



U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 255 51649 Office: CALIFORNIA SERVICE CENTER Date:

DEC 03 2009

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.

Perry Rhew
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 AAO will dismiss the appeal.

The petitioner is a Reform Jewish synagogue. 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 an assistant teacher in its religious pre-school. The director determined that the petitioner had not established that: (1) the beneficiary's position relates to a traditional religious function; (2) the beneficiary qualifies for the position; or (3) the position is full-time.

On appeal, the petitioner submits a brief from counsel, a letter from a temple official, and various documents relating to the beneficiary's background.

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 September 30, 2012, 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 September 30, 2012, 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).

RELIGIOUS OCCUPATION

The first issue we will consider is whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(5) defines a "religious occupation" as an occupation that meets all of the following requirements:

- (A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination.
- (B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.
- (C) The duties do not include positions that are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible.
- (D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

Describing the beneficiary's duties, [REDACTED], stated:

As an Assistant Teacher [the beneficiary] has the following responsibilities:

1. Primarily responsible for educating pre-school children in Judaic and Hebrew studies. . . .
2. To create a feeling of independence in the children and keep an open line of communication with the parents of children.
3. Convey an appreciation of Judaica through drama and storytelling.
4. Prepare and carry out art projects, story telling, science lessons, cooking lessons and music lessons that primarily teach the students about various holidays, festivals, fast days and Shabbat Services, Jewish history and customs.
5. Prepare and carry out lessons about numbers, letters, colors and shapes related to current Jewish holidays and festivals. For example, counting eight Hanukah candles.
6. To keep the Preschool Director informed of any concerns about the children regarding important age appropriate milestones, and attend all staff meetings [and] in-service training.
7. To take responsibility for room arrangement, set-up and breakdown.
8. Work with other teachers, staff and the Rabbi in developing appropriate teaching methods to optimize students' learning of Judaica including Torah (Bible) and traditional prayers.

The position is different from that of an assistant teacher in a secular school in that the teacher is expected to integrate aspects of Judaism into the everyday experiences of the children. . . .

This position relates directly to our religious practice. We integrate and emphasize Jewish values, prayers and traditions in our every-day curriculum.

The director denied the petition on January 28, 2009, based in part on the finding that "[t]he beneficiary's duties do not relate to a traditional religious function. . . . Although the petitioner created predisposed duties to create a religious significance to the functions of the pre school teacher, it appears that the religious significance did not equate to a traditional religious function."

On appeal, counsel asserts that the petitioner's "[c]ongregants send their children to the synagogue's preschool rather than to a secular preschool because they want their children to receive religious indoctrination from the earliest age possible."

██████████ disputes the director's contention "that we invented religious significance for the purpose of this petition that did not exist before." ██████████ asserts that the secular components of the beneficiary's work are common to all pre-school teachers, secular and religious, and that these aspects of the beneficiary's work do not diminish the religious significance of her work.

We find that the director did not clearly explain why the position appears to be secular, or how the petitioner failed to demonstrate the religious nature of the position. We note that Congress specifically included religious instructors in a list of examples of qualifying religious occupations. *See* H.R. Rep. No. 101-723, at 75 (1990). Clearly, a petitioner cannot simply disguise secular employment with a qualifying job title; the petitioner must demonstrate the predominantly religious nature of the work. In this instance, however, the petitioner has not simply applied superficial religious trappings to an otherwise secular pre-school teaching position. Rather, the petitioner has credibly described the position as relating to the traditional religious function of providing religious education to children.

We withdraw the director's finding that the beneficiary's position does not relate to a traditional religious function. Other issues remain, however, which prevent the approval of the petition.

QUALIFICATIONS

8 C.F.R. § 204.5(m)(5) defines a "religious worker" as an individual engaged in and, according to the denomination's standards, qualified for a religious occupation or vocation, whether or not in a professional capacity, or as a minister. The director questioned the beneficiary's qualifications for the position.

Regarding the requirements for the position, ██████████ stated:

Please note that Judaism, as a religion, does not have set standards for teachers. Each community can set its own standards and requirements. However, teaching the faith is a long-standing occupation in Judaism usually performed by properly educated lay people. Ordination is not required for the position. Our requirements are as follows:

1. The assistant teacher must be a practicing Jew.
2. Education at a Jewish institution in the United States or, if educated in Israel, matriculation exam results in Bible.
3. Must participate in course work and/or conferences that provide for professional growth.

