

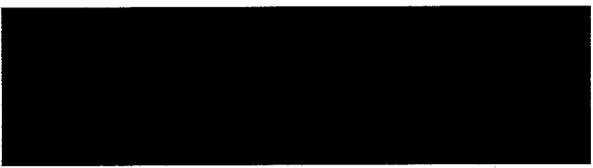
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **JAN 28 2005**
WAC 97 147 51403

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, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an organization that operates several churches. 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 disciple/preacher. The director determined that the petitioner had not established (1) that the beneficiary entered the United States solely to perform religious work; (2) that the beneficiary had the requisite two years of continuous work experience as a disciple/preacher immediately preceding the filing date of the petition; (3) that the petitioner had offered the beneficiary a qualifying position for which the beneficiary possessed adequate qualifications; or (4) the petitioner's ability to pay the beneficiary's proffered wage.

On appeal, the petitioner submits a brief from counsel.

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 unrebutted, 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 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. *Matter of Ho*. 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:

- (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 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 first issue raised in the director's decision concerns the beneficiary's entry into the United States. Section 101(a)(27)(C)(ii) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii), requires that the alien seeking classification "seeks to enter the United States" for the purpose of performing qualifying religious work. In this instance, the beneficiary entered the United States as a B-2 nonimmigrant visitor for pleasure. Thus, the director concluded, the beneficiary did not enter the United States for the purpose of working for the petitioner.

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 concerns 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 experience in the religious vocation, professional religious work, or other religious work. The petition was filed on April 30, 1997. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a disciple/preacher throughout the two years immediately prior to that date.

██████████ the petitioner's international coordinator, states that the beneficiary "has been serving the spiritual needs of our growing congregation . . . since May 1993 until the present time. . . . [The beneficiary] took up various training programs . . . in 1993. After which he worked as a volunteer spreading the Word of God . . . and he has been receiving 'love offering' from the ministry."

A January 5, 1995 memorandum from ██████████ informs the beneficiary that, "[e]ffective immediately," the beneficiary is "over-all in-charge for the radio program at the KSPC Radio Manila aired every Sunday from 6:00 am to 8:00 am." Copies of four canceled checks show that various chapters of the petitioning organization paid the beneficiary \$50 on each of four occasions, in October 1994, September 1996, October 1996 and February 1997. One payment is labeled as a "love offering," another as a "stipend."

Following the approval of the petition, the beneficiary applied for adjustment to permanent resident status. As part of that application, the beneficiary submitted Form G-325A, Biographic Information. On that form

the beneficiary indicated that he had worked for the petitioner since November 1994, and also as a security guard for Fujiken Co., Ltd., from July 1993 to October 1997, the month his petition was approved.

Mission Accomplishment Reports from 1995 identify the beneficiary as a "Volunteer Disciple," and tax documents indicate that, in 1997, the petitioner paid the beneficiary \$1,150. That same year, [REDACTED] paid the beneficiary \$14,340.51, indicating that over 92% of the beneficiary's 1997 earnings derived from secular employment. [REDACTED] paid the beneficiary \$17,729.50 in 1995 and \$20,230.50 in 1996. On his tax returns for those years, the beneficiary identified his occupation as "security guard."

In a notice of intent to revoke, the director informed the petitioner that the available evidence does not establish that the beneficiary continuously worked for the petitioner during the qualifying period. The director found it "not reasonable to assume" that the beneficiary, as a volunteer, had the same duties and working hours as a paid, full-time employee.

In response to the notice, counsel states "this is an unfair position for the Service to take given the fact that the I-360 [petition] had previously been approved." A revocation, by definition, can only occur after the petition has been approved, and there is clear statutory authority to revoke the approval of an immigrant petition. Elsewhere in this decision, we have cited case law which demonstrates that the approval of an immigrant petition does not create a presumptive right to an immigrant visa, and that the realization that a petition was approved in error is sufficient cause for revocation. Counsel's other arguments are essentially repeated on appeal, and we shall address them in that context.

