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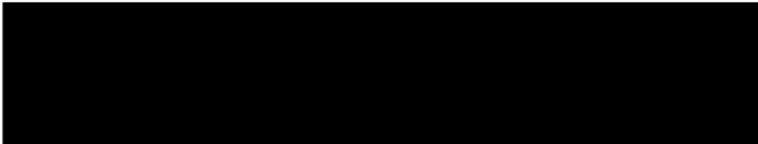


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: APR 10 2006
EAC 03 208 52780

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:



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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The petitioner appealed that denial. The director treated the denial as a motion to reopen, reopened the matter, and again denied the petition. The petitioner appealed the second denial, and the appeal was sent to Administrative Appeals Office (AAO) for review. The AAO remanded the matter for a new decision. The director has subsequently denied the petition for a third time, and the petitioner has again appealed the denial. The appeal is once again before the AAO. The appeal will be dismissed.

We note that the Form I-140 petition identifies St. Stephen & St. Martin's Church as the petitioner. The petition, however, was signed not by any church official, but by the alien beneficiary herself. Therefore, the alien beneficiary, and not the church, must be and shall be considered to be the petitioner. When the AAO issued its remand order, the AAO addressed its decision to the alien beneficiary rather than to the church. The director mailed the subsequent decision to the church, in care of the alien beneficiary's attorney. It is obvious that counsel received this decision, and therefore the director's error in calling the church the petitioner has not resulted in any procedural flaw that would require correction at this stage.

We further note that, in its remand order, the AAO had instructed the director to certify any adverse decision to the AAO for review. The director did not do so. As noted above, the matter is currently before the AAO on appeal rather than on certification. This error does not affect the ultimate outcome of the proceeding, but we note the error nevertheless.

This proceeding has had a long and complicated history. In this present decision, we shall not discuss issues (such as the church's tax-exempt status) that have already been resolved in prior decisions.

The petitioner seeks classification 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 religious counselor/missionary/program director at St. Stephen & St. Martin's Church, an Episcopal church in Brooklyn, New York. In the most recent decision, the director determined that the petitioner had not established that she had the requisite two years of continuous work experience in the position sought immediately preceding the filing date of the petition. In addition, the director determined that the church had not established its ability to pay the alien's proffered wage.

The two issues, the church's ability to pay and the petitioner's past experience, are somewhat interconnected in this proceeding, linked by the matter of compensation. We shall therefore address the two issues more or less in tandem, rather than in entirely separate sections of the decision.

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 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 July 7, 2003. Therefore, the petitioner must establish that she was continuously performing the duties of a religious counselor/missionary/program director throughout the two years immediately prior to that date.

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 a letter submitted with the initial filing, Rev. Barclay Stoute, rector and dean of the petitioning church, states:

Commencing mid-January 2001, [the petitioner] has maintained working closely with the priest in the Rector’s Visitation Group. . . .

[The petitioner] has served our congregants and neighbors within our surrounding communities on a full-time basis for just over two years. . . .



[The petitioner] spends a minimum of 40 hours per week in the fulfillment of her duties. . . .

To date, on a part-time basis (21 hours per week), [the petitioner] provides tutoring and counseling services to the students of the Metropolitan College of New York. The income accrued from this activity serves the purpose of satisfying her additional financial needs. . . .

[The petitioner] is currently pursuing a graduate degree in Public Administration and has completed a baccalaureate degree in Psychology. [The petitioner's] future goals include becoming a Clinical Psychologist and eventually owning and managing a home for the mentally ill. As a result of her role as a Religious Counselor/urban Missionary, [the petitioner] has begun to work toward her goal, which is in the Mental Health field, and continues to volunteer her services to the St. Stephen and St. Martin's congregants.

We hope to establish a permanent and exclusive relationship with [the petitioner], for her services are essential to our ministry. We intend to provide remuneration in the sum of \$175.00 each week.

