



U.S. Citizenship  
and Immigration  
Services

CA

[Redacted]

JUL 29 2004

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:  
Beneficiary:

[Redacted]

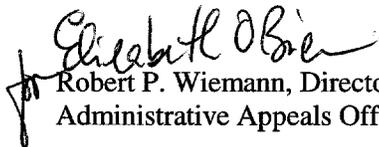
PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**PUBLIC COPY**

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**DISCUSSION:** The Director, California Service Center initially approved the special immigrant religious worker petition. On the basis of new information received and 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 September 10, 2003. The director subsequently obtained additional information that was not previously considered in the revocation decision, and reopened and vacated the September 10, 2003 decision. The director issued a Notice of Intent to Deny and again revoked approval of the petition on July 1, 2004. The director certified the decision to the Administrative Appeals Office (AAO) for review. The AAO will affirm the director's decision to revoke the approval of the petition.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(4), to perform services as a minister of music. The director determined that the beneficiary's position does not qualify as a religious occupation, and revoked the approval based on that finding on September 10, 2003. The director has since vacated that decision, however, and the subsequent revocation rests on entirely different grounds. Therefore, we need not discuss the initial revocation here.

The new notice of revocation rests on the director's determination that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a music minister immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established that it had the ability to pay the beneficiary's proffered wage.

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 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*, 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:

(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).

On May 18, 2004, when the director withdrew the previous revocation, the director also reopened the matter and issued a Notice of Intent to Deny. In response to the NOID, counsel states that the director had no authority to reopen the petition because [REDACTED] has already determined that he has jurisdiction to review this matter, as there is no administrative relief available.<sup>1</sup> Accordingly, the agency can only reopen this matter as part of settlement efforts." Counsel has submitted nothing from the court to show that the judge agrees with counsel's assessment of the legality of the director's notice. We note that the director was authorized by CIS regulation to reopen the proceeding and to reconsider his decision, and followed the regulatory prescription that if the new decision would be unfavorable to the affected party, the director must give the party 30 days notice and the opportunity to respond. 8 C.F.R. § 103.5(a)(5)(ii). The director then properly certified the decision to the AAO for review under 8 C.F.R. § 103.4(5). We shall restrict consideration here to the issues raised in the NOID, and will not address whether the federal court's jurisdiction of the litigation prohibited the agency from taking further action on the underlying petition. The NOID raises several issues. In the interest of clarity, we shall address each issue individually, followed by counsel's response to each issue.

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

---

<sup>1</sup> We note that there was "no administrative relief available" in September 2003, because the statute authorizing the visa classification was then about to "sunset." Congress has since reauthorized the statutory provision for special immigrant religious workers, which is now valid until September 30, 2008. Thus, to the extent the petitioner's argument regarding the absence of administrative relief may have referred to the sunset of the visa classification (which appear to have formed the primary justification for litigation), and not to the doctrine of "exhaustion of administrative remedies," this argument no longer applies.

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 February 21, 2001. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a minister of music throughout the two years immediately prior to that date.

In the NOID, the director noted that the beneficiary had initially entered the United States as an F-1 nonimmigrant student. One of the documents involved in obtaining the student visa is the Form I-20 A-B/I-20ID, which discusses, among other things, the alien's intended subject area and duration of study. This form, issued August 27, 1997, indicates that the beneficiary "has been accepted for a full course of study at [the University of Southern California], majoring in Scoring for Motion Pictures. The student is expected to report to the school not later than 08/27/97 and complete studies not later than 05/15/99. The normal length of study is 2 YEARS." The two-year qualifying period began in February 1999, during the period of study listed on the form.

Based on the above information, the director concluded that "[t]he beneficiary was a full time student for a segment of the 2-year qualifying period; therefore, she could not have been working as a full time Music Minister."