The director revoked the approval of the petition, stating that the petitioner had failed to overcome the grounds listed in the notice of intent to revoke. On appeal, counsel offers several arguments regarding the acceptability of unpaid volunteer work. Counsel then renders these arguments moot by observing that the beneficiary was not entirely unpaid. Rather, he received "love offerings" from individual churches in exchange for services rendered. Because the beneficiary was not a wholly unpaid volunteer, we need not devote any time here to arguments regarding what circumstances would have applied, had the beneficiary been an unpaid volunteer.

In the notice of intent to revoke, and (in greater detail) in the revocation notice, the director had noted the beneficiary's income from sources other than the petitioner during the 1995-1997 qualifying period. Counsel states that this outside income does not prove that the beneficiary did not work for the petitioner during the qualifying period. It remains that this outside employment as a security guard was the beneficiary's principal means of support during the qualifying period. When considering whether the beneficiary's past work was continuous, we note that case law holds that part-time work is not continuous. See *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980). Similarly, a circular letter which expressed the joint views of the Departments of State, Labor, and Justice, indicates that the continuity of such work is interrupted by "activities inconsistent with the theory that [the alien] was attempting continuously to carry on his vocation." C.L. 338, May 16, 1939, quoted in *Matter of B*, 3 I&N Dec. 162, 164 (CO 1948). *Matter of B* indicates, at 163, that engaging "in any other work or occupation" is a factor to consider when determining if the alien's activities are inconsistent with the required continuous work.

In this instance, the beneficiary is known to have earned his living as a security guard from 1995 to 1997, while collecting negligible income from his religious work; the petitioner has documented only four \$50 "love offerings" during the two-year qualifying period. There is insufficient documentation to show that the beneficiary's religious work amounted to a full-time occupation during that time. Rather, the record portrays the beneficiary as a security guard who, in his spare time, worked for churches belonging to the petitioning

organization. Even after the approval of the petition, the director had indicated that the beneficiary had reported income from "an unknown source" in 1998 and 1999. Neither counsel nor the petitioner has claimed that this "unknown source" is, in fact, the petitioner, which appears to amount to an admission that the beneficiary has continued to work outside of the petitioning organization.

Counsel observes that the regulation at 8 C.F.R. § 204.5(m)(4) does not prohibit *future* outside employment by the beneficiary, because it permits some level of support from outside employment. This regulation, however, is strictly *prospective* in its construction, and does not affect the requirement that the beneficiary's *past* work must have been "continuous," as that term has been shaped by case law such as *Matter of B*.

Based on the foregoing, we affirm the director's finding that the beneficiary did not work continuously (i.e., without interruptive secular employment) during the qualifying period.

The next issue is whether the petitioner seeks to employ the beneficiary in a qualifying occupation, and whether the beneficiary is qualified to work in that occupation. The regulation at 8 C.F.R. § 204.5(m)(2) offers the following pertinent definitions:

Minister means an individual duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion. In all cases, there must be a reasonable connection between the activities performed and the religious calling of the minister. The term does not include a lay preacher not authorized to perform such duties.

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.

There are occasional references to the beneficiary as a minister, but the overall record of proceeding does not support such a designation. We will focus, here, on whether his position amounts to a religious occupation.

Citizenship and Immigration Services 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 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.

8 C.F.R. § 204.5(m)(3)(ii)(D) requires the petitioner to establish that, if the alien is to work in another religious vocation or occupation, he or she is qualified in the religious vocation or occupation, including evidence that the type of work to be done relates to a traditional religious function.

Lourdes Rustia states that the beneficiary "provides counseling, preaches the Gospel, performs community outreach, conducts prayer meetings and visits the sick. In addition, [the beneficiary] has a regular 2-hour radio program every Sunday where he is in charge of the radio ministry which is part of the outreach program. During this program, [the beneficiary] provides counseling to those who call and ask for assistance."

On November 2, 2000, as part of the adjudication of the beneficiary's adjustment application, the beneficiary was instructed to submit copies of documentation to establish his credentials as a preacher. In response, the petitioner has submitted a copy of a Certificate of Attendance, indicating that the beneficiary completed a two-month Discipleship Training course in the spring of 1993. In a separate letter, dated around the same time, [REDACTED] indicated that the beneficiary "conducts Bible Studies and discipleship training around the nation," and "is currently assigned in Northern California to assist administrative management" as well as his radio broadcasts.