A separate job description stated: "The person selected for this position must be professionally prepared with a minimum of 12 hours in course work in child development." The petitioner submitted no evidence, and made no claims, relating to the beneficiary's fulfillment of this requirement.

In the initial submission, the only documentation of the beneficiary's educational background was a letter from [REDACTED] of Records and Graduation at California State University, Northridge, who stated that the beneficiary "completed all requirements for the Bachelor of Science Degree in Marketing. . . . This degree will be awarded officially on August 19, 2008."

In a translated letter, [REDACTED] Tel Aviv, Israel, stated that the beneficiary is "a religious Jew who wants to embrace the religion even more."

In the denial notice, the director stated: "the petitioner indicated that religious teaching has always been done by pious lay individuals who practice what they preach. However, the beneficiary was never regarded as a pious lay individual." The director also stated:

The beneficiary[']s qualifications submitted did not indicate that he/she was a graduate of a Jewish school program or have an Israeli Matriculation certificate. Although USCIS believes that he/she is a practicing Jew, he/she has not participated in any course work or conferences for her professional growth as a teacher. . . . [The beneficiary's bachelor's degree in marketing] did not contribute to the beneficiary's professional growth as a Jewish religious instructor.

On appeal, [REDACTED] states:

Many congregations in the United States choose to hire Israeli citizens because they are raised steeped in the tradition that we must struggle to maintain. . . . [M]ost Israelis who graduated from the Israeli public school system and took a matriculation exam are far more knowledgeable in religious subjects than the average American Jew. [The beneficiary] is such a product of the Israeli school system and therefore has had at least 10 years of bible study and daily learning of religious subjects. We believe that evidence to that effect was included with our application. The decision states that there

was [no] evidence included that [the beneficiary] had religious education; we dispute that and enclose an additional copy of the same evidence. The decision also states that there is no evidence that [the beneficiary] is a pious individual. That is also incorrect. A letter from the Rabbi in her home congregation was enclosed with the appropriate translation and it is enclosed again herein. We most certainly regard [the beneficiary] as a practicing Jew with religious training sufficient and adequate to teach the children of our congregants about their faith and heritage.

The decision states that [the beneficiary's] degree does not relate to religious education. We desire to employ college graduates because they are well-rounded, well-informed, educated individuals who are better suited to teach our children than people who are not similarly educated. As long as the religious background is present and the individual can show sufficient religious training we do not require that their degree involve religious education.

The petitioner is correct that the initial submission included a letter from an Israeli rabbi who described the beneficiary as "a religious Jew," which contradicts the director's unexplained and unsupported assertion that "the beneficiary was never regarded as a pious lay individual." This assertion, however, was not the focus of the director's decision.

Contrary to the petitioner's claim on appeal, the record does not indicate that the petitioner submitted the beneficiary's educational credentials with the initial submission. On appeal, the petitioner submits copies of translated documents showing that the beneficiary studied such subjects as "Bible" and "Jewish Studies" in high school. This meets the petitioner's requirement for "matriculation exam results in Bible."

With respect to [REDACTED] statement that the petitioner prefers college graduates, the beneficiary was not a college graduate when the petitioner first hired her in 2006. She received her college degree only weeks before the petition was filed. Therefore, we can effectively dismiss the beneficiary's 2008 marketing degree as a requirement for the job she already had.

Noting the petitioner's assertion that the beneficiary "[m]ust participate in course work and/or conferences that provide for professional growth," the director observed that the petitioner had not shown that the beneficiary had "participated in any course work or conferences for her professional growth as a teacher." On appeal, the petitioner does not dispute or even address this finding.

In a similar vein, the petitioner's own "Job Description for Teachers" states that the position requires "a minimum of 12 hours in course work in child development," but the petitioner has submitted no evidence that the beneficiary completed this required course work. Instead, the petitioner has taken the new position that practically any Israeli with a college degree is intrinsically qualified for the position the beneficiary seeks.

The petitioner has failed to establish that the beneficiary meets the stated requirements of course work in child development and ongoing course work/conferences. Therefore, the petitioner has not shown that the beneficiary meets the petitioner's stated minimum requirements for the position. We affirm the director's finding in this regard.