In response, counsel contends that there is no statutory or regulatory requirement that an alien's religious work must be full-time. The statute and regulations do, however, require "continuous" work in a religious occupation or vocation. Case law holds that part-time work is not continuous. See *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980). Similarly, engaging in other work interrupts continuous religious work. See *Matter of B*, 3 I&N Dec. 162 (CO 1948). In the absence of a full-time employment requirement, counsel suggests no alternative as to how little religious work an alien can perform and still qualify as a special immigrant religious worker.

Counsel correctly observes that the Form I-20 A-B/I-20ID dates from 1997, and therefore it is not proof that the beneficiary was, in fact, still a student as of February 1999, when the qualifying two-year period began. Documentation in the record shows that the beneficiary had changed status from an F-1 student to an R-1 religious worker in 1998, before the 1999-2001 qualifying period. Counsel is correct that there is no affirmative evidence of record that the beneficiary's studies interrupted her religious work during the qualifying period. Furthermore, even if the beneficiary had been studying on a part-time basis, because studies are not an occupation or vocation, they are not interruptive of religious work, provided that those part-time studies do not limit the beneficiary's ability to carry on the religious work. We note, however, that a full-time student, performing only ancillary religious duties, is not continuously performing qualifying religious work. *Matter of Varughese*.

The director noted that, in 2001, the petitioner had stated that the beneficiary would be paid \$1,200 per month. In 2002, the petitioner had stated the beneficiary's salary was \$1,300 per month. The director observed that "[t]he petitioner submitted copies of checks drawn on the church's account indicating payments to the beneficiary in 2001." The amounts on these checks total \$10,879.72, which "does not coincide with the amounts indicated on the beneficiary's Form 1040 and Form W-2 for the year 2001." Those tax forms had indicated the beneficiary's gross income was \$13,000. The petitioner's letter from 2001 had indicated a salary of \$1,200 per month, which annualizes to \$14,400 per year, which, again, differs from the amounts on the checks. The director determined that these inconsistencies undermined the petitioner's credibility.

In response, counsel argues that the director failed to take into account that various taxes had been withheld from the beneficiary's salary checks. A check from March 28, 1999, actually lists the withholdings:

Check amount	\$823.50
FICA	76.50
SIT	15.00
FIT	80.00
<u>SDI</u>	<u>5.00</u>
Total	1,000.00

After taking withholding into account, the check reflects the \$1,000 per month that the petitioner had claimed to be paying the beneficiary at that time (prior to subsequent salary increases). Considering this information, we find that counsel and the petitioner have provided plausible explanations for the purported discrepancies in the beneficiary's pay records.

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 director states, "[t]he petitioner submitted copies of checks allegedly paid to the beneficiary from January 2001 to December 2001 and bank statements from January 2001 to December 2001. However, the petitioner has not furnished the church's annual reports, federal tax returns, or audited financial statements. Therefore, the petitioner has not satisfied the documentary requirements" of 8 C.F.R. § 204.5(g)(2).

Counsel responds, reasonably enough, by observing that the petitioner has, in fact, been paying the beneficiary her full salary, which rules out any finding that the petitioner was unable to do so at the time. The petitioner has submitted copies of canceled checks, and bank statements that further corroborate the authenticity of the checks.

The director stated that, according to an investigative report prepared by Immigration and Customs Enforcement (ICE), "there were approximately 30 parishioners in attendance" when ICE investigators visited the petitioning church. The pastor of the church indicated "that there were 52 formal members of his church but that the congregation could swell to as many as 100 depending on the service and the time of year." The church holds three services a week, two on Sunday mornings and one on Friday evenings.

The beneficiary told the ICE investigators that, while she only spent three days a week at the church's premises, she "works over 35 hours each week" composing, translating, arranging, and otherwise working with music for the church. The director determined that the petitioner had offered no documentary corroboration for the assertion that the beneficiary has worked 35 hours per week. The director stated, "given the limited size of the congregation, the number of services per week, and the fluctuations of attendees, the petitioner has not fully established that the demands of the petitioning church will consistently necessitate the services of a full time Music Director."

