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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: APR 06 2005
EAC 03 023 55004

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.

Mari Jensen
S Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 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 (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a musical director. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a musical director immediately preceding the filing date of the petition.

On appeal, the petitioner submits statements from church officials and members of the congregation, attesting that the beneficiary worked 35 hours per week during the period in question.

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 October 28, 2002. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a musical director throughout the two years immediately prior to that date.

Rev. Suk Hwan Shin, pastor of the petitioning church, states:

In December 2001, [the beneficiary] was awarded a *Bachelor of Music Degree* from the famed *Manhattan School of Music* in New York City.

For the past 4 years, [the beneficiary] has served at our church in the capacity of *musical director*, overseeing all aspects of music pertinent to worship services, at the church and beyond (revivals and recitals). In the evenings and weekends, [the beneficiary] has dedicated himself to our church. . . .

As a way of showing appreciation for [the beneficiary's] dedication to our church, we have provided a *monthly remuneration in the form of scholarship*, attempting to assist in his schooling.

The petitioner submits copies of canceled checks, showing that the petitioner paid the beneficiary \$450 per month from January 2000 to May 2001. From July 2001 to June 2002, the petitioner paid the beneficiary \$500 per month. There is also a \$500 check dated September 2002. The record contains no checks from June 2001, July 2002, or August 2002, nor alternative documentation to establish that the beneficiary worked during those months. Bank statements in the record show that the petitioner did not issue any \$500 checks in July of 2002, so the absence of a check from that month is not simply a matter of those checks having been lost. This statement is *prima facie* evidence that the petitioner did not consistently issue monthly checks to the beneficiary.

Sara Lerch, assistant to the registrar at Manhattan School of Music (MSM), states that the beneficiary "received a Bachelor of Music degree from Manhattan School of Music on December 12, 2001. [The beneficiary] is currently enrolled as a full time graduate student at Manhattan School of Music. He is expected to complete the full requirements for a Master of Music degree in May of 2003."

The petitioner submits a copy of the beneficiary's resume, which lists engagements at MSM, the Brooklyn Opera Company, and other concert venues, as well as operatic performances at the Chautauqua Institute of Music and the Intermezzo Young Artist Program.

The director notified the petitioner that the initial submission "does not establish that the beneficiary was a full-time religious worker for the entire two-year period from October 2000 to October 2002." The director added that the beneficiary's "curriculum vitae also presents a picture of only secular, or mostly secular, activities" during the same period.

In response, the petitioner submits copies of the beneficiary's class schedules, indicating that the beneficiary frequently had afternoons or evenings free. Professor Patricia J. Misslin of MSM states that the beneficiary "has the ability to juggle a seemingly impossible schedule without complaint (he is a full time student who in addition to his studies volunteers at his church afternoons, evenings and weekends)." The director did not contest that the beneficiary is active at his church; the issue was whether or not this activity amounted to full-time experience. While Prof. Misslin is clearly very impressed with the beneficiary's talents and dedication, her assertion that the beneficiary "volunteers at his church" sheds no further light on the issue at hand. Although counsel maintains that the beneficiary's class schedule did not rule out full-time church work, the petitioner's response contains no affirmative claim that the beneficiary actually *did* work full-time.

The petitioner submits copies of church programs, identifying the beneficiary as an individual who tithes to the petitioning church. The petitioner does not submit copies of every weekly program, but rather provides monthly examples from the qualifying period. The record contains no programs from June 2001, February 2002, July 2002 or August 2002. With respect to February 2002, corroboration exists in the form of a canceled check from that month. As for the other months, the missing programs correspond to missing

checks. These two lines of evidence are consistent with the conclusion that the beneficiary was not at the church in June 2001, July 2002 or August 2002. Neither counsel nor the petitioner acknowledges, much less explains, these gaps in the record.

In denying the petition, the director acknowledged the beneficiary's "very considerable involvement in the musical activities of [the petitioning] church," but concluded that the beneficiary's "primary activity during those two years has been the pursuit of secular degrees in Music, and his work at [the petitioning] church appears to have been other than full-time and incidental to his studies."

On appeal, the petitioner submits two "affirmations." The first, jointly signed by Rev. Shin and seven deacons of the petitioning church, indicates that the beneficiary "spent at least thirty-five (35) hours per week at the church," working "weekend hours, weekday evening hours, and holidays." A similar "affirmation" bears the signatures of the church's pianist and members of its choir. These individuals do not, themselves, claim to have spent 35 hours worth of nights and weekends at the church each week, thereby placing themselves in a position to have personal knowledge to attest to the duration of the beneficiary's hours.

Furthermore, the director had previously instructed the petitioner to submit additional evidence to demonstrate that the beneficiary worked continuously throughout the qualifying period, thereby putting the petitioner on notice that the record was deficient in that regard. At the time of the notice, the petitioner made no affirmative claim of continuous work, instead offering a non-continuous series of church programs and the passive argument that the beneficiary's class schedule at MSM permitted full-time work.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

The petitioner has asserted that the beneficiary was a "volunteer," with no contract or formal employment relationship. *Matter of Hall*, 18 I&N Dec. 203 (BIA 1982), indicates that work compensated by means other than a cash salary is, nevertheless, "employment" for immigration purposes, but this applies only insofar as the alien receives some kind of compensation. Here, there is a one-month gap in June 2001 and a two-month gap in the summer of 2002. The beneficiary's prolonged absences, with no paid leave or other formal arrangement concerning his return, were inherently interruptive of continuous work, whether or not the beneficiary intended to return. The record does not show that the beneficiary carried on the duties of a musical director in July or August of 2002, for instance; and given this fact, it is not clear how one could conclude that the beneficiary nevertheless worked *continuously* as a musical director during that time.

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.