A "Job Description" in the record states the petitioner's job title as "Religious Counselor/Missionary (Program Director)," although it is not clear what program the petitioner directs. Her job duties are a combination of clerical and counseling functions. The job description indicates that the petitioner works 42 hours per week, as follows:

Tuesday	10 a.m – 8 p.m.
Wednesday	10 a.m – 8 p.m.
Thursday	10 a.m – 8 p.m. (in the field/sick visitations)
Friday	10 a.m – 6 p.m.
Saturday	when requested
Sunday	12 p.m. – 4 p.m. (after Mass)

Some documents indicate that the petitioner is paid \$700 per month. Other materials indicate that the petitioner is paid \$175 per week. These amounts are not equal; \$700 per month equates to \$8,400 per year, whereas \$175 per week equates to \$9,100 per year. The higher wage of \$175 per week, combined with the petitioner's stated schedule of 42 hours per week, indicates an hourly wage of \$4.17 per hour, which is almost a dollar per hour below the federal minimum wage. At \$700 per month, the petitioner's hourly wage calculates to roughly \$4.02 per hour. There is no indication that this pay is regularly augmented by additional considerations such as food or housing. The petitioner has not shown that federal and state minimum wage laws do not apply to the church's lay workers.

The petitioner has submitted unaudited balance sheets, indicating that the church had a net income of \$31,095 in 2002 and \$164,207 in 2003.

On July 25, 2005, the director instructed the petitioner to submit a list of the church's salaried employees, and copies of its quarterly withholding statements to show that the salaries were paid as claimed. In response,

treasurer of the petitioning church, states that the church "is exempt from taxation . . . and therefore does not withhold taxes for our salaried/stipendiary employees." The church's tax exemption does not exempt the church's employees from withholding of taxes. According to the Internal Revenue Service, "Every employer, *including a tax-exempt organization*, who pays wages to employees is responsible for withholding, depositing, paying, and reporting federal income tax, social security taxes (FICA), and federal unemployment tax (FUTA) for such wage payments, unless that employer is specifically excepted by statute from such requirements or if the taxes are clearly inapplicable." Emphasis added. Source: <http://ftp.irs.gov/charities/article/0,,id=96103,00.html>, visited April 4, 2006. Section 3401(a)(9) of the Internal Revenue Code indicates that "remuneration paid . . . for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order" do not constitute "wages," but there is no such exemption for lay religious workers such as the petitioner.

The petitioner lists five salaried employees:

Position	Salary per month
Priest/Rector	\$3,534.00
Organist/Choir Director	475.00
Assistant Organist	350.00
Program Director/Counselor	700.00
Custodian	400.00

The above salaries add up to \$5,459 per month, which is \$65,508 per year. The unaudited balance sheets submitted simultaneously with this list indicate that the church paid \$58,983 in salaries in 2002, and \$62,456 in 2003.

In the same July 25, 2005 notice, the director instructed the petitioner to submit copies of the church's tax documents from 2001, 2002 and 2003. In response, the petitioner has submitted various payroll and tax documents and a new letter in which Rev. Stoute states:

Prior to May 2003, [the petitioner] volunteered at the St. Stephen and St. Martin's Church whilst working at the Weston United TLC (Shelter for Mentally Ill patients) from 2001-2002, and at the Metropolitan College of New York from 2001-2003. Within that period of time she also pursued a Masters Degree in Public Administration at the Metropolitan College of New York. Both of these employments were done through the Optional Practical Training Program for International Students.

Once [the petitioner's] Optional Practical Training period expired, she started working with the Church on a full-time basis in May of 2003 up to the present for \$175.00 a week.

We will discuss the payroll and tax documents in detail later in the decision. At this point, it will suffice to state that the petitioner has submitted copies of canceled checks, payable from the church to the petitioner, dated between December 2003 and July 2005. Most of the checks reflect monthly payments of \$650. Thus,

the most direct possible evidence, *i.e.*, the petitioner's own paychecks, show that the petitioner has received less than the proffered wage.

The director denied the petition on December 28, 2005, stating that the petitioner has failed to establish the required two years of experience or the church's ability to pay the proffered wage of \$175 per week. On appeal, counsel stipulates that the petitioner "was a volunteer until the Month of May 2003 when she began receiving \$175 per week from the Church," but counsel asserts that this does not prove that the church was unable to pay the petitioner prior to May 2003 or that the petitioner did not work full time prior to that date. The implication is that the petitioner worked full-time all along, and the church was able to pay the petitioner all along, but the church simply chose to regard her as an unpaid volunteer until May 2003, thus creating a situation in which there exists no first-hand documentation of the petitioner's work for most of the qualifying period. However far this assertion may or may not go as an explanation for the absence of evidence of employment and the church's failure to pay the petitioner for most of the qualifying period, it does not establish that the petitioner worked as claimed or that the church was, in fact, able to pay the proffered wage. The petitioner submits copies of previously submitted documents, but only one new document, specifically a copy of what purports to be a Form 1099-MISC Miscellaneous Income statement from 2004, indicating that the church paid the petitioner \$8,000 in 2004. This amount is less than both the proffered wage of \$175 per week and the lower subsequent claim of \$700 per month. We will discuss this document in further detail later in the decision.

