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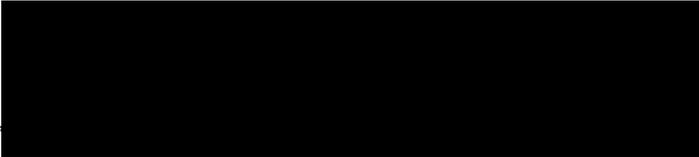
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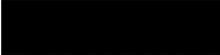
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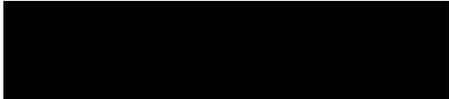
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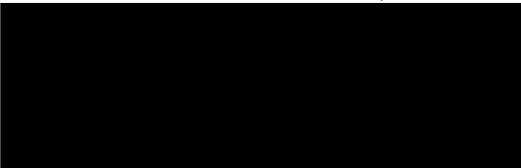
Petitioner:



Beneficiary:

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:



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.

Maui Johnson

Sr 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 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), to perform services as its Buddhist education director. The director determined that the petitioner had 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 or that the petitioner had extended a qualifying job offer to the beneficiary. The director further determined that the petitioner had not established that the beneficiary had received a waiver of the two-year foreign residence requirement of section 212(e) of the Act.

On appeal, counsel submits a brief and additional documentation.

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 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 December 19, 2002. Therefore, the petitioner must establish that the beneficiary was continuously working in the religious occupation throughout the two-year period immediately preceding that date.

The record reflects that the beneficiary was present in the United States pursuant to a series of J-1, exchange visitor, visas to work as a research scholar in industrial design. The Forms DS-2019, Certificates of Eligibility for Exchange Visitor (J-1) Status, indicate that the beneficiary was approved to work first at the New School University (September 15, 2000 to December 31, 2001) and then the Pratt Institute (January 1, 2002 to September 14, 2003).

A “Certification of Incumbent” issued by the Korea Buddhism Jo-Gei Temple of America, Inc. states that the beneficiary served as a Buddhist Education Director at the organization from October 8, 2000 to June 10, 2001, volunteering her services in managing the plan of instruction for the education program and teaching paint to the children in Sunday school. In its letter accompanying the petition, the petitioner stated that the beneficiary worked nights and weekends for the Korea Buddhism Jo-Gei Temple of America, who was unable to compensate her for her services because she was in a J-1 status. The petitioner submitted no documentary evidence to corroborate the beneficiary’s employment with the Korea Buddhism Jo-Gei Temple of America, Inc. 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).

The petitioner also stated that the beneficiary began working for the petitioning organization in March 2001 in the proffered position. The beneficiary stated that the beneficiary worked nights and weekends for approximately 30 hours per week. The petitioner stated that it was also unable to compensate the beneficiary because of her J-1 status. The petitioner submitted photographs that it states are depictions of the beneficiary, but provides no documentary evidence to corroborate the beneficiary’s service as education director with the petitioner. *Id.*

In response to the director’s request for evidence (RFE) dated May 20, 2003, the petitioner stated that the beneficiary was able to support herself financially during the qualifying two-year period from her personal funds. The petitioner submitted copies of the beneficiary’s certificates of deposit, which reflect that, as of July 10, 2002, she had the equivalent of approximately \$22,131 USD in savings and a personal pension trust. The beneficiary’s Form W-2, Wage and Tax Statement, indicates that the New School University paid her \$3,960 in 2001 and \$990 in 2002. The Forms DS-2019 reflect that the beneficiary relied on her personal funds and

contributions from organizations for her financial support during her stay as an exchange visitor in a J-1 status.

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." See H.R. Rep. No. 101-723, at 75 (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 is 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 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. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who in accordance with their vocation live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and generally salaried. To hold otherwise would be contrary to the intent of Congress.

In the rare case where volunteer work might constitute prior qualifying experience, the petitioner must establish that the beneficiary, while continuously and primarily engaged in the traditional religious occupation, was self-sufficient or that his or her financial well being was clearly maintained by means other than secular employment.

