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[Redacted]

FILE: [Redacted]  
WAC 97 152 51818

Office: CALIFORNIA SERVICE CENTER Date: FEB 22 2005

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 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*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center initially approved the special immigrant religious worker petition. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and exercised his discretion to revoke the approval of the petition on October 27, 2003. The petitioner filed an appeal to this decision, and the petitioner's timely appeal is now before the Administrative Appeals Office (AAO) for review. The AAO will dismiss the appeal.

The petitioner is a church.<sup>1</sup> 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 "pastoral agent" and "religious worker." The director determined that the petitioner had not established (1) the beneficiary seeks to enter the United States for the purpose of carrying on a religious vocation or religious occupation; or (2) the beneficiary had the requisite two years of continuous work experience immediately preceding the filing date of the petition; or (3) the position qualifies as a religious occupation; or (4) the ability to pay the beneficiary's wage; or (5) the beneficiary will not be dependent on supplemental income.

On appeal, the petitioner, through counsel, provides a brief with no additional documentation.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime* . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

*Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.* at 590. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

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:

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<sup>1</sup> Counsel takes issue with the director's reference to the petitioner as [REDACTED] rather than "[REDACTED] Church." We note that the name listed by the petitioner as its company or organization name is "St. Anne."

(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 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 first issue raised in the director's decision concerns the beneficiary's entry into the United States. Section 101(a)(27)(C)(ii)(III) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii)(III), requires that the alien seeking classification "seeks to enter the United States" for the purpose of carrying on a religious vocation or religious occupation. In this instance, because the beneficiary entered the United States without inspection, the director concluded the beneficiary did not enter the United States for the purpose of performing religious work.

This finding is not defensible. The AAO interprets the language of the statute, when it refers to "entry" into the United States, to refer to the alien's intended *future* entry *as an immigrant*, either by crossing the border with an immigrant visa, or by adjusting status within the United States. This is consistent with the phrase "*seeks to enter*," which describes the entry as a future act. We, therefore, withdraw this particular finding by the director.

The next issue relates to the beneficiary's past experience. 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 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 5, 1997. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a pastoral agency and religious worker for the two years immediately prior to that date.

The Form I-360 indicates the beneficiary entered the United States in 1988 without inspection. Thus, though the beneficiary was in the United States during the qualifying period, any work performed by the beneficiary was undertaken while the beneficiary was in an unlawful status.

In a letter submitted with the petition, Sister [REDACTED] Religious Education Coordinator for the church, states that the beneficiary "works as a pastoral agent."

A second letter, submitted by Rev. Adalberto Blanco, Pastor for the church, states:

[The beneficiary] has worked as a Religious Worker at St. Anne's Catholic Church . . . continuously and without interruption for the past four years.

[The beneficiary] is well qualified for this position. Educationally, he has Seminary College Training and has experience in religious life, including constant religious training and formation. His experience as a Religious Worker ministering in a variety of contexts, has prepared him to continue his ministry of service to the People of God.

[The beneficiary] will be assigned to St. Anne's Catholic Church in the United States . . . as soon as his legal status permits. Because of the large and constant in-flow of mainly Latino population living in the area, we need the services of [the beneficiary] who has knowledge of their language and culture. [The beneficiary] will be responsible for conducting Youth Programs aimed at preventing gang involvement and drop-out of school. Helping the needy, illiterate, and the elderly conducting health education programs to prevent the spread of diseases such as AIDS.

The position of Religious Worker/Pastor Minister is offered on a permanent basis. [The beneficiary] will receive the usual compensation for a Religious Worker full care and maintenance including room and board. His support will be provided by St. Anne's Church and he will not become a public charge or burden on any [f]ederal, [s]tate, or [l]ocal authority.

The petitioner's initial claim that the beneficiary has "worked continuously and without interruption for the past four years," is contradicted by the petitioner's statements that the beneficiary "will be assigned," "will be responsible," and "will receive the usual compensation" as soon as "his legal status permits," which imply that these terms cover future employment, rather than terms already in effect.

