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U.S. Citizenship
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Services

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[REDACTED]

FILE:

SRC 06 051 51473

Office: TEXAS SERVICE CENTER

Date: AUG 15 2007

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]

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.

Maura Deadrack
Robert P. Wiemann, Chief
Administrative Appeals Office

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

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 the director of [REDACTED] in Louisville, Kentucky. The director determined that the petitioner had not established that she had the requisite two years of continuous work experience in the position immediately preceding the filing date of the petition, that the position qualifies as a religious occupation, or that the prospective employer is able to compensate her at the proffered level.

Part 1 of the Form I-360 petition identifies [REDACTED]. Review of the petition form, however, indicates that the alien beneficiary is the petitioner. An applicant or petitioner must sign his or her application or petition. 8 C.F.R. § 103.2(a)(2). In this instance, Part 9 of the Form I-360, "Signature," has been signed not by any official of the church, but by the alien beneficiary herself. Thus, the alien, and not the church, has taken responsibility for the content of the petition. This will not affect the adjudication of the appeal, because the record shows that the attorney who filed the appeal represents both the alien beneficiary and the church. Thus, the appeal has been properly filed.

On appeal, the petitioner submits a brief from counsel.

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).

We shall first consider the issue of the petitioner'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 December 5, 2005. Therefore, the petitioner must establish that she was continuously performing the duties of a director of cross cultural ministry throughout the two years immediately prior to that date.

The petitioner's résumé indicates that she began working at [REDACTED] in June 2005, and was "Director of multicultural outreach at [REDACTED] (Sep. 2003-March 2005)." These dates, provided by the petitioner herself, indicate a three-month gap in the spring of 2005. [REDACTED] Clerk of Session at [REDACTED], states that the petitioner "was employed by [REDACTED] from May 19, 2003 to June 15, 2005 as Director of Multicultural Ministries Outreach. (Beginning June 15, 2005, [the petitioner] began her employment as Director of Cross Cultural [REDACTED])" The dates provided by [REDACTED] show no gap in the petitioner's employment, but also they do not match the dates shown on the petitioner's own résumé. Further confusion arises from a letter from [REDACTED], who states that the petitioner has worked at that church "since May 15, 2005." Subsequent evidence (to be discussed later) is consistent with the petitioner's having left Buechel in mid-June 2005, and begun at Beulah immediately thereafter.

Nothing in the petitioner's initial submission refers to the proffered position as full time. [REDACTED] "Budget Summary" for 2005, included in the initial submission, describes the petitioner's position as "3/4th time." The same paragraph of that document refers to other positions as "full time," proving that the church distinguished between ¾ time and full time. This indicates that the petitioner's work at that church was not full-time in 2005. The petitioner's initial submission contained no other reference to the petitioner's work schedule, and no evidence to suggest that the petitioner worked full time for Beulah in 2005.

The petitioner also claimed to have been an "Educational consultant at Asian American Leader Development of Congregational Ministries Division of the PCUSA," the [REDACTED] (U.S.A.), from January 2003 onward. The record contains no documentary evidence regarding this position, no witness other than the petitioner mentions it, and there is no indication that the petitioner ever received compensation for performing this function. The petitioner does not mention this position in subsequent submissions.

On December 9, 2005, the director issued a request for evidence (RFE), in which the director requested "a detailed description of the [petitioner's] prior work experience" along with evidence of compensation and "detailed time sheets" or comparable evidence of the petitioner's hours worked.

In response to the RFE, the petitioner stated that she had worked as [REDACTED] of Multicultural Ministry from May 19, 2003 until June 15, 2005, and thenceforth as Director of [REDACTED] [REDACTED] The petitioner stated that she also "received small supplemental income" (less than \$2000) in 2004 "as home caregiver for [a] disabled, elderly woman."

The petitioner submitted copies of her income tax returns from 2003-2005. The petitioner reported \$3,785.43 in wage and salary income in 2003. A Form W-2 Wage and Tax Statement shows that [REDACTED] paid the petitioner \$3,750.00 in 2003. The source of the petitioner's remaining \$35.43 in earned income is not identified. In 2004, the petitioner reported \$15,000 in wages and salaries, all from [REDACTED] and \$1,912.50 in business income for "Care of disabled elderly woman." On the 2005 return, the petitioner claimed \$14,025 in wages and salaries, and \$1,650 in business income from "Translation and Recording for PCUSA." Forms W-2 show that Buechel Presbyterian Church paid the petitioner \$6,875 and Beulah paid her \$7,150. These amounts are consistent with eleven semimonthly \$625 payments from Buechel from January to mid-June, 2005, followed by thirteen semimonthly \$550 payments from Beulah from mid-June through December. This reduction in the petitioner's earnings is consistent with a change from full time to ¾ time employment.

