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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 20 2008

WAC 07 084 52550

IN RE: Petitioner:
Beneficiary: [redacted]

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a Gurdwara (Sikh 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), to perform services as a Granthi (priest/musician). The director determined that the petitioner had not established that the beneficiary was qualified to serve as a Granthi, or that the beneficiary had the requisite two years of continuous work experience as a Granthi immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established that it had made a qualifying job offer to the beneficiary or that it is able to compensate the beneficiary.

On appeal, the petitioner submits copies of various documents.

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 . . . ; 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 first issue we will consider concerns the beneficiary's authorization to work as a Granthi. 8 C.F.R. § 204.5(m)(3)(ii)(B) requires evidence that, if the alien is a minister, he or she has authorization to conduct religious worship and to perform other duties usually performed by authorized members of the clergy, including a detailed description of such authorized duties. In appropriate cases, the certificate of ordination or authorization may be requested.

Materials in the petitioner's initial submission attested to the beneficiary's past experience as a Granthi and documented the beneficiary's musical training, but these documents did not indicate that this education was of a religious nature.

On March 19, 2007, the director issued a request for evidence (RFE), instructing the petitioner to submit "evidence to show that the beneficiary has been ordained" or otherwise authorized to perform the functions of clergy. In response, the petitioner submitted a letter from [redacted] who identified himself as "the New York Regional Administrative and Religious Authority for [redacted] and Assistant Chancellor to the office of the [redacted], the chief religious and administrative authority for [redacted]

of the Western Hemisphere." He asserted: "the Sikh Religion does not ordain its Ministers in the same manner as the Catholic Church ordains its priests or Protestant churches ordain graduates from a seminary, [but the beneficiary] is without question considered to be an ordained and highly qualified Sikh Minister."

The director denied the petition on August 13, 2007, stating: "the petitioner has failed to establish that the beneficiary is authorized to perform the duties of a Granthi." The record does not support this finding (which appeared, almost incidentally, within a paragraph of the decision discussing a separate ground for denial). [redacted] appears to be a ranking official within the regional Sikh community, and as such is entitled to some degree of deference within his range of authority in the absence of contradictory evidence. The record contains nothing that would cast doubt on the assertions that the beneficiary is a fully-qualified Granthi who began performing such duties in the 1990s. The AAO withdraws this finding by the director. Other grounds, however, remain to be considered.

The next issue under consideration relates to the beneficiary's 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 January 29, 2007. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a Granthi throughout the two years immediately prior to that date.

Letters in the record attest to the beneficiary's long-standing work as a Granthi, dating back to 1993, but these letters predate the 2005-2007 qualifying period. These letters indicate that, on several occasions, the beneficiary's [redacted] (trio of priest/musicians) traveled to the United States and the United Kingdom while still nominally employed by the beneficiary's home Gurdwara in India.

The director, in the RFE, issued these instructions to the petitioner:

> Provide evidence of the beneficiary's work history beginning January 29, 2005, and ending January 29, 2007, only. Provide experience letters written by the previous and current employers. . . . In addition, submit evidence that shows monetary payment, such as pay stubs or other items showing the beneficiary received payment. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported himself during the two-year period or what other activity the beneficiary was involved in that would show support.
>
> NOTE: Each experience letter must be written by an authorized official from the specific location at which the experience was gained. . . .
>
> Submit copies of the beneficiary's IRS Forms W-2 (Wage and Tax Statement) for 2004, 2005, and 2006.

In response, counsel stated: "please find enclosed [a] letter from [redacted] of the Sikh Dharma of New York which should address all the points you raise." Counsel did not enumerate "the points" or explain how the letter could suffice to "address all the points" in the RFE, when some of those "points" clearly required documentary evidence. The Sikh Dharma official stated: "Beginning *February 1, 2004 to present* [the beneficiary] has been employed by the [petitioner], the Sikh Gurdwara serving the New Jersey area" (emphasis in original) and expressed the "opinion that [the beneficiary] has been employed full time as a Sikh Minister from March 1993 until the present without break or lapse." While the official's position entitles him to some deference with respect to his knowledge of Sikh customs and practices, it does not necessarily mean that he has specific, detailed knowledge of the activities of individual religious workers under his jurisdiction.

The petitioner did not submit any experience letters "from the specific location at which the experience was gained" for the 2005-2007 qualifying period. (The petitioner did submit copies of letters and other materials dating from before the qualifying period.) Also, the petitioner did not submit any evidence of compensation, or even describe the terms of such compensation. Thus, for several reasons, the petitioner's response fell far short of compliance with the detailed instructions contained in the RFE.

In denying the petition, the director concluded that the petitioner had failed to sufficiently account for the beneficiary's work during the two-year qualifying period, and that the petitioner had "not provided sufficient evidence of the beneficiary's remuneration."

