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FILE:

WAC 05 028 53350

Office: CALIFORNIA SERVICE CENTER

Date: **AUG 16 2006**

IN RE:

Petitioner:

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:



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 (AAO) on appeal. The appeal will be sustained and the petition will be approved.

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 religious education director. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a religious education director immediately preceding the filing date of the petition.

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) 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 November 10, 2004. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a religious education director throughout the two years immediately prior to that date.

[REDACTED] of the petitioning church states that the beneficiary “has been serving as a Religious Education Director at our church from August 2002 to present. . . . Her salary is \$2,200 per month. Her position is full time permanent.” The record contains a copy of an approval notice from August 2002, showing the beneficiary’s R-1 nonimmigrant religious worker status.

The petitioner submits copies of Form 1099-MISC, Miscellaneous Income, indicating that the petitioner paid the beneficiary \$21,600 per year in “Nonemployee compensation” in 2002 and 2003. \$21,600 per year is \$1,800 per month. The petitioner submits copies of cancelled checks showing monthly \$1,800 payments to the beneficiary. The earliest check is dated September 1, 2002. From January to March of 2004, the checks are for \$2,200 each. Subsequent checks are in the amount of \$1,893.91, presumably to reflect withholding of taxes. The petitioner also submits copies of the beneficiary’s Form 1040 Income Tax Returns for 2002 and 2003. In each of those two years, the beneficiary reported \$21,600 in “Business income” and no significant income from any other source.

The director requested additional evidence of the beneficiary’s past experience. The petitioner resubmitted copies of the documents mentioned above, and new tax documents showing that the petitioner paid the beneficiary \$26,400 in 2004. The petitioner reported half of this amount on Form 1099-MISC and the other half on Form W-2, Wage and Tax Statement. The petitioner also submits a copy of the beneficiary’s 2004 Form 1040 Income Tax Return, showing that the beneficiary reported \$13,200 as wages/salaries and \$13,200 as business income. On the tax return, the beneficiary identified her “Principal business” as [REDACTED] which is the name of the petitioning church.

In denying the petition, the director did not contest the evidence of the beneficiary’s past religious work. Rather, the director stated: “The petitioner claims that the beneficiary is performing religious services but yet the beneficiary is considered a non-employee for taxation purposes.” The director concluded that the beneficiary’s nonemployee status is an inconsistency that fatally undermines the petition. The director cited no other basis for denial.

On appeal, counsel argues: “In utilizing the IRS test it is clear that the beneficiary is considered to be an employee and not an independent contractor.” In the larger perspective, however, the exact terminology seems to be unimportant. There appears to be no dispute that the beneficiary provided services to the petitioner, as documented by contemporaneous records of the beneficiary’s compensation. The director also has not questioned the nature of the duties performed by the beneficiary or suggested that those duties do not amount to qualifying religious work.

The director, in effect, did not contest the beneficiary’s performance of two years of religious work, but found that this work does not qualify because the beneficiary’s income was reported on Form 1099 instead of Form W-2. Upon consideration, we are not persuaded that this is adequate grounds for denial of the petition. The director cites no statute, regulation, or case law to show that religious work, performed under an R-1 religious worker visa, is excluded from qualifying experience if the remuneration is reported as “nonemployee compensation” on Form 1099.

We note some anomalies on the beneficiary's tax documents. The beneficiary consistently identified her filing status as "Head of household," although the Form I-140 petition indicates that the beneficiary is married. Also, the Form 1099 for 2002 shows the same amount of compensation (\$21,600) as the Form 1099 for 2003. The petitioner, however, has repeatedly claimed that the beneficiary began working in August 2002, which is consistent with the September 2002 date on the earliest paycheck submitted, in which case it is not clear why the 2002 Form 1099 shows an entire year's pay. While this is very puzzling, this information has no direct bearing on the beneficiary's employment from November 2002 through November 2004, which has been amply documented through cancelled checks, and it does not shift the preponderance of evidence away from a finding of eligibility. To the extent that these discrepancies may be of concern, they appear to be of more concern to the Internal Revenue Service than they are to Citizenship and Immigration Services.

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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.