The director denied the petition on November 3, 2006, partly on the basis that the petitioner "has to rely on supplemental income in order to meet her living expenses. Furthermore, that she had to take other occupations simultaneously." The petitioner's only non-church employment documented in the record is her work caring for an unnamed "disabled elderly woman."¹ The record does not specify the period over which the petitioner performed this work, but the small amount of reported earnings indicates very short-term work rather than habitual secular employment. Also, the petitioner earned no reported income from secular sources in 2003 or 2005. Thus, there is no basis to conclude that the petitioner relied on secular employment for basic material support. Also, as counsel points out on appeal, there is no indication that this minimal, short-term work in any way interfered with the continuous performance of religious duties at [REDACTED].

We note that the evidence indicates that the petitioner was ordained as a minister before she arrived in the United States. The record, however, does not indicate that the petitioner's work in the United States has been ministerial in nature, and the petitioner does not claim to have carried on the vocation of a minister during the two-year qualifying period. If it were the petitioner's position that she has been, and will be, carrying on the vocation of a minister, then her secular caretaking work would be inherently disqualifying, because the petitioner has not worked solely as a minister throughout the two-year qualifying period.

The director also stated that there was a discrepancy regarding the petitioner's past work at [REDACTED], with the petitioner and [REDACTED] stating that the petitioner worked there as Director of Multicultural Ministries Outreach, whereas [REDACTED] [sic] initially indicated that the [petitioner] had been working as a minister."

[REDACTED] is not a church official or other witness in this case, but rather the petitioner's attorney of record in this proceeding. Counsel's cover letter contained a list of exhibits, including a "[l]etter prepared by [REDACTED] . . . confirming that [the petitioner] had been employed as a minister." Thus, the only indication that the petitioner worked as a "minister" was in counsel's inaccurate description of [REDACTED] letter. The

¹ The petitioner's work as a religious translator for PCUSA constitutes a religious occupation under 8 C.F.R. § 204.5(m)(2).

assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 2, 4 (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). While counsel clearly was incorrect in summarizing the contents of [REDACTED] letter, we cannot reasonably find that this discrepancy is a disqualifying factor, supporting a decision denying the petition.

Nevertheless, the director also observed in the decision that religious work performed on other than a full time basis is not considered continuous for immigration purposes. Here, the petitioner claimed that [REDACTED] Church had budgeted her position as $\frac{3}{4}$ time rather than full time, and documents in the record prove that her pay decreased when she began working for the petitioner. Thus, there is no documentary evidence that the petitioner worked full time for Beulah in 2005, and considerable reason to conclude she did not do so. On this basis, we affirm the director's basic finding that the petitioner has not shown her 2003-2005 employment to have been continuous.

The next issue is whether the petitioner seeks employment in a qualifying occupation. The regulation at 8 C.F.R. § 204.5(m)(2) defines "religious occupation" as 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.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

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.

A one-page, photocopied position description submitted with the initial filing lists the petitioner's "Specific Areas of Responsibility":

The Director of Cross Cultural Ministry will:

1. Assist and teach Sunday School classes for children and youth following a rotational model, offering appropriate cross cultural educational opportunities for these age groups.
2. Teach and assist in the Wednesday Program evening session of Kid's Club.
3. Assist in Youth Groups on Sunday evenings.
4. Assist in Sunday worship services as liturgist; preach and assist at the Lord's Table as needed.
5. Visit members in the hospital and home bound members in their homes.

6. Participate and lead Bible Studies as invited by Presbyterian Women's Circles and in other educational events as available; serve on Presbyterian Women Council as Spiritual Life and Stewardship resource person.
7. Plan and implement a Cross Cultural Family Educational Event for the congregation.
8. Plan and participate in a youth multicultural church camp event at Cedar Ridge Camp.

██████████ General Presbyter for the Mid-Kentucky Presbytery of the Presbyterian Church (U.S.A.) (PCUSA), stated that the petitioner's "responsibilities will be planning, implementation and participation in activities that enhance the cross cultural awareness and growth of the congregational members and the larger community. . . . By creating this position, ██████████ is responding to the vision of the higher judicatory."

The director, in the RFE, instructed the petitioner to identify "the requirements for [the petitioner's] position" and to submit "published material" to establish that the denomination considers the petitioner's position to be a religious occupation that relates to a traditional religious function.

