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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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JUN 23 2005

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

EAC 03 167-51221

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

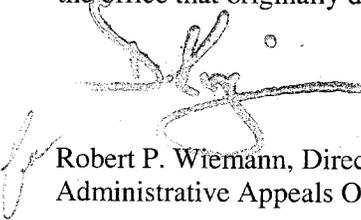
PETITION: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

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, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the 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 a its director of music. The director determined that the petitioner had not established that the position qualifies as that of a religious worker.

Counsel indicated on the Form I-290B, Notice of Appeal to the Administrative Appeals Unit, that a brief and/or additional evidence would be submitted within 30 days of filing the appeal. Counsel notified the AAO by facsimile on May 13, 2005 that he submitted no additional documentation. On appeal, the petitioner submitted a letter. The record is considered complete as presently constituted.

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 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.

In a letter dated August 6, 2003, the petitioner stated that the duties of the choir director involve serving as the church organist and choir director. According to the petitioner:

[The position of music director] is clearly a professional position which requires an incumbent with an educational background equivalent to at least a Baccalaureate in Music. The incumbent has to have a full knowledge of the music requirements for the Roman Catholic Liturgy, as expressed in the Lithuanian language and tradition. The incumbent must be also versed in the technique and theory of music and choral accompaniment. The incumbent is expected to research and perform musical selections harmonious with the two traditions followed by our parish church.

In addition to the organist duties, the incumbent selects choral accompaniment and rehearses the parish choir for Masses, devotions and other liturgies.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. 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. Persons in such positions would reasonably be expected to perform services directly related to the creed and practice of the religion. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature. The lists of qualifying and nonqualifying occupations derive from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

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.

On appeal, counsel states:

The position of Music Director submitted in this Petition is a professional position which related directly to the conduct and execution of the Roman Catholic Liturgy (Mass). Liturgical Music has a long established and highly important role in the Mass, High Mass, Vespers, Matins, Benedictions, weddings, funeral liturgies and other liturgical and sacramental proceedings in Catholic Faith and Tradition . . . This position relates directly to the celebration of the liturgy by the faithful in accordance with the Musical guidelines set forth in Roman Catholic Canon Law and Tradition . . . While the Roman Catholic Church has, since the Second Vatican Council permitted musical accompaniment [sic] by instruments other than the organ at the Mass, the fact remains that the Liturgy is more often than not accompanied by Music selected by a professional in accordance with the strict guidelines of Canon Law and Western Church tradition.

No evidence in the record supports the statements of counsel. 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 Obaigbena*, 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 Dec. 503, 506 (BIA 1980).

The petitioner submitted no evidence 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 Roman Catholic Church, or that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

The record does not establish that the position is a religious occupation within the meaning of the statute and regulation.

Beyond the decision of the director, the petitioner has 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. For this additional reason, the petition may not be approved.

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 May 5, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a music director throughout the two-year period immediately preceding that date.

In its letter of August 6, 2003, the petitioner stated that the beneficiary had worked as its director of music for the past two years. The petitioner submitted no documentary evidence to corroborate the beneficiary's employment. 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 record does not establish that the beneficiary has worked continuously in a religious occupation for two full years immediately preceding the filing of the visa petition.

Additionally beyond the decision of the director, the petitioner has not established that it has the ability to pay the beneficiary a 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.

As evidence of its ability to meet this regulatory requirement, the petitioner submitted a copy of an "income statement" for the twelve-month period ending June 30, 2002.

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.

Additionally, the evidence submitted by the petitioner reflected that it had net income of approximately \$5,800 at the end of June 2002. While the document reflects payment of clergy salaries and honorarium, it does not indicate salaries or wages paid to any other employee. The net income of \$5,800 would be insufficient to pay the beneficiary a livable wage.

The evidence does not establish that the petitioner had the continuing ability to pay the beneficiary a wage as of the date the petition was filed. This deficiency constitutes an additional ground for denial of the petition.

Also beyond the decision of the director, 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.

The petitioner has not identified the terms of remuneration or shown that the alien would not be dependent on supplemental employment or the solicitation of funds for her support. Therefore, the evidence does not establish that the petitioner has tendered a qualifying job offer. For this additional reason, the petition 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.