Further, although the petitioner indicates the position offered to the beneficiary is that of a "Religious Worker/Pastor Minister," the petitioner fails to identify the position and the duties performed by the beneficiary for the "past four years." The regulations at 8 C.F.R. § 204.5(m)(1) and (3)(ii)(A) require that the beneficiary must have carried on *the* vocation or occupation, rather than *a* vocation or occupation, indicating that the work performed during the qualifying period should be substantially similar to the intended future religious work. The underlying statute, at section 101(a)(27)(C)(iii), requires that the alien "has been carrying on such . . . work" throughout the qualifying period. The beneficiary cannot be considered to have been carrying on "such work" if he was employed in a different position and performing different duties than those described in the proffered position for the preceding two years.

The sole evidence of the beneficiary's remuneration by the church is a check in the amount of \$231. However, as the check was issued in March 1999, it does not establish the beneficiary's employment with the petitioner during the requisite period of May 5, 1995, to May 5, 1997.

Following the approval of the visa petition, the beneficiary applied for adjustment of status on July 7, 1997. On August 25, 2003, the director issued a notice of intent to revoke based upon an investigation showing that the beneficiary worked for the petitioner as a janitor and was also involved in "outside employment." The director subsequently revoked the approval of the petition on October 27, 2003.

On appeal, counsel asserts the reason the director revoked the petition was because the director's investigation revealed the petitioner works as a maintenance worker. Counsel states "the beneficiary's present employment in maintenance did not warrant the revocation of the I-360 petition as such employment is outside of the two year period required for the approval of such petition." Counsel then argues the "relevant and controlling inquiry is whether or not the beneficiary was employed by the petitioner on a full time basis between May 12, 1995 and May 12, 1997." Counsel does not submit any additional documentation on appeal.

We agree that the relevant period in question is from May 1995 through May 1997. As previously noted, however, the record does not establish the duties performed by the beneficiary during this time or that the beneficiary was remunerated by the petitioner on a full-time basis. We note that tax documents contained in the record show that in 1997 and 1998 the petitioner paid the beneficiary \$5,916 and \$6,321, respectively. These amounts clearly do not reflect full-time work. It should also be noted that the beneficiary identified himself as a "laborer" on his 1997 tax return and declared total wages of \$20,655. The record remains absent any evidence to establish how the beneficiary supported himself prior to this time, dating back to the filing of the petition in May 1995.

From the documentation contained in the record, we cannot conclude that the beneficiary, throughout the two-year qualifying period, had been continuously performing essentially the same duties that the petitioner intends for the beneficiary to perform in the United States. Therefore, we uphold the director's finding that the petitioner has not satisfied the two-year experience requirement.

The next two issues relate to the question of whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The regulation at 8 C.F.R. § 204.5(m)(2) offers the following pertinent definitions:

*Professional capacity* means an activity in a religious vocation or occupation for which the minimum of a United States baccalaureate degree or foreign equivalent degree is required.

*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, fundraisers, or persons solely involved in the solicitation of donations.

Rev. Blanco indicates the beneficiary "will be responsible for conduction Youth Programs aimed at preventing gang involvement and drop-out of school. Helping the needy, illiterate, and the elderly conducting health education programs to prevent the spread of diseases such as AIDS." Rev. Blanco also indicates the beneficiary "will receive the usual compensation for a Religious Worker full care and maintenance including room and board."

The director determined that the beneficiary's position is not in a professional capacity because it does not require a bachelor degree. The director further determined the position does not qualify as a religious occupation.

We concur with the director that there is no evidence the beneficiary's position requires the minimum of a United States baccalaureate degree or foreign equivalent degree, nor is there evidence that the beneficiary has

a United States baccalaureate degree or its foreign equivalent. Accordingly, the beneficiary's cannot be considered to be employed in a professional capacity. Counsel does not dispute this finding on appeal.