In response to the RFE, the petitioner submitted a list of "Staff positions," identifying the petitioner's position as "Full Time - 40 hrs/wk." The petitioner also submitted an unsigned, undated "Addendum to Job Description" which consisted primarily of a "Weekly Schedule" showing a 40- to 41-hour week, including "Office work," "Pastoral care/visitation," "Worship leadership," "youth group assistance" and other duties. The 40-hour schedule conflicts with the previously submitted "Budget Summary," which referred to the petitioner's schedule as "3/4th time" as opposed to "full time." The "Addendum" is printed in a different typeface, on different paper, than the position description submitted previously (and resubmitted in response to the RFE).

██████████ in a new letter, cited several passages from the PCUSA's *Book of Order*, relating to inclusiveness in the face of diversity within the church. ██████████ asserted that the petitioner's "work is in fulfillment of" these requirements. ██████████ stated that the petitioner's "ordination to the ministry," "educational training," "[l]eadership recruitment and training are essential" for her duties within the church.

In denying the petition, the director found that "the proffered job is more of an administrative and secular occupation. It cannot be determined that the [petitioner's] prospective occupation is to be considered a traditional religious function."

On appeal, counsel repeatedly asserts that the petitioner has worked, and continues to work, "as an ordained minister," and that "being an ordained minister is a prerequisite [for the position] of Director of Ministry." We have already observed that the petitioner's duties, as described, do not appear to be ministerial in nature, and the petitioner's employers have not stated that those duties must be performed by an ordained minister. (Furthermore, as we have also noted, if the petitioner had been working as a minister, then her caretaking duties in 2004 are automatically disqualifying.) The record is devoid of documentary evidence that the petitioner has worked as a minister in the United States. Being a church employee who was ordained at some time in the past is not equivalent to carrying on the vocation of a minister.

Counsel is on firmer ground when asserting that the petitioner's duties are those of a liturgist and catechist. Both of these functions are listed in the regulatory definition of "religious occupation" at 8 C.F.R. § 204.5(m)(2). Such duties, if performed full-time, would amount to a qualifying religious occupation. The petitioner's response to the RFE contains the claim that the petitioner's position is full-time and pays \$15,000 per year. It may be that [REDACTED] intends eventually to pay the petitioner \$15,000 a year for full time work, but in 2005 the church paid less than that, and indicated that the petitioner's position had been budgeted as $\frac{3}{4}$ time. Given these discrepancies, and the absence of credible and consistent evidence regarding the intended terms of future employment, we cannot conclude here that the petitioner has been offered a position in a qualifying, full-time religious occupation. If this had been the only stated basis for denial, it may have merited a remand order in order to clarify the issue. As it stands, however, the denial rested on other factors as well, which by themselves justify denial of the petition and dismissal of the appeal.

The final issue concerns the petitioner's ability to pay the beneficiary's salary. 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.

A photocopied contract submitted with the petitioner's initial filing specifies an "Annual Salary" of \$15,000, with "Housing Expenses Provided." \$15,000 is the only annual amount cited anywhere in the petitioner's initial submission, and its appearance on a signed contract amounts to a firm commitment by [REDACTED] to pay the beneficiary in that amount. As noted previously, the petitioner submitted a 2005 "Budget Summary," indicating income of \$379,200 and expenditures of \$373,462. A budget, by definition, is not evidence of an entity's actual income and expenditures, but rather a projection of what the entity *expects* to take in and spend during a defined future period. We reiterate, here, that according to the "Budget Summary" the petitioner held a " $\frac{3}{4}$ th time" position.

In the December 2005 RFE, the director stated that the petitioner had "submitted an un-audited financial document." The director quoted the list of types of acceptable evidence from 8 C.F.R. § 204.5(g)(2).

In response to the RFE, the petitioner submitted what appeared to be the original April 15, 2005 "Position Description" from which the previously submitted copy had been taken. The page previously reproduced in the petitioner's initial submission is followed by a second page, jointly signed by the petitioner and by Rev. Hockenberry, which reads, in part: "Compensation for this position is \$13,200.00. . . . Other compensation includes room and board provide[d] by a church member." The "church member" is never identified. This newly-submitted document is in disagreement with the previously submitted contract, also signed by the petitioner and by [REDACTED] which stated the petitioner's annual salary as \$15,000. Other documents

show the beneficiary working 40 or more hours a week. Thus, while the petitioner's original submission referred to a \$15,000 salary and a "3/4th time" schedule, the petitioner and the church later amended those claims by increasing her hours and reducing her stated salary. As we have already discussed, the record shows that Beulah has always paid the petitioner the lower amount, and has never paid the amount specified in the contract.

