U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536

identifying data deleted to prevent clearly unwarranted [redacted] privacy

File: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 04 2003

IN RE: Petitioner:
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]

PUBLIC COPY

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 an associate pastor. The director determined that the petitioner had not established that it has paid, or will pay, any salary to the beneficiary. The director also found that the petitioner has not established that the beneficiary has been, or will be, a full-time employee of the petitioning church. The director observed that the record shows that the beneficiary has been engaged in secular employment throughout the two-year qualifying period immediately prior to the petition's filing date.

On appeal, the petitioner submits a church schedule and asserts that the director's findings are incorrect.

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 May 1, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as an associate pastor throughout the two-year period immediately preceding that date.

We note that the beneficiary refers to his work as a "vocation," and both the petitioner and the beneficiary refer to the beneficiary as an associate pastor. We note that, pursuant to section 101(a)(27)(C)(ii)(I) of the Act and 8 C.F.R. § 204.5(m)(1) and (4), an alien seeking classification in the vocation of a minister must work solely in that vocation. An alien who will engage in outside, secular employment, or who has so engaged during the two-year qualifying period, is ineligible for classification as a minister.

The petitioner submits a statement from the beneficiary, describing his work for the petitioner. The beneficiary states:

> [I]n 1991 . . . the Associate Pastor Ministry (Audio, Recording for Broadcast and Editing) position was created and plans for "In-house" training assembled. I was preliminarily trained with other members, and few of us were appointed to the above titled permanent positions "on the job" as Associate Pastors in training, sometime in 1994.
>
> My full vocation in religious work was thus born. The days assigned to me till date was/are [sic], Monday to Friday: from 4:00PM – 10:00PM (sometimes stays [sic] till 1:00AM especially during month-end Revivals and conference days), Saturdays: from 7:30PM – 8:00PM, and Sundays: from 7:00AM – 8:30PM (after the house caring fellowships) which is a total of 42 hours (or more) per week.

> As an Associate Pastor my duties includes [sic] (Audio Taping and Recording Ministry), and ranges from dealing with extensive magnetic media to editing (using magnetic media); in addition to printed tracts as an effective 20th [sic] century technology for spreading the word of God.
>
> I am also engaged in the production of live gospel programs, editing and preparing tapes of sermons, meetings, conferences, and services, and distribution for re-broadcast. Associate Pastors teaches [sic] weekly Bible studies, assist in the coordination of "Open Air" preaching and Evangelism works, and attends to other assignments in the interest of the church and in other matters concerning inter-church functions, conferences, and pray for people as needed.
>
> As an Associate, I assists [sic] in the Training of Lay Ministers, Evangelists, Missionaries in all of Deeper Life Bible Churches throughout North America. Also, I assists [sic] (where needed) maintain, assemble, and service all Tape-Recording machines, and broadcasting equipments [sic].
>
> My employment with Petitioner has been continuous and full time to now. Although I holds [sic] a "field day Job" with the City of New York (investigating cases of Vaccine Preventible [sic] Diseases) so as to augment the salary/ allowances derived from my religious work. I have nevertheless, been diligent and faithful to the work of my father.

On a Form G-325A Biographic Information sheet submitted with the petition, the beneficiary states that he has been an associate pastor with the petitioner from 1991 to present, and a "Public Hlth Adv." with the New York City Department of Health since May 1997.

The director instructed the petitioner to submit detailed schedules to show the beneficiary's past and intended future work for the petitioner. In response, the petitioner submits a letter from counsel, which essentially repeats portions of the beneficiary's introductory letter.

The director denied the petition, stating that the petitioner failed to establish "that the beneficiary was a full-time religious worker for the two-year period from June 1999 to June 2001" or that "the beneficiary would be a full-time religious worker in the job offered." The director noted the absence of a detailed weekly schedule of the beneficiary's activities.

On appeal, the petitioner submits a "Weekly Schedule of Church Activities" and states that this schedule "show[s] that the beneficiary['s] work schedule is full-time." The beneficiary himself had previously stated his full job title as "Associate Pastor (Recording Ministry)," and discussed at some length his work recording and editing taped materials. The only entry on the newly-submitted schedule that could be interpreted as regarding the production, editing, or distribution of recorded materials is a three-hour block of time on Monday afternoon, set aside for "Review and Duplication of Messages." The petitioner does not explain why the new schedule is so significantly at odds with the beneficiary's own description of his job. The petitioner submits no

first-hand evidence showing that the beneficiary has performed or will perform the duties listed on the "Weekly Schedule." The beneficiary's name does not appear on the schedule itself.