Counsel, in response, asserts that there is no statutory requirement “for a petitioner to establish that it will consistently need the services of [the] beneficiary in a full time capacity.” The R-1 nonimmigrant visa exists to facilitate the temporary staffing needs of religious organizations. The fact that Congress created both nonimmigrant and immigrant visa classifications for religious workers implies some kind of meaningful difference between the nonimmigrants and the immigrants. This is not to say that a petitioner must guarantee lifetime employment for a beneficiary, but because the petitioner has sought a permanent rather than temporary immigration benefit, there is the implicit understanding that the position should be “permanent” in the generally-understood sense of that word. Otherwise, the visa classification would be susceptible to abuse, as a church with only one available position could provide a conduit for a succession of aliens, hiring each one just long enough for the alien to secure permanent immigration benefits.

Counsel asserts that it is an unconstitutional intrusion for immigration authorities to rule on a church’s personnel needs. The AAO lacks the authority to decide constitutional questions. We do note, however, that the matter before us is not an internal church matter, but a request, initiated by the petitioner, for government benefits. 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 director noted that, in her conversation with ICE investigators, the beneficiary “did admit to doing some sporadic ‘freelance’ composing with her husband who works as a composer for various Hollywood post-production sound studios.”

Regarding this work, counsel states “[t]he agency’s suggestion that [the beneficiary’s] sporadic freelance composing is somehow disqualifying is . . . without merit,” because “the agency’s regulations establish conclusively that that is not so.” Counsel cites 8 C.F.R. § 204.5(m)(4), which requires the petitioner to “clearly indicate that the alien will not be solely dependent on supplemental employment . . . for support.” Counsel emphasizes the inclusion of the word “solely,” which indicates that an alien *can* be *partially* dependent on supplemental employment. The wording of the regulation, however, calls for evidence that the alien *will not be* solely dependent on supplemental employment. This is clearly a reference to the beneficiary’s intended *future* work for the petitioner. (Counsel, in a later brief, chastises the director for failing to recognize that every word in a regulation has meaning.)

With regard to the beneficiary’s *past* work during the qualifying period, the regulations mirror the statutory requirement of *continuous* engagement in religious work. See section 101(a)(27)(C)(iii) of the Act, 8 U.S.C. § 1101(a)(27)(C)(iii), and 8 C.F.R. § 204.5(m)(1) and (3)(ii)(A). As we have already noted, *Matter of B* interprets “continuously” to mean that one did not take up any other occupation or vocation. Counsel has cited *Matter of B* in support of the petitioner’s position,<sup>2</sup> so counsel is clearly aware of the case, but counsel

---

<sup>2</sup> Counsel cites *Matter of B* to establish that an interruption in a rabbi’s work was not disqualifying for immigration purposes. We note that the interruption in *Matter of B* was not caused by self-imposed factors such as voluntary relocation to a country where the alien had no work authorization. Rather, the alien in *Matter of B* was unable to carry on the vocation of a rabbi because he was imprisoned in a Nazi concentration camp. Another case cited by counsel, *Matter of M*, 1 I&N Dec. 147 (BIA 1941), regards another rabbi, who fled Nazi persecution after his native Poland fell while the alien was on vacation abroad.

While *Matter of B* predates the current special immigrant religious worker statute, Congress, when it revised the law in 1990, approvingly acknowledged the body of “[s]ubstantial case law” already in existence. See H.R. Rpt. 101-723, at 75 (Sept. 19, 1990). This case law, as noted above, establishes an operational definition of “continuous” work, and there is

does not explain why the pervasively secular work of composing film scores is not another, interrupting occupation.

While counsel stipulates to the beneficiary's film work, he maintains that this information resulted from "illegal contact" with the beneficiary, undertaken without counsel's knowledge. 8 C.F.R. § 103.3(a)(1)(iii)(B) states that the beneficiary of a visa petition is not an affected party, and therefore lacks legal standing. Counsel observes that the matter was already in litigation at the time the ICE agents contacted the beneficiary. The matter at hand concerns the petition, rather than any litigation; the court has jurisdiction over the latter. The AAO's jurisdiction here is limited to the question of the beneficiary's eligibility for immigration benefits, rather than any kind of determination as to the admissibility of evidence obtained by immigration authorities during the course of their duties. We do note that counsel elsewhere faults the director for failing to take into account *all* of the evidence, while at the same time insisting that some of that evidence must be disregarded.