A cover letter from attorney [REDACTED] indicated that the petitioner's RFE response included an "[u]naudited financial report for [REDACTED] 06/2005-12/2005." The attorney did not explain why the petitioner submitted admittedly unaudited documents after the director had clearly spelled out the regulatory requirements. The documents show that the church ended most months with a bank balance under \$2,000; as of the end of December 2005, the church had just under \$6,500 in non-designated funds.

The director denied the petition in part based on the petitioner's failure to submit financial documents that conform to 8 C.F.R. § 204.5(g)(2). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The director also noted that the contract between the petitioner and Beulah Presbyterian Church specifies an annual salary of \$15,000.

On appeal, counsel acknowledges the regulatory requirements but states that the director "fails to recognize that the Petitioner – per regulatory requirement – has provided its Federal Tax Returns for 2005 and 2004." Counsel's use of the pronoun "its" here seems to refer to [REDACTED]. The record, however, contains no tax returns from that organization. The 2004 and 2005 tax returns in the record belong to the self-petitioning alien beneficiary. Her personal tax returns do not satisfy 8 C.F.R. § 204.5(g)(2), because that regulation specifically requires that the financial documents must relate to "the prospective United States employer." Even then, the petitioner's tax documents show that [REDACTED] has been paying her \$13,200 per year, not the \$15,000 per year specified in the contract. The petitioner's subsequent attempts to reduce that amount are without effect. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998).

Materials in the record show semimonthly \$550 payments to the petitioner, which annualize to \$13,200, beginning in late June 2005. There is no indication in these materials that the church ever paid the beneficiary at the \$15,000 rate specified in the contract submitted with the initial filing of the petition. The lower salary would therefore appear to constitute a violation of that contract.

Counsel asserts that the petitioner's "room and board are provided by an in-kind donation to the [church] from a member of a congregation (hereinafter "Donor"). The [church] is free to use this in-kind donation however it chooses; and, in this case, it is used for room and board for the Beneficiary." The appeal does not contain any evidence to support counsel's assertions. Counsel states: "The Petitioner can easily provide evidence for this in the form of agreements with the Donor and tax documents on request," but at the appellate level, we are not obliged to request such evidence. The petitioner and counsel, for whatever reason, chose not to submit this evidence on appeal, opting instead merely to claim that it exists. Because the evidence is not in the record, we will not speculate as to its nature or contents, and we cannot take it into consideration.

We note that, according to the petitioner's tax documents, the petitioner has resided at the same address since at least early 2004. This proves that the petitioner's residence at that address was not contingent on, or a result of, employment at [REDACTED] she already lived at the same address more than a year before she began working for that church. With this in mind, we further note the wording of counsel's assertion that the petitioner's housing is said to be donated by "a member of a congregation," not "the congregation." This wording is significant because, in context, it suggests that the unnamed "Donor" is not even a member of Beulah's congregation.

Furthermore, if housing is donated by a church member, rather than owned or controlled by [REDACTED] then the petitioner's use of that house incurs no cost to that church. The detailed ledger documents in the record show no expenses that can be readily identified as reimbursing the "Donor" for the petitioner's use of his or her property. Therefore, Beulah would have no basis to deduct the value of this housing from the petitioner's salary. Material support from a third party, that the petitioner already received before she ever worked for Beulah, cannot reasonably be considered to be part of the petitioner's compensation from Beulah. Also, neither the petitioner nor the church has ever explained what alternative arrangements, if any, are in place in the event that the "Donor's" house becomes unavailable. It is, for this reason, highly problematic that the petitioner's purported compensation is, in part, contingent on the actions of a third party who may or may not have any direct connection to [REDACTED]. Beulah is not responsible for the petitioner's housing; it has been, for the time being, relieved of that responsibility by the "Donor," who may or may not have been motivated by the petitioner's work for the church.

It also bears mentioning that a document submitted in response to the RFE, relating to the petitioner's earlier work at [REDACTED], provides an "approximate value" of \$4,800 for the petitioner's housing. The difference between \$13,200 and \$15,000 is \$1,800, not \$4,800, and therefore the petitioner's housing arrangement does not explain that discrepancy.

We affirm the director's finding that the petitioner has not established the prospective employer's ability to pay the proffered compensation as required by 8 C.F.R. § 204.5(g)(2). The petitioner has shown only that she receives a reduced salary and continues to live in a house she already occupied before she ever began working for [REDACTED].

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.