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U.S. Citizenship and Immigration Services

[redacted] PUBLIC COPY

APR 21 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 02 090 53936

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 Director, California Service Center, initially approved the employment-based immigrant visa petition. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and exercised his discretion to revoke the approval of the petition on January 9, 2004. An appeal to this decision was timely filed and is now before the Administrative Appeals Office (AAO) for review. The AAO will dismiss the appeal.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General 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 Estime* . . . 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 unrebutted, 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 Estime*, 19 I&N Dec. 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*, 19 I&N Dec. at 590. The approval of a visa petition vests no rights in the beneficiary of the petition or the self-petitioner, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary or self-petitioner is not, by mere approval of the petition, entitled to an immigrant visa. *Matter of Ho*, 19 I&N Dec. at 590.

The petitioner is Catholic school that is under the Archdiocese of Los Angeles. 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 fifth grade teacher. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience in the position sought immediately preceding the filing date of the petition. The director further determined that the petitioner failed to establish the beneficiary was coming to the United States to work in a qualifying vocation or occupation.

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 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 first issue to be examined is whether the petitioner has demonstrated that the beneficiary had been continuously engaged in a qualifying religious vocation or occupation for at least the two years preceding the filing of the petition. The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that "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 petition was filed on January 18, 2002. Therefore, the petitioner must establish that the beneficiary had been continuously engaged in a qualifying religious vocation or occupation from at least January 18, 2000.

The Form I-94, Arrival and Departure Record, indicates that the beneficiary initially entered the United States on August 15, 2001, with authorization to remain in the United States until August 22, 2002. Thus, the beneficiary's experience in the United States, by itself, is not sufficient to meet the requirements of the regulation.

In support of the petition, Sister [redacted] principal of the petitioning school, submits a letter in which she provides a brief description of the beneficiary's background and the job offered, but does not provide any specific details relating to the beneficiary's work experience during the two years preceding the filing of the petition. Siste[redacted] states only that the beneficiary "has served the Roman Catholic Church in the United States continuously and without interruption for the past two years." As noted above, however, the beneficiary entered the United States a mere five months prior to the filing of the petition. Accordingly, Sister [redacted] assertion that the beneficiary "served the Roman Catholic Church in the United States continuously and without interruption for the past two years," cannot be substantiated.

The petitioner's submission of a copy of the beneficiary's employment contract, signed on May 25, 2001, for the school year beginning August 20, 2001 and ending June 30, 2002, is also insufficient to establish the beneficiary's continuous employment as it does not cover the entire qualifying period.

The director approved the petition on July 3, 2002. Subsequently, on August 2, 2002, the beneficiary filed a Form I-485 Application to Register Permanent Residence or Adjust Status. As part of the adjustment application, the beneficiary submitted Form G-325A, Biographic Information. Instructed on that form to list his employment over the past five years (2002-1997), the beneficiary indicated "teacher" at the petitioning school for his employment from September 1999 to the present.

On September 9, 2003, the director issued a notice of intent to revoke, stating, in part, that the record does not establish that the beneficiary performed continuous religious work during the two-year qualifying period.

In response to the director's notice, counsel for the petitioner states:

> [The beneficiary] has been working full time at St. Francis of Assisi School in Los Angeles since August, 1999 to the present time, serving the educational and spiritual needs of the 5th grade students. As evidence of his being paid the full salary of a professional, please find enclosed copies of W-2 for 1999, 2001 and 2002.

Contrary to counsel's statement, however, the evidence in the record does not establish that the beneficiary was in the United States prior to August 2001. Further, despite counsel's assertion that the beneficiary's 1999 W-2, Wage and Tax statement had been submitted, a review of the record reveals copies of only the beneficiary's 2001 and 2002 W-2 Wage and Tax Statements. Such evidence does not establish the beneficiary's continuous work during the requisite period. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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).