The director issued a decision on July 1, 2004, and certified the decision to the AAO for review, allowing the petitioner thirty days to submit a response. Many of the director's conclusions, and many of counsel's responses, echo those in the NOID and its response, discussed above. For example, the director again noted claimed discrepancies between the beneficiary's paychecks and her tax returns, failing to take into account counsel's arguments regarding withholding of taxes. It would be redundant to repeat these arguments and rebuttals here, and we shall therefore limit discussion to issues not previously addressed in the context of the NOID.

The director indicates that the petitioner has failed to satisfy the regulation at 8 C.F.R. § 204.5(g)(2), which states that evidence of ability to pay "shall be" in the form of tax returns, audited financial statements, or annual reports. In response, counsel contends:

8 CFR 204.5(g)(2) controls proof of ability to pay in employment based matters *when no other regulation does so*. Ability to pay in religious worker cases is governed by 8 CFR 204.5(m)(4) which states:

"The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or solicitation of funds for support. In doubtful cases, additional evidence such as bank letters, recent audits, church membership figures, and/or the number of individuals currently receiving compensation may be requested."

Counsel contends that the above regulation becomes "meaningless" if 8 C.F.R. § 204.5(g)(2) applies to religious workers. We do not find this argument to be persuasive. 8 C.F.R. § 204.5(m)(4) is more germane to the *terms* of the beneficiary's compensation, than to the petitioner's ability to pay that compensation. 8 C.F.R. § 204.5(g)(2), by its plain wording, applies to "[a]ny petition filed by or for an employment-based immigrant which requires an offer of employment." Because special immigrant religious worker petitions require an offer of employment, 8 C.F.R. § 204.5(g)(2) applies to special immigrant religious worker petitions. Counsel offers no support for the argument that Congress implicitly exempted religious workers from this requirement by designating them as "special immigrants."

---

nothing in the statute or regulations to indicate that the word "continuous" means one thing for a minister, and something else for a worker in a religious occupation. Indeed, the structure of section 101(a)(27)(C) of the Act strongly implies a single, universal sense of the word "continuous" for the different classifications of special immigrant religious workers.

Counsel is on firmer footing when observing that a CIS official has stated that “CIS adjudicators should make a positive ability to pay determination . . . [when t]he record contains credible verifiable evidence that the petitioner . . . has paid or currently is paying the proffered wage.” Memorandum from William R. Yates, Associate Director of Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 4, 2004).<sup>3</sup> As noted above, the petitioner has provided credible evidence that it has paid the beneficiary the proffered wage. We therefore find that the petitioner has proved that it has the ability to pay the wage, and withdraw the director’s finding to the contrary.

The director acknowledged that the petitioner has paid the beneficiary since October 1998, but noted that the beneficiary performed the same work as an unpaid volunteer beginning in February 1998. The director stated “[t]he petitioner has not provided any explanation as to why service previously performed on a voluntary basis must now be compensated.” The beneficiary did not have an R-1 visa until October 1998, and therefore compensated employment prior to that date would have been unlawful. The petitioner’s desire to avoid violating federal immigration law appears to be ample motivation for withholding payment prior to the approval of the R-1 petition that allowed the beneficiary to work for the church.