Instead, counsel argues that the director failed to "truly consider the religious position offered to the beneficiary" and on appeal, attempts to reclassify the beneficiary's position as that of a "religious counselor." We are not persuaded by counsel's argument as the petitioner is prohibited from making such a material change in the proffered position on appeal. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The record contains no evidence to establish that the petitioner's denomination considers the duties of the beneficiary's position to be directly related to the religious creed of the denomination. Further, the record contains no evidence to establish that the beneficiary's position is defined and recognized by the governing body of the petitioner's denomination, or that the position is traditionally a permanent, full-time, salaried occupation within the denomination. As noted above, there is no evidence the beneficiary was paid for his work until 1997 when he received a nominal amount of \$5,916, nearly one-fourth his total declared wages for the year. Such evidence does not establish that the petitioner's denomination considers "Religious Workers/Pastoral Ministers" to be full-time, paid employees rather than dedicated volunteers from the congregation. That the beneficiary identified himself as a "laborer" on his 1997 tax return indicates that he viewed his church work as a voluntary activity rather than as a job or occupation.

Most notably, from the evidence in the record, the beneficiary appeared be working as a janitor, not as a religious worker/pastor minister, during the requisite two-year period. The petitioner has offered no evidence to overcome the results of the director's investigation in which it was determined that the beneficiary worked as a maintenance worker during the requisite period.

The remaining issues relate to the beneficiary's reliance on supplemental employment and the petitioner's ability to pay the beneficiary's wage.

The regulation at 8 C.F.R. § 204.5(m)(4) states:

*Job offer.* The letter from the authorized official of the religious organization in the United States must also state how the alien will be solely carrying on the vocation of minister (including any terms of payment for services or other remuneration), or how the alien will be paid or remunerated if the alien will work in a professional religious capacity or in other religious work. The documentation should clearly establish that the alien will not be solely dependent on supplemental employment or solicitation of funds for support.

In his decision, the director noted that the petitioner provided no evidence of the beneficiary's "permanent salaried full-time position" or evidence that the petitioner actually "paid the beneficiary's wages and all above benefits" to support the petitioner's claim that the beneficiary "will not become a public charge or a burden on any [f]ederal, [s]tate, or [l]ocal authority."

On appeal, counsel alleges the director's decision "fails to consider the evidence that was submitted in 1997 documenting the [petitioner's] ability to pay the offered wage including the beneficiary's pay-check stubs." As noted previously, the only paychecks contained in the record are paychecks covering March 1, 1999 through March 15, 1999. The record contains no evidence of any payment or other remuneration to the beneficiary prior to this date. Further, there is not tax documentation indicating the beneficiary's receipt of payment any time prior to 1997. The scant evidence contained in the record as proof of the beneficiary's remuneration from the church, namely one period's pay and the beneficiary's receipt of \$5,916 in 1997 and \$6,321 in 1998, does not clearly establish that the beneficiary was not solely dependent on supplemental employment or solicitation of funds for support.

As it relates to the petitioner's ability to pay, on appeal, counsel argues that the petitioner as a "Catholic church [is] fully capable of paying the wage offered in the petition." Counsel further asserts the "question of whether or not the Catholic Church has the ability to pay such wages is at best facetious. Understanding this point fully well, the officer fails to mention that [the petitioner] is a Catholic Church, whose solvency has been re-affirmed time and time again by [CIS]."

We do not find counsel's argument to be persuasive. The regulation does not provide for any exemptions from the burden of establishing the ability to pay. Moreover, the regulation does not indicate that once a particular petitioner has demonstrated the ability to pay in a specific case, that petitioner exempt from demonstrating its ability to pay in all future cases. Thus, counsel's argument that the petitioner is a Catholic church and that the Catholic Church's ability to pay has been "re-affirmed time and time again" is without merit.<sup>2</sup>

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.*

In this instance, the petitioner has submitted no documentation to demonstrate its ability to pay. Counsel's attestation of financial viability is not corroborated with any of the types of evidence required by regulation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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<sup>2</sup> We note the recent, widely-publicized bankruptcy declaration of the Archdiocese of Portland, Oregon, which serves to demonstrate that individual divisions of the Catholic Church are not impervious to financial distress. See internet article entitled "Portland Archdiocese Declares Bankruptcy," dated July 7, 2004, accessed at <http://www.cnn.com/2004/LAW/07/06/portland.archdiocese>.

While the determination of an individual's status or duties within a religious organization is not under the purview of Citizenship and Immigration Services (CIS), the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests within 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).

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.