In a statement provided by the petitioner in response to the director's notice, Sister Werth states:

> In our search for a fulltime teacher for our Grade-5 students, we found that [the beneficiary] qualified for the position. He was first hired in 1999 and re-hired for the present school year to fill a fulltime position for a stipulated annual salary, to serve the St. Francis of Assisi Catholic School Faith Community.

Sister Werth provides no contemporaneous documentary evidence to support her claims of the beneficiary's employment beginning in 1999. Although the record contains a signed contract for the 2001 school year, as well as W-2 Wage and Tax Statements for 2001 and 2002, the record contains no evidence to establish the beneficiary's employment for more than nineteen months out of the entire two-year period. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, given that Sister Werth's letter is dated September 29, 2003, we can only assume that her reference to re-hiring the beneficiary for "the present school year," means the school year beginning August 20, 2003 and ending June 30, 2003. Accordingly, the beneficiary's hiring for this school year has no bearing on whether the beneficiary was working for the beneficiary during the requisite period, which ended at the time of filing in January 2002.

The director revoked the petition determining that the evidence in the record did not support a finding the beneficiary was continuously working as a teacher during the requisite period.

On appeal, counsel for the petitioner provides no additional evidence to document the beneficiary's continuous experience during the requisite period. Instead, counsel provides a single statement that "the

beneficiary has worked continuously for two years prior to filing the Form I-360. As noted previously, the record does not support such a finding. Further, the statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The record contains no evidence related to the beneficiary's employment prior to coming to the United States. Further, as it relates to the beneficiary's employment in the United States, the record supports a finding that the beneficiary first began his employment with the beneficiary in 2001. Such evidence is certainly not indicative of the beneficiary's full-time continuous employment during the requisite period. Accordingly, we concur with the director's decision on this issue.

The remaining issue is whether the petitioner seeks to employ the beneficiary in a qualifying vocation or occupation. The regulation at 8 C.F.R. § 204.5(m)(2) defines "religious occupation" as 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, fund raisers, or persons solely involved in the solicitation of donations.

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 at 8 C.F.R. § 204.5(m)(2) 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 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 petitioner has offered the beneficiary a position as a fifth grade teacher. In response to the director's notice, Sister Werth describes the duties required of the beneficiary's position. She states:

> Every day at St. Francis, each class devotes time (30 minutes daily for K-3, and 40 minutes daily for Grade 4-8) for Religion class. [The beneficiary] as well as the entire faculty devote their time to teaching of the Bible and the life of Christ, as well as the New Catholic Catechism. Then he instills in the students the actualization of spiritual values and ethics learned during this period as integrated in the other subjects he teaches, in the classroom and outside, during the lunch and during play.

The submission from counsel in response to the director's notice states, in part:

> Students get one hour a day for each core subject. Every day after [m]orning [p]rayer, [the beneficiary] starts his day in class with 30 minutes of formal Religion lessons, which is dedicated to basic principles of the Catholic faith. The implementation of spiritual and Catholic values is emphasized in its integration with all other subjects, including the arts, music, and technology, which are all tools of teaching.
>
> - In Language Arts, [the beneficiary] incorporates and integrates religious Catholic emphasis by having students write compositions based on verses from Scriptures, by assigning reading materials by Catholic authors, or by using sentence and spelling examples of Catholic words or phrases, and by giving parallel examples from the bible.
>
> - In Music class, [the beneficiary] teaches his students religious and liturgical songs and hymns. He then asks his students to interpret them and relate them to their lives.
>
> - In Mathematics, [the beneficiary] uses religious icons and objects and use geometric figures for his illustrations with Catholic and religious significance like the equilateral triangle which is the symbol of the Holy Trinity.
>
> - [The beneficiary] also encourages the observance of religious feast days through room decorations and class discussion about the history of the special celebration being observed.
>
> Under the guidance of [the beneficiary], 5th grade students have [sic] benefited spiritually from these activities. The responsibilities of [the beneficiary] as a Catholic grade school teacher clearly show that he is expected to implement the philosophy of Catholic education emphasizing the importance of <u>integrating Catholic values in all subjects in the elementary school curriculum.</u>

[Emphasis in original.]