Regarding the small number of parishioners attending the church, counsel states “[a] bus driver puts in the same amount of hours at work whether there is only one passenger aboard his bus, or whether there are 80 passengers aboard.” This analogy fails because, if there is *consistently* low ridership on the bus, the expense of continuing that bus route would quickly outstrip the fares needed to support it; the route would likely be eliminated. In the same way, a church relies on parishioners for its income, and the beneficiary’s employment at the petitioning church can only be justified if there are sufficient parishioners to pay the beneficiary’s wages with their tithes or other offerings. The church’s small size is not, by itself, sufficient grounds to deny the petition, but in this instance it was not by any means the sole or principal basis for the denial. CIS is entitled to determine the *bona fides* of the job offer and, if necessary, attempt to verify the petitioner’s claims that it needs a permanent, paid minister of music. We note that, other than the beneficiary, the petitioner church currently does not have any other compensated employees. This raises legitimate questions about the long-term intentions of the petitioner to keep the beneficiary in its full-time employment.

Counsel repeats the argument that the beneficiary’s past supplemental employment is permitted by the regulations, again relying on the regulation regarding the beneficiary’s *future* source of support. We have already addressed these arguments. As to how “sporadic” the beneficiary’s film work has been, the beneficiary’s work history is readily available through an examination of her film credits, which, in turn, are freely available to the public via the World Wide Web. The Internet Movie Database, <http://www.imdb.com>, indicates that the beneficiary has received credit as a “score coordinator” on five films released during the 1999-2001 qualifying period: *Entrapment* (1999), *In Too Deep* (1999), *The Big Kahuna* (1999), *The Hurricane* (1999), and *Wonder Boys* (2000). The beneficiary is also credited as a composer on a sixth, more recent film, *The Visit* (2002). On two of the above films (*Entrapment* and *Wonder Boys*), the beneficiary’s spouse is also credited. The fact that the beneficiary did not report any income from any of these projects on her 1999 or 2000 income tax returns would seem to demonstrate that those returns are not inerrant, definitive proof of her earnings during those years.

The beneficiary’s work in film is particularly significant given her previous college studies, concentrating in film scores. These studies and the beneficiary’s subsequent work, considered together, point toward the

---

<sup>3</sup> We note that this memorandum does not indicate that 8 C.F.R. § 204.5(g)(2) does not apply to special immigrant religious worker petitions.

conclusion that the beneficiary intends to continue a career in the film industry. Congress did not create the special immigrant religious worker program as a means to facilitate the immigration of film composers.

Counsel states “[i]t is clear that Defendants have a policy to deny religious worker matters by any means necessary.” The denial or revocation of a single petition is not proof that CIS is determined to deny *every* petition, any more than the approval of one petition would prove that CIS seeks to approve all petitions. Counsel has not offered proof that CIS denies every special immigrant religious worker petition, nor is it possible for counsel to offer such proof, given that many such petitions are, in fact, approved. The denial of a single petition is not evidence of a systematic conspiracy to deny deserved benefits to an entire class of aliens. Rhetorical hyperbole does not, and cannot, replace evidence-based logic and legal argument in this proceeding.

Counsel goes so far as to claim that an alien can earn one dollar a year through religious work, relying otherwise on secular employment, and still qualify as a special immigrant religious worker. Counsel’s argument that the employment need not be full-time implies that the alien could earn this dollar through one hour (or, presumably, even less) of qualifying religious work per year. Thus, an alien could work full-time in a secular job, but qualify as a special immigrant religious worker provided that the alien engages in a negligible amount of paid religious work. We have difficulty accepting that this was the intent of Congress. The special immigrant religious worker program exists as a separate classification in order to recognize the particular needs and practices of religious organizations, rather than merely as a reward for aliens who perform small amounts of religious work in addition to their otherwise pervasively secular careers.

While not all of the director’s findings withstand scrutiny, we concur with the director that the petitioner has not established the *continuous*, i.e., *uninterrupted* religious work that is, by law, necessary for the beneficiary to qualify for classification as a special immigrant religious worker. This finding is without prejudice to any future filing, submitted at such a time when the beneficiary has continuously worked in the qualifying religious occupation throughout the two-year period immediately prior to the filing of the new petition.

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. The petition was approved in error, and the director properly exercised his discretion in revoking that approval. Accordingly, the director’s decision will be affirmed.

**ORDER:** The director’s decision of July 1, 2004 is affirmed. The revocation of the approval stands.