

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

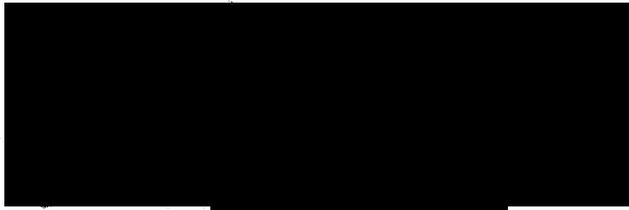
PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services

CI



FILE:



WAC 03 210 54141

Office: CALIFORNIA SERVICE CENTER

Date: SEP 19 2005

IN RE:

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a Sikh center. 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 (Sikh priest). 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.

On appeal, counsel submits a brief.

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 had been continuously employed in a qualifying religious vocation or occupation for two full years prior to the filing of the visa petition.

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 July 10, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a granthi throughout the two-year period immediately preceding that date.

In a June 18, 2003 statement accompanying the petition, Dr. Tarlochan Singh, the petitioner's program director, stated:

[The beneficiary] has been a regular participant and a devoted volunteer [with the petitioning organization]. As a voluntary worker he helps on regular basis by devoting lot of time and labor in preparing religious community meals, perform [sic] functions of a Sikh priest as and when needed during our religious programs, generally three times a week. He also helps on conducting [redacted] at the center. He helps generously with his time during lot of extra community activities, specially [sic] the meals for the senior citizens, and Sikh cultural events arranged by the [petitioner].

The petitioner submitted copies of photographs that counsel stated were of the beneficiary performing his duties. However, the photographs are not dated or otherwise identified and therefore have no evidentiary value. 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 to corroborate the beneficiary's claimed work with the petitioning organization. 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)).

In a request for evidence (RFE) dated June 22, 2004, the director instructed the petitioner to:

Provide evidence of the beneficiary's work history beginning July 10, 2001 and ending July 10, 2003 only. Provide a breakdown of duties performed in the religious occupation for an average week. Include the employer's name, specific job duties, the number of hours worked, [and] remuneration . . . Ideally, this evidence should come in a way that shows monetary payment, such as W-2 forms, pay stubs, or other items showing the beneficiary received payment. Documentation showing the withholding of taxes is good evidence. However, you may also show payment through other forms of remuneration. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported him or herself (and family

members, if any) during the two-year period or what other activity the beneficiary was involved in that would show support.

In response, [REDACTED] stated that the beneficiary "has been one of our priests since May 2001. [He] was compensated for his services with room and board to start with. In 2003, the [petitioner] hired him full time as 'Head Granthy', with a monthly[] salary of \$2000.00." Dr. Singh further stated:

His routine starts at 5AM everyday, with Prakash of Guru Granth Sahib, and recitation of traditional five Sikh prayers, these services last till about 6:30 AM

Next, about 7:30 AM another Morning Prayer service, called Kirtan of Aassa Di War is performed. This lasts for about one hour.

In the evening he conducts daily prayers, recitation {Path} of Raehraas Sahib followed by the closing ceremonies. These services begin at 7:00 Pm and finish at about 9:00 PM.

The main big community events at the [petitioner] are conducted, on Friday evening [7:00pm – 9:15pm], Sunday Morning [8:00am – 10:00am] and Sunday Noontime [11:30am – 1:30 pm]. All these programs are conducted and managed by [the beneficiary].

Additionally people come randomly, all day for private prayers at the center and helped by [the beneficiary].

In addition to above religious services, he also conducts Sikh Weddings under Sikh religious guidelines, blesses the new born who come to our Center first time, perform Sikh Baptisations [sic].

The petitioner submitted copies of pay stubs reflecting that it paid the beneficiary \$2,000 per month beginning in May 2003. The petitioner submitted no evidence that it provided lodging to the beneficiary and submitted no other documentary evidence of the beneficiary's work with the organization from July 2001 until May 2003 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)).

In his cover letter accompanying the petitioner's response to the RFE, counsel stated that since the petitioner only provided the beneficiary with room and board "at that time," the beneficiary supported himself by working at a 7-Eleven store, 25-32 hours per night. The petitioner submitted copies of earnings statements reflecting that the beneficiary worked for a 7-Eleven store in Santa Ana, California, earning a base pay ranging from \$7.25 per hour in June 2001 to \$8.00 an hour in May 2003. Copies of the beneficiary's tax returns show that he reported earnings of \$15,261 in 2001, \$29,518 in 2002 and \$29,372 in 2003. The beneficiary's Form 1040EZ, Income Tax Return for Single and Joint Filers With No Dependents, for the year 2003 lists his occupation as "caretaker."

The director determined, that as the beneficiary was not engaged in full-time employment with the petitioning organization, the petitioner had not established that he was continuously engaged in a qualifying vocation or occupation for two full years preceding the filing of the visa petition.