Based upon the description of the proffered position and the evidence in the record, the director noted that he would not consider the beneficiary's position in terms of a religious vocation, but rather whether it could be considered a religious occupation. The petitioner does not dispute this portion of the director's decision on appeal.

In examining whether the beneficiary's position was a qualifying occupation, the director noted that the beneficiary's position "appears to be a secular position," in that his duties involve "the teaching of ordinary school curricular subjects to children at the grade school level." The director further noted that "the mere adoption of a position title . . . from the above regulation," and "the fact that an individual is a member of a religious denomination working in a facility run by that religious denomination," does not mean that the job qualifies as a religious occupation.

We concur with the director findings. Although the petitioner identifies 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." In short, the beneficiary's job *duties*, rather than his title, will determine his eligibility. To hold otherwise would permit religious organizations to sidestep immigration law simply by giving qualifying job titles to all their employees.

On appeal, counsel for the petitioner argues that the beneficiary "uses the classroom setting to impart the Catholic faith to students" and that his "education and work experience provide him with the qualifications necessary to teach Catechism and liturgy." Counsel further argues that a "teacher at St. Francis cannot be performed by a secular individual because of its strong emphasis on Catholicism."

Although we do not dispute the beneficiary's qualifications for the position, counsel's argument related to the beneficiary's background is not relevant to the issue of whether the beneficiary's duties are related to a traditional religious function. The fact that teachers at the petitioning school are knowledgeable about Catholicism, and use "the classroom to impart the Catholic faith," is not conclusive evidence that the beneficiary's position qualifies as a religious occupation. The issue is not whether the beneficiary is "a secular individual," but whether the beneficiary's *duties* involve religious or secular duties.

Although the record contains several copies of reference materials related to Catholic education and teachers, the petitioner does not submit copies of actual lesson plans or other evidence to establish the actual content of the curriculum to be taught by the beneficiary. Without such evidence we are unable to corroborate the petitioner's statements that the beneficiary "integrates" religious material into his teaching and are, therefore, unable to determine whether the beneficiary can be considered a teacher of religion, as opposed simply a teacher at a religious institution. This distinction is important because the regulatory definition at 8 C.F.R. § 204.5(m)(2) clearly states that some occupations do not qualify as religious occupations, notwithstanding the religious character of the employer. The fact that the beneficiary teaches at a religious institution does not make the beneficiary's duties a religious occupation. If there is no meaningful or significant distinction between the beneficiary's work at a secular institution and the petitioning religious school, then there is no reasonable basis to determine that the beneficiary's work is a traditional religious function rather than a pervasively secular activity.

Even if the petitioner were able to demonstrate that the beneficiary's duties incorporate some religious principles as part of an overall curriculum, we do not find that the beneficiary's primary duties are religious. When comparing the beneficiary's duties to those of other religious instructors, such as Hebrew language instructors or seminary professors, we find the beneficiary's duties are easily distinguishable. For instance, the duties of an instructor of the Hebrew language can be considered primarily religious because Hebrew is the predominant language of prayer for the Jewish religion. Similarly, the primary purpose of a seminary professor's instruction is to prepare students for the ministry. In these instances, it is difficult to conclude that either position is not a "religious instructor." It important to note that the United States Supreme Court recently held that, in the context of teaching devotional theology to college-level students in preparation for careers in the ministry, "religious instruction is of a different ilk" than instruction in secular subjects. *See Locke v. Davey*, 124 S.Ct. 1307, 540 U.S. ____ (2004).

Clearly, the overwhelming portion of the beneficiary's duties involve the teaching of secular subjects such as language arts, mathematics, and music. The beneficiary spends less than one hour per day teaching a religion class. In this instance, we find the petitioner has offered no evidence to establish the beneficiary's duties are any different from those of a elementary school teacher at a public school. The fact that the beneficiary may intersperse some religious material into his teachings does not make him a teacher of religion or a religious instructor.

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.