On appeal, the petitioner submitted an affidavit from the beneficiary in which she states that she was required to be at the Parsons School of Design (New School University) for only six hours per week, and a letter from the chair of the Industrial Design Department of the Pratt Institute who states the school required the beneficiary to be present for only six hours per week. On appeal, counsel states that the Korea Buddhism Jo-

Gei Temple of America, Inc. and the petitioning organization “specifically formulated their weekday and weeknight schedules to accommodate beneficiary’s J-1 schedule.”

Counsel also submitted a work schedule that he states the beneficiary maintained at both organizations. However, counsel submitted no documentary evidence to substantiate his statements. 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).

Further, the petitioner submitted no documentary evidence to corroborate the beneficiary’s work at either institution. The record is therefore insufficient to establish that the beneficiary was continuously employed in the religious occupation for two full years preceding the filing of the visa petition.

The director also determined that the petitioner had not established that the proffered position offered full-time employment and thus the petitioner had not established that it had extended a qualifying job offer to the beneficiary.

In its letter accompanying the petition, the petitioner listed the duties of the proffered position and stated that they would require a minimum of 30 hours per week. It stated the duties were to be performed “within” the following work schedule: on Tuesday and Thursday from 1:00 to 6:00 p.m., on Saturday from 11:00 am to 10:00 p.m., and “all day” on Sunday.

In her RFE, the director instructed the petitioner to “[s]ubmit a breakdown of the number of hours devoted to each of the beneficiary’s proposed job duties on a weekly basis.” In response, the petitioner resubmitted its original letter. Counsel also stated in his cover letter that the position “additionally” requires a minimum of eight hours per week outside of the temple to prepare lecture notes and write religious articles for publication. As noted above, the assertions of counsel are not evidence. *Id.* Further, the duties stated by counsel are included in the duties that the petitioner stated would be performed “within” the minimum 30 hours required of the position.

On appeal, the petitioner states that the proffered position will require 40 hours per week and adds the hours of 10:00 a.m. to 6:00 p.m. on Wednesday and Friday (alternating weeks) to the work schedule, and states that the position would require services from 4:00 a.m. to 5:00 p.m. on Sunday. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Consistent with the requirements of the U.S. Department of Labor’s Bureau of Labor Statistics and other regulations pertaining to employment based visa petitions, CIS holds that employment of less than 35 hours per week is not full-time employment. The petitioner has not established that it will provide permanent full-time employment to the beneficiary. Part-time employment is not a qualifying job offer for the purpose of this employment based visa petition.

Although not relevant to the adjudication of the Form I-360, the director, in her RFE, instructed the petitioner to submit evidence that the beneficiary had received a waiver of the two-year foreign residence required of section 212(e) of the Act, which places limitations on the eligibility of certain J-1 visa holders to apply for a nonimmigrant visa. The copies of the beneficiary’s visas submitted by the petitioner clearly indicate that section

212(e) of the Act was applicable to the beneficiary's visa. In response to the RFE, counsel acknowledged that section 212(e) of the Act was applicable in the beneficiary's case, but asserted that she was "qualified" for a waiver. The petitioner submitted a copy of a February 26, 2003 letter from the beneficiary requesting a "no objection" letter from the Korean Consulate General, a March 11, 2003 letter from the Korean Embassy granting the request, and a July 11, 2003 letter from the U.S. Department of State recommending a waiver of the two-year foreign residence requirement of the Act. On appeal, the petitioner submits a copy of the July 31, 2003 approval notice, granting the beneficiary a waiver.

Nevertheless, as the petitioner has not established that the beneficiary was continuously employed in a qualifying religious occupation or vocation for two full years preceding the filing of the visa petition or that it would provide full-time employment, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that it has the ability to pay the beneficiary the proffered 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.

The petitioner indicates that it will pay the beneficiary \$2,000 per month. As evidence of its ability to pay this wage, the petitioner submitted copies of its checking account statements for the months of November 2002 through April 2003.

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 evidence. This decision constitutes an additional ground for dismissal of the appeal.

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.