JOB OFFER

The final stated ground for denial concerns the terms of the job offer. 8 C.F.R. § 204.5(m)(2) requires that the beneficiary must be coming to the United States to work in a full time (average of at least 35 hours per week) compensated position in a qualifying religious occupation or vocation.

8 C.F.R. § 204.5(m)(10) requires verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation.

Describing the terms of employment, [REDACTED] stated:

[The beneficiary] works a full-time schedule consisting of 25 classroom hours a week as well as many additional hours of preparation. . . .

[The beneficiary] is paid at the rate of \$10.50 per hour in compensation for her work. Enclosed please find copies of her tax returns and W2 forms.

The terms of employment that [REDACTED] described – 25 hours per week, at \$10.50 per hour – also appear in the beneficiary's employment contract (which also describes a 42-week school year). Given those terms, the petitioner should pay the beneficiary \$262.50 per week. Over the course of the petitioner's 42-week school year, the beneficiary should receive \$11,025.00. The record, however, does not show such payments.

The beneficiary began working for the petitioner in August 2006, and therefore we acknowledge that she would have received less than half a year's pay during that calendar year. Internal Revenue Service Form W-2 Wage and Tax Statements show that the petitioner paid the beneficiary \$3,782.56 in 2006 and \$8,501.49 in 2007. The petitioner's quarterly wage report for the second quarter of 2008 shows that the petitioner paid the beneficiary \$1,824.98 during that period.

The director, in the denial notice, stated that the amounts shown on the beneficiary's tax documents do not reflect full time employment. The director concluded: "It appears that the beneficiary is not coming to the United States to work in a full time position with an average of at least 35 hours per week."

On appeal, [REDACTED] states: "We pay our teachers by the hours they spend actually teaching in the classroom, but we expect additional hours of work as specified in the contract. . . . We . . . pay per classroom hour."

While the regulations permit the petitioner to compensate the beneficiary in ways other than salary payments, qualifying employment must be compensated in some fashion. The petitioner's stated intention to require the beneficiary to work additional unpaid hours, while being paid for only 25 hours per week, resolves nothing in the petitioner's favor. Even then, the petitioner has submitted no credible evidence that the petitioner has ever paid the beneficiary \$10.50 per hour for a 25-hour work week. The tax documents in the record consistently indicate either a substantially lower hourly rate, greatly reduced work hours, or some combination of the two.

We affirm the director's finding that the petitioner has not shown the existence of a full-time job offer.

Beyond the factors discussed above, our review of the record shows other issues of concern. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The USCIS regulation at 8 C.F.R. § 204.5(m)(7), which went into effect on November 26, 2008, after the petition was filed, but which applies to petitions pending on that date, requires the petitioner to submit an attestation relating to the petitioning entity, the beneficiary, and the job offer. The record contains no such attestation from the petitioner. The petitioner's various submissions cover most, but not all, of the points required in the attestation. The lack of this attestation would be easily remedied by the petitioner's submission of that document. The remaining issue, however, is more significant and problematic.

Section 101(a)(27)(C)(ii) of the Act, and its subclauses, indicate that the beneficiary must intend to engage in qualifying religious work in the United States. The regulations at 8 C.F.R. § 204.5(m)(2) and elsewhere reflect this requirement of continued intent. The petition, therefore, must reflect not only the beneficiary's employment in religious work at the moment of filing, but also the beneficiary's genuine intention to remain in that field of work.

As noted previously, the beneficiary "completed all requirements for the Bachelor of Science Degree in Marketing" at California State University, Northridge." The petitioner has not explained how the beneficiary's pursuit of a degree in marketing indicates her intent to continue working as a preschool teacher's assistant, a field that does not appear to require significant expertise in marketing.

We note that the beneficiary listed her occupation as "student" on her 2006 and 2007 income tax returns. Thus, even while she was working for the petitioner, the beneficiary apparently considered herself to be not a religious worker, but a student who performed religious work while pursuing an obviously secular degree in a field unrelated to education. The record does not indicate that the beneficiary has any history of religious work apart from the part-time work that she performed for the petitioner while working on her degree. Combined with the director's prior un rebutted finding that the

beneficiary does not appear to have pursued training required by the petitioner, these circumstances do not support a finding that the beneficiary seeks to enter the United States in order to continue working as a religious educator.

The AAO will dismiss the appeal 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.