On appeal, counsel initially contends that Citizenship and Immigration Services (CIS) erred in its interpretation that the statute and regulations require the petitioner to establish that the beneficiary's qualifying work experience was in the same position as the proffered position. However, counsel's arguments center on the issue of whether or not Congress intended to require full-time, paid employment as a condition of the qualifying experience.

Counsel asserts that by requiring that the qualifying experience to be full-time, paid employment, and by excluding aliens who have also engaged in secular employment, CIS, in effect, "carve[s] out exceptions to who meets the definition of 'special immigrant.'" By doing so, counsel argues, CIS has engaged in de facto rulemaking that has not been subjected to the requirements of the Administrative Procedures Act.

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.

Counsel asserts that CIS's reliance upon *Matter of Bisulca* is inapplicable as the beneficiary in *Bisulca* had no formal theological training, was not to be paid for his services, and there was no evidence that he had ever performed services as a minister.

Nonetheless, the BIA cited *Bisulca* in its decision in *Matter of Varughese, id*, for the proposition that as the beneficiary had been performing his religious duties for several years without compensation, he had not been carrying on the vocation of minister with the Church of God. More on point with the current petition, the BIA also held in *Varughese* that the beneficiary was not continuously carrying on the vocation of minister while claiming to devote only nine hours per week to church activities while attending school full time.

The work schedule provided by the petitioner indicates that the beneficiary works approximately 20.5 hours per week as a granthi. The petitioner does not state when the beneficiary began working these hours, but it appears that this schedule commenced while he was working at the 7-Eleven store. According to the work schedule provided by the petitioner, the beneficiary conducted daily prayers from 7 to 9 p.m. However, the petitioner also stated that one of its "big" events is conducted on Friday evening from 7-9:15 p.m. It is unclear from the record, therefore, whether the beneficiary conducted prayers on a daily basis from 7 to 9 p.m. Further, in his initial letter of June 18, 2003, [REDACTED] stated that the beneficiary "perform[ed the] functions of a Sikh priest . . . during our religious programs, generally three times a week." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The record does not establish the number of hours the beneficiary worked in his secular job, however counsel asserted that it was from 25-32 hours per week. The assertions of counsel are not 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 provided no evidence of the beneficiary's working hours or how they fit within the petitioner's claim that the beneficiary conducted daily evening prayers from 7 to 9 p.m. and started daily morning prayers at 5 a.m. Counsel assertion that these hours were worked at night is not evidence. *Id.*

The record does not establish that the beneficiary was continuously employed in a religious vocation or occupation for two full years preceding the filing of the visa petition.

Beyond the decision of the director, the petitioner has not established that it is a bona fide nonprofit religious organization.

The regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

(3) *Initial evidence.* Unless otherwise specified, each petition for a religious worker must be accompanied by:

(i) Evidence that the organization qualifies as a nonprofit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases,

evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organization.

To meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(A), a copy of a letter of recognition of tax exemption issued by the Internal Revenue Service (IRS) is required. In the alternative, to meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B), a petitioner may submit such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code (IRC) of 1986 as it relates to religious organizations. This documentation includes, at a minimum, a completed IRS Form 1023, the Schedule A supplement, if applicable, and a copy of the organizing instrument of the organization, which contains a proper dissolution clause and which specifies the purposes of the organization.

The organization can establish eligibility under 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting documentation that establishes the religious nature and purpose of the organization, such as brochures or other literature describing the religious purpose and nature of the activities of the organization. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operation for CIS, *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003):

- (1) A properly completed IRS Form 1023,
- (2) A properly completed Schedule A supplement, if applicable,
- (3) A copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization, and
- (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

The above list is consistent with the regulatory requirement at 8 C.F.R. § 204.5(m)(3)(i)(B), cited above. The memorandum specifically states that the above materials are, collectively, the "minimum" documentation that can establish "the religious nature and purpose of the organization." Thus, for example, a petitioner cannot meet this burden by submitting only its articles of incorporation. Also, obviously, it is not enough merely for the petitioner to *submit* the documents listed above. The *content* of those documents must establish the religious purpose of the organization.

The petitioner submitted a copy of an August 7, 1995 letter from the IRS to the Sikh Center of Orange County at [REDACTED] Santa Fe Springs, California, which its articles of incorporation identify as its agent for service of process. The employer identification number listed in the letter is [REDACTED]. However, on the Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, the petitioner lists its address as [REDACTED] Santa Ana, California and its employer identification number as [REDACTED]. The latter number is the same as that used on the petitioner's Form 990, Return of Organization Exempt from Income Tax, and on the Form W-2 that it issued to the beneficiary. The petitioner submitted no evidence to establish that it is the same organization to which the IRS granted tax-exempt status.

The record does not establish that the petitioner is a bona fide nonprofit religious organization. This deficiency constitutes an additional ground based on which the petition may not be approved.

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

ORDER: The appeal is dismissed.