The director, in the notice of intent to revoke, stated "there is no supporting evidence to establish that the beneficiary has the qualifications for the religious occupation position." The director made a similar finding in the notice of revocation. In response to the notice, and again on appeal, counsel argues that the beneficiary's duties relate to traditional religious functions, and that the beneficiary's tasks include religious counseling and religious broadcasting, two occupations that the regulatory definition specifically lists as qualifying. Counsel also observes that the beneficiary completed a training course in 1993, and counsel claims that this course demonstrates that the beneficiary is qualified to perform the duties of the position.

The original description of the beneficiary's duties appears, indeed, to conform to the regulatory definition of a religious occupation. Other correspondence from the petitioner, however, indicates that the beneficiary's duties have changed, and perhaps are in a general state of flux. Because the beneficiary does not appear to be in any one fixed occupation, there is no one occupation that we can identify as a religious occupation. The conclusion that the beneficiary, as a "disciple," is a sort of all-purpose religious worker, cannot suffice to establish eligibility. We note that the regulatory definition of a religious occupation specifically excludes administrative employees such as clerks, which is significant given [REDACTED] 2000 assertion that the beneficiary "is currently assigned . . . to assist administrative management."

Given the petitioner's own changing descriptions of the beneficiary's duties, we cannot conclude that the petitioner has established that the beneficiary's position qualifies as a religious occupation.

The final issue concerns the petitioner's ability to pay the beneficiary's proffered salary of \$1,000 per month. 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 petitioner has submitted copies of Internal Revenue Service Form 990, Return of Organization Exempt from Income Tax, for 1997 through 1999. These documents are the functional equivalent of tax returns for non-profit organizations. As noted above, the petitioner had paid the beneficiary \$1,150 in 1997. In that year, the petitioner's revenue exactly matched its expenses, and the petitioner claimed zero net assets at the end of the year. In 1998, the petitioner's expenses exceeded revenue by \$4,157, leaving a net asset balance of \$13,728 for the year. In 1999, the petitioner claimed excess revenue of \$106,693, in addition to the net asset balance left over at the end of 1998. Thus, the petitioner's financial situation has improved significantly between 1997 and 1999, but the documents do not show that the petitioner has consistently been able to pay

the beneficiary's proffered wage since the April 1997 filing date. The documents in the record show that the petitioner paid the beneficiary only a small fraction of the proffered wage during 1997.

The director, in the notice of intent to revoke, stated "it has become clear that the petitioner has not established that they have continuously had the ability to pay the beneficiary's wage from the time of filing to the present." In response to this notice, counsel argues that the petitioner has been able to pay the beneficiary's wage since the petition was approved in October 1997. Counsel repeats this and other arguments on appeal, and we will address those arguments in that context.

Counsel, on appeal, asserts that the beneficiary has received the proffered wage ever since the petition was approved in October 1997, and therefore it is obvious that the petitioner has been able to pay that wage. Counsel's argument fails on two counts.

First, by regulation, the petitioner must have the ability to pay beginning on the petition's filing date, not the subsequent date of approval. The financial documentation discussed above does not indicate that the petitioner was able to pay the beneficiary's wage on April 30, 1997. The petitioner paid the beneficiary only \$1,150 in 1997, and claimed on its Form 990 return that it had no funds left over at the end of that year. This evidence affirmatively indicates that the petitioner was not able to pay the beneficiary's proffered wage as of the April 1997 filing date.

Furthermore, the record does not show that the beneficiary received the proffered wage between October and December of 1997. Counsel states "[t]he fact that the petitioner only paid the beneficiary \$1,150 in 1997 was due to the fact that the petition was not approved until October of the same year. There was [sic] barely 2 months left during the year." The petition was approved on October 7, 1997, meaning that nearly three months remained in the year. At the proffered wage of \$1,000 per month, the beneficiary should have received over \$2,500 in the last months of 1997; instead, the petitioner paid the beneficiary less than half that amount. Therefore, it is clear that the petitioner did not immediately begin paying the beneficiary the full proffered wage upon the approval of the petition, and the partial payment does not establish the petitioner's ability to pay the full wage. We affirm the director's finding in this regard.

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.