

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[REDACTED]

AUG 15 2003

File: [REDACTED] Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

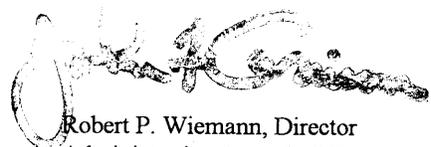
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


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 on appeal. The appeal will be dismissed.

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, 8 U.S.C. § 1153(b)(4), to perform services as a cantor. The director determined that the petitioner had not established its ability to pay the beneficiary's proffered wage, or that the beneficiary had the requisite two years of continuous work experience as a cantor immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established that the beneficiary's duties constitute a qualifying religious occupation.

On appeal, counsel argues in a brief that the petitioner has established the necessary prior employment, and that the beneficiary's duties constitute a qualifying religious occupation.

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, 2003, 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, 2003, 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 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 an 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.”

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 June 18, 2001.¹ Therefore, the petitioner must establish that the beneficiary was continuously working as a cantor throughout the two-year period immediately preceding that date.

Pastor Hannays Charles states that the beneficiary “has been providing full services as a Cantor leader on a full time, voluntary basis with our organization continuously from June, 1998 to present.” In a separate letter, Pastor Charles states that the beneficiary “has been performing the duties of a Minister in my congregation.”

The director instructed the petitioner to submit evidence showing “all jobs the beneficiary has held, religious or non-religious, during the period June 1999 to the present,” as well as “[a]n explanation as to how the beneficiary has supported herself and her family from June 1999 to the present.” In response, Pastor Charles states “[t]he beneficiary supports herself and her daughter [with] funds she brought with her from Guyana in addition to any monies or financial help she receives from her

¹ On appeal, counsel states :

Please note that instant petition was originally mailed . . . on April 17, 2001 and was received on April 20, 2001. However, inadvertently, on May 31, 2001 the service returned the petition stating that the fee was not required at that time. Immediately, the respondent re-mailed the petition back to the Vermont Service [Center] and on June 18, 2001 the service registered the petition.

Since it was not the fault of the respondent it is respectfully requested that in the interest of justice instant petition be deemed to have been filed as [of] April 20, 2001.

The record does not support counsel’s version of events. The record contains a letter from Theodora Perryman of KSMD Consultants, who had prepared the petition. In the letter, dated June 11, 2001, Ms. Perryman states “the I-360 petition was inadvertently left out of the mailing package. I have now enclosed the petition together with the filing fee.” A petition submitted without the petition form itself is not properly filed and therefore no filing date can be assigned. Nothing in the record of proceeding indicates that June 18, 2001 should not be considered the petition’s filing date.

extended family members and donations she receives from the church. The beneficiary will not be dependent on supplementary income for support if employed by the church.”

In denying the petition, the director stated that the petitioner has “not established that the beneficiary was a full-time religious worker for the 2-year period from June 1999 to June 2001.” On appeal, counsel states that Pastor Charles’ letter is “clear and convincing” proof of the beneficiary’s past work for the petitioner. Counsel observes that, as an unpaid volunteer, no payroll or tax records would exist to document this work. The absence of tax records aside, it is not credible that two years of continuous religious work would produce absolutely no contemporaneous documentation or evidence.

The apparent total absence of such evidence is consistent with a finding that the work did not take place at all, or that such work was minimal. The petitioner’s after-the-fact assertion that the beneficiary worked as claimed is not, as counsel asserts, evidence of the beneficiary’s work in a religious occupation. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel states “[t]he absence of specific statutory language requiring that the two years of work experience be full-time employment implies that any form of intermittent, part-time or voluntary activity constitutes continuous work experience in a religious occupation.”

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. Com. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Com 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 salaried. To hold otherwise would be contrary to the intent of Congress.

Another issue in this proceeding is whether the petitioner has made a qualifying job offer. 8 C.F.R. § 204.5(m)(4) states that each petition for a religious worker must be accompanied by a job offer from an authorized official of the religious organization at which the alien will be employed in the United States. 8 C.F.R. § 204.5(m)(2) states:

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

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 must complete prescribed courses of training established by the governing body of the denomination and their services are 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. Persons in such positions must be qualified in their occupation, but they require no specific religious training or theological education.

The Service 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 specific prescribed religious training or theological education is required, 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.