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 non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). On top of this, as noted above, are paychecks showing that the petitioner has, in fact, received less than the proffered wage.

We discuss, here, the financial documents submitted by the petitioner, and we shall show that questions of credibility arise from those documents. Tax returns in the record indicate that the petitioner reported \$15,292 in wages in 2001; \$22,517 in 2002; and only \$4,069 in 2003. On her 2003 tax return, the petitioner indicated that \$239 in federal income tax had been withheld. The petitioner submits a copy of what purports to be a Form 1099-MISC Miscellaneous Income statement, indicating that the church paid the petitioner \$7,800 in "Nonemployee compensation" in 2003 with no tax withheld. The \$7,800 claimed on the Form 1099-MISC is not reported on the petitioner's 2003 income tax return. The Form 1099-MISC shows no federal income tax withheld. It appears, therefore, that the \$4,069 reported on the 2003 income tax return reflects income from some other unidentified source, and that the \$239 reported as withheld was from this other income rather than from church work.

The Form 1099-MISC is a poor-quality photocopy with the petitioner's information written by hand. Parts of the document template (such as the bottoms of the letters "mp" in the word "compensation" and most of the letters "na" in the word "name") appear to have been obscured with correction fluid, which is consistent with

the alteration and copying of a completed Form 1099-MISC, with the petitioner's information replacing whatever prior information was present on the original form.

On appeal, the petitioner has submitted what purports to be another photocopied Form 1099-MISC, indicating that the church paid her \$8,000 in 2004. Several distinctive marks from the 2003 form (such as the incomplete "mp" and "na") are evident on the 2004 form, indicating that both photocopies were made from the same master source.

We have noted, above, the petitioner's submission of copies of canceled checks, showing monthly payments of \$650 from December 2003 to July 2005. The petitioner has also submitted monthly "Treasurer's Reports" from the church for the first eight months of 2005. Among the expenses listed on these reports are payments to "Lay Persons," divided into five categories, specifically: "Organist" (receiving \$475 per month); "Assistant Organist" (\$350 per month); "Honorarium" (\$200 per month); "Honorarium (C.D)" (\$400 per month); and "Part time Secretary." The payments to the "Part time Secretary" are generally \$650 per month, which is the amount shown on most of the petitioner's checks. The reports do not show any other regular expense in the amount of \$650 per month. Thus, the only line item in the treasurer's reports that could plausibly correspond to the petitioner's wages is that of the "Part time Secretary."

The petitioner submits copies of monthly "Time Sheets" from the first eight months of 2005, the same period covered by the treasurer's reports. These sheets, signed by both the petitioner and [REDACTED], show that the petitioner typically worked between 18 and 33 hours per week in 2005; the average is roughly 24 hours and 45 minutes per week. This further supports the conclusion that the petitioner is not a full-time religious worker, but rather the "Part time Secretary" mentioned in the treasurer's report. The record contains no credible evidence that, between 2001 and 2003, the petitioner worked longer hours than she did in 2005.

As shown above, the most reliable evidence in the record converges, from different directions, toward the conclusion that the petitioner has been a "Part time Secretary" for the church, rather than a full-time religious counselor/missionary/program director. The assertion that the petitioner performed qualifying religious duties, full-time or otherwise, rests entirely on uncorroborated, after-the-fact claims. Secretarial duties are not qualifying religious functions; the regulation at 8 C.F.R. § 204.5(m)(2) specifically excludes "clerks" from the class of individuals in religious occupations.

Adding to our concerns is [REDACTED] assertion that the petitioner's church work is merely a stepping-stone toward a secular career in clinical psychology, in which the petitioner's "future goals include becoming a Clinical Psychologist and eventually owning and managing a home for the mentally ill." Such goals do not appear to be readily consistent with a *bona fide* intention to continue working full-time as a religious worker.

The petitioner has not established that the church has the ability or, for that matter, the *bona fide* intention to pay her the full proffered wage of \$9,100 per year. With regard to past experience, while we cannot rule out the possibility that the petitioner has performed some religious functions for the church on a part-time, voluntary basis, we find that the preponderance of evidence leads to the conclusion that the church has employed the petitioner as a "Part time Secretary" rather than as a full-time counselor. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining

evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988). The petitioner's evidence has raised more questions than it has answered, and therefore we cannot find that the petitioner has credibly supported her claims.

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.