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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[REDACTED]

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FILE: [REDACTED]
EAC 00 252 53223

Office: VERMONT SERVICE CENTER

Date: JUL 22 2005

IN RE: Petitioner: [REDACTED]
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.

Maiphusa

sn Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied this employment-based immigrant visa petition on May 16, 2001. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal, noting that the petitioner had not submitted a supporting brief or additional documentation as stated on the Form I-290B, Notice of Appeal to the Administrative Appeals Unit. The matter is now before the AAO on a motion to reopen. The motion will be granted; the petition will be denied.

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 church worker. 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.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

The petitioner's appeal was summarily dismissed for failing to specifically identify an erroneous conclusion of law or statement of fact as a basis for the appeal. Counsel indicated on the Form I-290B that a separate brief and/or evidence would be submitted within 60 days of submission of the appeal. At the time of the AAO's previous decision, no further documentation had been received.

On motion, counsel submits evidence that a brief was timely filed and a copy of the brief is now contained within the record. This evidence is sufficient to reopen the AAO's decision and consider the appeal on the merits.

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 beneficiary was continuously engaged in a qualifying religious occupation or vocation for two full years prior to the filing of the visa 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 August 16, 2000. 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 is unclear as to the exact nature of the proffered position. In a letter dated November 4, 2000, submitted in response to the director's request for evidence (RFE) dated August 31, 2000, Mr. [REDACTED] "Chairman of the Executive" of the petitioner, stated that the petitioner was "willing to pay [the beneficiary] for being clerical assistant, choir leader and cultural convenor of our parish." In an undated statement, also submitted in response to the RFE, Mr. [REDACTED] stated that the duties of the proffered position included clerical assistance during church services. Mr. [REDACTED] further stated:

He is also the cantor, choir conductor and music director of the Parish. He must spend at least three hours per week in choir practices and must prepare the music, select the hymns and prepare various concerts as required by the religious and cultural occasions.

He also assists the Pastor in visiting the sick and the elderly

His duties require him to be about church business six hours every day seven days a week, thus constituting 42 hours per week, sometimes even more.

In a letter of November 2000, Mr. [REDACTED] stated that the church was offering the beneficiary the position as choir conductor and clerical assistant in all church services. In another undated statement, [REDACTED] indicated that, for the past two years, the beneficiary "was doing this work as a volunteer and was remunerated by special donations of the parishioners."

Regardless of the nature of the proffered position, the petitioner submitted no documentary evidence to corroborate any employment by the beneficiary during the qualifying 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 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 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, counsel states:

The beneficiary's service to the church was offered in a volunteer capacity since June 12, 1998. [He] was supported by his Father, who is a Pastor of this petitioning church. [The beneficiary], therefore, was able to devote his fulltime efforts to his religious volunteer services, without the need to engage in other employment

Thus, there is credible evidence that the beneficiary has worked for the Church in a volunteer capacity since July 12, 1998, as a family member who was also associated with the same church financially supported [the beneficiary] in his religious endeavors Clearly, no payroll receipts, wage or tax statements can be produced, as the position was unpaid. However, the beneficiary did perform a rigid weekly schedule, which he adhered to during the entire period of volunteer service.

The petitioner submitted a copy of a Form W-2, Wage and Tax Statement, that it stated it issued to the beneficiary's father in 2000. However, the Form W-2 simply shows that the petitioner paid the beneficiary's father. There is no corroborative evidence of any support provided to the beneficiary by his father or anyone else during the qualifying two-year period.

The petitioner also submitted an August 13, 2001 letter from Mr. [REDACTED] in which he purports to set forth the beneficiary's average work schedule from July 12, 1998. The petitioner provided no contemporaneous documentary evidence of the beneficiary's work schedule. The work schedule submitted purports to show an "average" workweek for the beneficiary, but is compiled over three years after the beneficiary is reported to have began work for the petitioner.

The evidence does not establish that the beneficiary worked continuously in a qualifying religious occupation for two full years prior to the filing of the visa petition.

Beyond the decision of the director, the petitioner has not established that the proffered 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.

As discussed above, the petitioner has not clearly identified the nature of the proffered position, and the proposed duties, such as family counseling/educational training of the congregation, readying the choir, recommending proper library materials to choir members, readying volunteers and the worship space for the liturgy, dispensing hymnals and study notes as needed, readying the room for worship services, are either vague or secular in nature. The petitioner stated that the duties also included preparing the evening's sermon and conducting Sunday worship services. However, as the position is not that of an ordained or lay minister, these duties do not appear to be consistent with those of a clerical assistant, choir leader or cantor.

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.

The petitioner stated, "From the beginning the duties of clerical assistant/choir leader etc. were performed by knowledgeable parishioners on a volunteer basis." The petitioner also stated that the beneficiary volunteered his services to the petitioner. The petitioner submitted no evidence that the proffered position is defined and recognized by the governing body of its denomination, or that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

The evidence does not establish that the proffered position qualifies as a religious worker within the meaning of the statute and regulation. This constitutes an additional ground for which the petition may not be approved.

Further 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 demonstrate this ability at the time the priority date is established and continuing until the beneficiary prospective United States employer has the ability to pay the proffered wage. The petitioner must 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 \$1,000 per month. As evidence of its ability to pay this wage, the petitioner submitted a copy of a June 2000 monthly checking account statement for its Ladies Auxiliary, a copy of the auxiliary's June 2000 money market savings account statement, and a copy of the auxiliary's certificate of deposit.

On appeal, the petitioner submits a list of the various bank accounts of the [REDACTED] showing that the accounts totaled approximately \$144,457 as of statement dates of June 2001, and copies of the June 2001 bank statements. According to the head of the petitioner's audit committee, the auxiliary raises funds for the petitioner. On appeal, counsel states that these funds are used to pay compensation to church employees and to pay church expenses.

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.

The evidence submitted does not establish that the petitioner has the ability to pay the beneficiary the proffered wage. This deficiency constitutes an additional ground for denial of the petition.

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 decision of the director will be affirmed, and the motion will be dismissed and the petition will be denied.

ORDER: The motion is dismissed. The director's decision of May 16, 2001 is affirmed. The petition is denied.