We note that the inclusion of the word “cantor” in the regulatory definition does not imply the automatic eligibility of any given worker who is declared to be a “cantor.” The nature of the duties themselves is, necessarily, of far greater significance than the label that the petitioner chooses to attach

to those duties. The petitioner must establish that the denomination traditionally employs paid cantors whose duties closely mirror those ascribed to the beneficiary.

In two separate letters (one of which refers to the beneficiary as a “Cantor leader,” the other of which refers to the beneficiary as a “Minister”), Pastor Charles lists the beneficiary’s duties as follows:

1. Makes announcements in Church
2. Co-ordinates the Offering Services
3. Attend Board Meetings
4. Church Secretary
5. Assist in Worship Services on Sundays and Tuesdays
6. Hospital Visitation
7. Missionary outreach
8. Evangelism
9. Bible Study Classes every Thursday

The director instructed the petitioner to submit “[a] detailed weekly work schedule for the beneficiary’s religious work” during the qualifying period, as well as other information about the petitioning church. In response, Pastor Charles states “[t]he church has fifty six [56] registered members and approximately twenty [20] unregistered members.” Pastor Charles expands upon the above list of duties but does not indicate the amount of time these duties occupy.

The director denied the petition, noting the size of the congregation and the petitioner’s failure to establish the hours of the beneficiary’s schedule. On appeal, counsel offers a breakdown of the beneficiary’s duties, totaling 38½ hours per week. Leaving aside the fact that this breakdown is not entirely consistent with earlier descriptions of the beneficiary’s schedule, counsel offers no documentary support for these claims on appeal. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Photographs of the church, submitted with the petition, show a single fairly small room. The congregation, according to the petitioner, numbers less than 80 people. We are not persuaded that this very small church could reliably generate full-time employment for the beneficiary to perform the duties described. Of the above 38½ hours, 13½ are said to be devoted to “meeting people and preaching [to] people on streets, trains, buses, sometimes visits from home to home.” The petitioner has not established the church’s denomination considers proselytizing in this way to constitute an occupation, as opposed to a function generally performed by unpaid volunteers or even a duty expected of dedicated church members. Another three hours of the beneficiary’s schedule consists of being “available to receive phone calls” while the church is closed. Here again, the small size of the church is a consideration.

For the above reasons, the petitioner has not persuasively established that the beneficiary’s prospective duties constitute a qualifying religious occupation primarily involving traditional religious duties that the denomination routinely delegates to paid employees rather than to volunteers or members of the congregation.

The final basis for denial regards the petitioner's ability to pay the proffered wage. 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 intends to pay the beneficiary \$300 per week, or \$15,600 per year. The director requested evidence of the petitioner's ability to pay this salary. In response, Pastor Charles submits a bank statement which, he states, "show[s] income to be approximately \$3,000.00 per month which is sufficient to cover the beneficiary's salary." A bank statement does not offer a complete perspective of the petitioner's finances, because it does not (for instance) reflect the petitioner's outstanding liabilities. Even then, the bank statement does not support the petitioner's claim. The bank statement shows a beginning balance of \$3,472.37 and an ending balance of \$2,602.65, for a net decrease of \$869.72. The statement reflects three deposits into the account, totaling \$1,850.00. Thus, there is no information on the bank statement that shows income of \$3,000 per month as claimed. The limited information on the bank statement does not readily portray an employer with significant available assets.

Furthermore, the regulation cited above states that evidence of ability to pay "*shall be* either in the form of copies of annual reports, federal tax returns, or audited financial statements" (emphasis added). While the petitioner may supplement the above evidence with other documentation, the petitioner has no discretion to submit other evidence (such as a bank statement) in lieu of the required annual reports, federal tax returns, or audited financial statements. Because the petitioner has submitted none of the required documents, the petitioner has failed to establish its ability to pay the beneficiary's proffered wage.

In denying the petition, the director stated that the petitioner has not established that it "can afford the beneficiary's \$15,600 yearly salary." On appeal, counsel acknowledges that this was one of the three stated grounds for denial, but counsel's ensuing brief offers no discussion or rebuttal of this finding. The petitioner's failure to address this basis for denial is, by itself, sufficient grounds for dismissal of the appeal, even without the above discussion of the other grounds for denial.

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.