On appeal, the petitioner submits copies of Internal Revenue Service Form 1099-MISC Miscellaneous Income statements that the petitioner had issued to the beneficiary for 2004, 2005 and 2006. The petitioner also submitted the beneficiary's tax returns for those years. Prior to these submissions on appeal, the petitioner had not even acknowledged the director's request for evidence of compensation, much less complied with that request.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). The petitioner had the opportunity to submit evidence of compensation in response to the RFE, and forfeited that opportunity by responding to the RFE without providing the requested evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Because the petitioner did not provide the requested evidence, the director acted properly in denying the petition, and the petitioner cannot remedy the situation by submitting, untimely, materials that should have accompanied the response to the RFE. The AAO affirms the director's finding.

The director, in the decision, raised another issue relating to the beneficiary's experience. The director stated: "The beneficiary was afforded R1 status, valid from January 30, 2004 until January 30, 2007. However, USCIS records indicate that the beneficiary departed the United States on April 18, 2004 . . . [and] returned on February 26, 2006." This indicates that the beneficiary was outside the United States (and therefore unable to work at the petitioning Gurdwara) for much of the 2005-2007 qualifying period.

On appeal, counsel states:

> It should be noted that the beneficiary was accorded a change of status to R1 status on January 24, 2004. He started working in R1 status on February 1, 2004. He decided to obtain an R1 visa in New Delhi. He and the other members of his priest group departed the United States on April 18, 2004 and applied for an R1 visa. . . . He received his R1 visa on July 13, 2004. As soon as he was able to obtain a flight back to the United States with the other priests in his group, he flew back to the United States to resume his duties as a Silkh [*sic*] priest for [the petitioner].

Counsel states that the appeal includes a "[c]opy of passport with stamp to show . . . travel back to the United States on 7/29/2004, not March 31, 2005." The petitioner does not submit a complete copy of the beneficiary's passport; the copies reproduce only four pages of the passport and an I-94 Departure Record. One page shows an entry stamp dated July 29, 2004. The same page, however, shows another entry stamp dated March 31, 2005. This indicates that, while the beneficiary did enter the United States on July 29, 2004, he must have left again in order to be readmitted on March 31, 2005. Because the petitioner did not submit copies of all the passport pages, the information submitted is insufficient to establish the duration of the beneficiary's multiple absences from the United States.

Furthermore, the director had already advised the petitioner that attestations of the beneficiary's experience must come from the actual locations where the beneficiary had served; the petitioner, in New Jersey, is not in a position to verify work that the beneficiary performed outside the United States. While it is conceivable that the beneficiary spent much or all of his time abroad in 2005 and 2006 working at other Gurdwaras, as the record shows he did on earlier trips overseas while employed by an Indian Gurdwara, the record is devoid of evidence to support that conclusion. We are left with evidence of long absences from the United States, with no evidence that the beneficiary performed qualifying religious work during those absences. We concur with the director's finding that these absences further support a finding that the petitioner has failed to establish that the beneficiary worked continuously as a Granthi during the 2005-2007 qualifying period.

The director introduced two issues in the denial notice that were not previously raised in the RFE. 8 C.F.R. § 204.5(m)(4) requires the prospective employer to state how the alien will be solely carrying on the vocation of a minister (including any terms of payment for services or other remuneration). The regulation at 8 C.F.R. § 204.5(g)(2) requires the prospective employer to demonstrate its ability to meet the terms of employment:

> *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's initial submission did not address either of the above issues, and the director, in the RFE, did not request information or evidence about the terms of the job offer or the petitioner's ability to compensate the beneficiary. In denying the petition, the director quoted the pertinent regulations and stated:

> Though requested, the petitioner has failed to provide copies of annual reports, federal tax returns, audited financial state[ment]s, bank records, or personnel records. The petitioner had failed to provide evidence that it had remunerated or supported the beneficiary during the requisite period. . . .
>
> It cannot be determined that this is a permanent job-offer. The petitioner has not provided any evidence to substantiate the proffered position as permanent employment. The petitioner and the beneficiary have not entered into any employment contract. The job-offer letter failed to [indicate] how the beneficiary will be paid or remunerated for his religious work. . . .
>
> The petitioner's ability to pay as well as the existence of a valid job offer has not been established.

We note that the director erroneously indicated that the director had previously requested evidence of ability to pay. Review of the five-page RFE shows that, while the director requested a wide range of evidence, the RFE did not touch on the issue of the petitioner's ability to compensate the beneficiary. Therefore, the appeal marked the petitioner's first opportunity to address the issue.

On appeal, the petitioner submits nothing to establish the terms of employment or compensation. As noted elsewhere in this decision, the petitioner submitted tax documents in an effort to show compensation, but there is nothing in the record to show that such compensation matches the pay rate agreed upon by the petitioner and the beneficiary.

The petitioner submits compiled financial statements for the petitioner for calendar years 2004 and 2005. These documents are not audited financial statements; the attorney who compiled the statements specifically states "I have not audited or reviewed the accompanying [data] or any other form of assurance on them." These documents, therefore, cannot satisfy the requirements of 8 C.F.R. § 204.5(g)(2). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Furthermore, because the petitioner has not set forth a complete and coherent job offer, including specific terms of compensation and/or material support, we still do not know the proffered wage. Without such information, it is impossible to determine the petitioner's ability to pay that wage. Pursuant to the above, the AAO affirms the director's findings relating to the job offer and the petitioner's ability to pay the beneficiary.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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.

ORDER: The appeal is dismissed.