Counsel argues that the petitioner must only establish that the beneficiary has been "performing the professional work" during the two-year qualifying period, not that this work was full-time. 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.

The other issue on appeal concerns the beneficiary's means of financial support and the petitioner's ability to provide that support. 8 C.F.R. § 204.5(m)(4) requires the petitioner to

establish details regarding the beneficiary's remuneration. 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 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 beneficiary, in his above description of his duties with the petitioner, has not specified how much he is paid, if he is paid at all. Therefore, the director instructed the petitioner to submit "[a] statement as to how much the beneficiary would be paid," evidence of the petitioner's ability to pay that amount, and the beneficiary's tax documentation from the relevant period. The director noted that the petitioner appeared to have filed at least 28 earlier petitions on behalf of other religious workers.

In response, the petitioner submits copies of bank statements and unaudited balance sheets and financial statements. Pastor Emmanuel Omotoso states that the church has branches in many locations throughout the United States, and that "some of the people sponsored earlier by this Church were volunteers, not on pay roll of the Church." Having thus stipulated that the petitioner has filed petitions on behalf of unpaid volunteers, Pastor Omotoso does not state outright that the beneficiary has been paid for his work.

Counsel states "[t]he beneficiary will receive an annual salary of $29,500," but at the time there was no direct assertion from the petitioner to that effect. 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). The claim regarding what the beneficiary "will receive" implies that he was not yet receiving that salary.

The petitioner submits copies of Forms W-2 issued to the beneficiary by the City of New York, showing that the beneficiary earned $26,251.09 in 1999, $28,029.67 in 2000, and $33,469.01 in 2001. The petitioner also submits copies of the beneficiary's federal income tax returns from 1999 and 2001, and his New York State income tax return from 2000. The only income that the beneficiary claimed on any of the forms was the income from his job with the City of New York. On the tax returns, the beneficiary identified his occupation as "Public Health Advisor." The beneficiary's wife (who, the beneficiary asserts, is also the beneficiary of a separate petition filed by the petitioning church) is identified as a "Registered Nurse."

We note that, on the 1999 return, the beneficiary did not identify his filing status as "married filing joint return" or "married filing separately," although the beneficiary claims to have been married to the same individual since 1980. Instead, the beneficiary listed his filing status as "head of household." Under "Dependents," the beneficiary listed only two of his four children. Because a head of household

qualifies for tax benefits not available to married taxpayers, the beneficiary's claim of this filing status effectively amounts to tax fraud. The record does not reveal whether or not the beneficiary's spouse also filed a return as a "head of household," claiming the other two children as dependents. If the petitioner has, in fact, paid the beneficiary during the two-year qualifying period, then the beneficiary's failure to report that income amounts to further fraud, and the petitioner's failure to report its payments to the beneficiary would also raise questions.

In denying the petition, the director stated that the petitioner has not established the beneficiary's compensation. On appeal, Pastor Omotoso asserts that the beneficiary "is currently on the Church payroll at a salary of $29,500.00 . . . per annum." The petitioner submits no evidence to show that the beneficiary has ever received this salary, even though the statement that the beneficiary "is currently on the Church payroll" implies that the petitioner is already paying the beneficiary. This claim remains unsubstantiated and the petitioner has not overcome the director's finding.

The above-cited regulation at 8 C.F.R. § 204.5(g)(2) 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 evidence.

The director found "[t]he beneficiary's primary employment appears to be as a secular public health worker for the City of New York." On appeal, the petitioner does not address, contest, or rebut this finding.

The record contains strong, contemporaneous documentation showing that the beneficiary worked in a secular occupation for the City of New York. The record contains no comparable evidence to establish his claimed religious work for the petitioner. The preponderance of the evidence in the record, therefore, clearly supports the director's finding that the beneficiary is not primarily a religious worker, eligible for immigration benefits arising from that work. Rather, the beneficiary has been, and by all appearances will continue to be, primarily a secular, municipal employee who participates in church activities as a secondary activity.

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.