable source of the petitioner's financial status. Further, because the documented payments to the beneficiary do not match the proffered wage, we cannot accept the argument that those payments represent proof of the petitioner's ability to pay.

A second issue beyond the decision of the district director is whether the beneficiary's position as an Instructor/Evangelist constitutes a qualifying religious occupation for the purpose of special immigrant classification.

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 reflects that non-qualifying 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.

The regulations specify that religious occupations involve activities that related to traditional religious functions. The nature of the activity performed must embody the tenets of the particular religion and have religious significance. Their service must be directly related to the creed of the denomination.

Though the petitioner attempts to identify the beneficiary's job title with that of a title found in the regulation as a qualifying occupation, it is important to consider the actual duties of the position. A religious organization cannot secure benefits for an ineligible alien simply by referring to the alien's position with a title such as Religious Instructor/Evangelist. In short, the beneficiary's job *duties*, rather than her title, will determine her eligibility. To hold otherwise would permit religious organizations to sidestep immigration law simply by giving qualifying job titles to all their employees.

There is no evidence in the record that the petitioner's denomination regards an Instructor/Evangelist as a

traditional religious function, with such Instructor/Evangelists being routinely employed full-time at the denomination's temples. First, there is no evidence to show that any person has ever been employed in this position prior to the beneficiary's hiring. That the petitioner was able to operate as a temple prior to the beneficiary's employment is evidence that the beneficiary's position is not traditionally a permanent, full-time salaried occupation within the petitioner's denomination and that the position was defined and recognized by the governing body of the petitioner's denomination prior to the beneficiary's employment.

Further, a finding that the petitioner's denomination considers the beneficiary's position as a permanent, full-time, salaried occupation is further undermined by the noted discrepancy between the beneficiary's purported salary and the actual salary received.

For this additional reason, the petitioner may not be approved.

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.