U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 1 4 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

Myron L. Rosenberg
for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner seeks classification of 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), in order to perform services as a cantor. The petitioner states that the beneficiary "is currently paid, and will continue to be paid, the amount of $1,600 per month for his services."

The director denied the petition in a decision dated May 22, 2003. The director determined that the petitioner had not established that the beneficiary had been continuously engaged in a qualifying religious vocation or occupation for two years immediately preceding the filing date of the petition. The director also determined that the petitioner had not established that the beneficiary is qualified to engage in a religious vocation or occupation.

On appeal, counsel for the petitioner submits a brief and additional documentation. Counsel concludes that: the denial of the petition should be reversed on several grounds. First, counsel asserts that that the restrictions placed on the [redacted] of North America "are an unconstitutional restriction on the free exercise of religion, prohibited by the First Amendment of the United States Constitution," and that "none of the purported grounds for denial evince any legitimate governmental interest." Counsel further asserts that, "going beyond the Constitutional infirmity of the denial of the petition, [the beneficiary] has shown that he has served as a cantor for more than the required time period" and that "his sole purpose has been to work for the petitioner." Finally, counsel concludes that the beneficiary "has submitted ample evidence to show that he is qualified for the position offered."

In order to establish eligibility for classification as a special immigrant religious worker, the petitioner must satisfy each of several eligibility requirements.

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,
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> (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
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> (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) states, in pertinent part:

> 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 alien must be coming to the United States solely for the purpose of carrying on the vocation of a minister of that religious denomination, working for the organization at the organization's request in a professional capacity in a religious vocation or occupation for the organization or 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. All three types of 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 petitioner is a [redacted] affiliated with the Greek Orthodox Archdiocese of North America. The petitioner states that there are approximately 500 families that contribute financially to the church, of which 300 are members. The church has six paid employees, including the beneficiary.

The record reflects that the beneficiary is a native and citizen of Albania who was last admitted to the United States as a nonimmigrant visitor for pleasure (B-2) on June 28, 1999, with authorization to remain until December 27, 1999. On September 9, 2000, the beneficiary obtained a change of status to that of a nonimmigrant religious worker (R-1), with authorization to remain until September 9, 2003.

The first issue issue raised by the director to be addressed in this proceeding is whether the petitioner has established that the beneficiary had been continuously engaged in a qualifying religious occupation or vocation for two years immediately preceding the filing date of the petition.

The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that:

> All three types of 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 petition was filed on April 12, 2001. Therefore, the petitioner must establish that the beneficiary had been continuously engaged in a qualifying religious vocation or occupation for the two-year period beginning on April 4, 1999.

In addressing this requirement, the petitioner has submitted copies of the beneficiary's 2000, 2001, and 2002 Forms W-2, Wage and Tax Statements; the beneficiary's 2000, 2001, and 2002 IRS Forms 1040, U.S. Individual Income Tax Returns; and copies of cancelled checks issued to the beneficiary by the petitioner dated November 3, 2000 through December 27, 2001. The documentation submitted indicates that the beneficiary has been employed by the petitioner since September 9, 2000, the date on which he was granted a

change of status to that of a nonimmigrant religious worker. The petitioner states that the beneficiary's position is full-time and that he is compensated based on 40 hours of work per week.

The petitioner has also submitted documentation indicating that prior to the beneficiary's entry into the United States on June 28, 1999, he performed temporary services as a sexton's helper, church reader, and cantor at the [redacted] at Patisia, Athens, Greece. In a letter dated October 19, 2002, counsel for the petitioner states that the beneficiary "worked an average of 15-20 hours a week abroad and received fees for his services of approximately $5,000 per year." On appeal, counsel submits documentation from the St. Barbara Holy Parochial Church at Patisia indicating that the beneficiary worked from 1997 to 1999 as a care-giver's assistant and cantor, receiving a salary of 70 thousand drachmas per month.

The legislative history of the religious worker provision of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (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. *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 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 or she had been "continuously" carrying on the vocation of minister for the two years immediately proceeding 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).

The term "continuously" is also 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 studies. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he or 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).

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 or 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 be otherwise would be outside the intent of Congress.

Based on the above discussion, it is concluded that the petitioner has not provided sufficient evidence to establish that the beneficiary had been continuously engaged in a qualifying religious occupation or vocation

throughout the entire two-year period from April 4, 1999 through April 4, 2001. A review of the record reflects that the beneficiary performed temporary services as a part-time sexton's helper, church reader, and cantor in Greece prior to his entry into the United States on June 28, 1999. His employment with the petitioner did not begin until September 2000. There is no evidence contained in the record concerning the beneficiary's employment from June 1999 through September 2000. For this reason, the petition must be denied.

The second issue raised by the director to be discussed in this proceeding is whether the petitioner has established that the beneficiary is qualified to engage in a religious occupation or vocation.

In support of the petition, the petitioner submitted a document from the beneficiary asserting that from the age of 12 through 15, he "trained under [the] head chanter and past General Secretary of the Orthodox Church of Albania . . . ;" in 1979, he attended the "Higher Institute of Education in Vojo Kushi and received a Degree in Physical Education;" and, in 1991, he received "specialized training by [the] head chanter of the Durres Theological School." The record does not contain any corroborative evidence to verify the beneficiary's claims regarding his education and training.

In a letter dated April 6, 2001, the petitioner stated that the position of cantor "does not require a degree. However, it does require substantial experience, which [the beneficiary] clearly has." In his letter of October 19, 2002, counsel for the petitioner also indicated that the services of a cantor are essential liturgical functions and separate religious functions in the Orthodox church, and that they must be performed by a qualified cantor who is separate from the priest performing the ceremony

It is noted that the petitioner has not provided evidence, other than its own and counsel's statements, to establish that the beneficiary is authorized to perform services as a cantor. The petitioner has not provided documentary evidence to explain the standards required to be recognized as a cantor within the [redacted] and has not shown that the beneficiary has met those standards. The petitioner has not provided any other objective documentation that discusses the requirements and manner by which an individual may be trained and recognized as a cantor in the [redacted] 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).

It is concluded that the petitioner has not submitted sufficient evidence to establish that the beneficiary is qualified to engage in a religious occupation or vocation. For this reason as well, the petition must be denied.

Beyond the decision of the director, the petitioner has also not submitted sufficient evidence to establish that the petitioner has had the ability to pay the beneficiary the proffered wage as of the date of filing the petition continuing through to the beneficiary's obtaining lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part, that:

> *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 has not furnished the church's annual reports, federal tax returns, or audited financial statements that are current as of the date of filing the petition. Therefore, the petitioner has not satisfied the documentary requirements of 8 C.F.R. § 204.5(g)(2).

With regards to counsel's assertion that the denial of the petition is unconstitutional, it is noted that while the determination of an individual's status or duties within a religious organization is not under the purview of Citizenship and Immigration Service (CIS), the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests with CIS. Authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States. *Matter of Hall*, 18 I&N Dec. 203 (BIA 1982); *Matter of Rhee*, 16 I&N Dec. 607 (BIA 1978). Accordingly, counsel's argument that the denial of the petition violates the free exercise of religion clause of the First Amendment of the United States Constitution is not persuasive.

In reviewing an immigrant visa petition, CIS must consider the extent of the documentation furnished and the credibility of that documentation as a whole. The petitioner bears the burden of proof in an employment-based visa petition to establish that it will employ the beneficiary in the manner stated. See *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966); *Matter of B. Semerjian*, 11 I&N Dec. 751 (Reg. Comm. 1966).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.