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U.S. Citizenship
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Services

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FILE:

[REDACTED]
EAC 04 038 50599

Office: VERMONT SERVICE CENTER

Date: DEC 22 2005

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

PETITION: 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 Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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 pastor. The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition or that it has the ability to pay the beneficiary the proffered wage.

On appeal, counsel submits a brief and additional documentation.

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 on appeal is whether the petitioner established that the beneficiary had been continuously employed in a qualifying religious vocation or occupation for two full years prior to the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that “[a]n alien, or any person in behalf of the alien, may file a Form I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States.” The regulation 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.”

The regulation at 8 C.F.R. § 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

(ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:

(A) 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 November 21, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a pastor throughout the two-year period immediately preceding that date.

In its July 2, 2003 letter accompanying the petition, the petitioner stated:

From July 2000 to February 2002, [the beneficiary] was the Pastor of the Brazilian Foursquare Gospel Church in Newark, NJ. During his employment he prepared sermons, preached the Gospel, visited the sick, comforted the bereaved, performed weddings, funerals, baptisms, communion and the sacraments, attended and organized seminars, taught church doctrine and leg [sic] doctrine.

From February 2002 until the present he has been employed with our church as a minister on a full time basis. He has been working approximately 40 hours per week. His salary is paid by a sister church in Brazil. His duties have been traditional pastoral duties such as preaching the gospel, leading the congregation in worship, providing religious and spiritual counseling, preparing teaching programs for the youth, performing the sacraments, visiting the sick and those in need, leading seminars, organizing evangelistic activities in the community. His position and duties will remain the same in the future.

The petitioner submitted a statement dated May 24, 2002 from Rev. [REDACTED] the superintendent of Igreja do Evangelho Quadrangular, indicating that the beneficiary had served as pastor of the Brazilian Foursquare Church in Newark, New Jersey from July 2000 to February 2002. The petitioner submitted a copy of a church program that lists the beneficiary as pastor of the petitioning organization, but submitted no other corroborative evidence of the beneficiary's employment with the Brazilian Foursquare Church or with the petitioning organization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In a request for evidence (RFE) dated October 28, 2004, the director instructed the petitioner to:

Submit evidence that establishes that the beneficiary has the continuous two years full-time experience in the religious vocation, professional religious work, or other religious work for the period immediately prior to November 21, 2003. Such evidence may be statements which include all of the following information: detailed listing of the beneficiary's duties, the commencement and termination dates of employment, and the time spent per week by the beneficiary performing those duties . . . However, documentation to establish the employment dates, training, and salary of the beneficiary should consist of more than a

statement. Objective documentary evidence, such as payroll records, tax return forms, contracts, etc., should be submitted to confirm the claimed employment dates and compensation for services performed.

In response, the petitioner submitted a January 15, 2005 letter from [REDACTED] a "church official" of the Brazilian Foursquare Church of Newark. Ms. [REDACTED] advised that the beneficiary had served as a pastor with that organization from July 2000 to February 2002, working approximately 40 hours per week. Ms. [REDACTED] did not indicate any other terms of the beneficiary's employment with the church, and the petitioner submitted no evidence such as canceled checks, pay vouchers, authenticated work schedules or other documentary evidence to corroborate the beneficiary's employment with the Brazilian Foursquare Church of Newark. *Id.* Additionally, the petitioner submitted no evidence to substantiate the beneficiary's employment with the petitioning organization during the qualifying two-year period.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." See H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Comm. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 1963).

The term "continuously" also is discussed in a 1980 decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

In line with these past decisions and the intent of Congress, it is clear, therefore, that to be continuously carrying on the religious work means to do so on a full-time basis. That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is not paid, the assumption is that he/she is engaged in other, secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who in accordance with their vocation live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and generally salaried. To hold otherwise would be contrary to the intent of Congress.

On appeal, the petitioner submits canceled checks indicating that, during the qualifying period, the petitioner paid the beneficiary various amounts and with varying frequency beginning in April 2002. The checks range

in amount from \$50 to \$1,600. Most do not indicate the purpose for which they were drawn, although a few indicate that they were for salary, gasoline or "lawyer." The petitioner also submits copies of the beneficiary's Forms 1040, U.S. Individual Income Tax Returns, for the years 2001 and 2002. It is noted that both of the returns are dated May 2, 2005. The petitioner also submits copies of the beneficiary's monthly banking account statements for the period July 2000 through February 2002.

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 Obaighbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. The appeal will be adjudicated based on the record of proceeding before the director.

The record before the director does not establish that the beneficiary was continuously employed as a pastor for two full years preceding the filing of the visa petition.

The second issue on appeal is whether the petitioner established that it has the ability to pay the beneficiary the proffered wage.

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 its letter of July 2, 2003, the petitioner indicated that it would pay the beneficiary \$1,900 per month in addition to a housing allowance. In his letter of October 28, 2003 forwarding the petition, counsel stated that the American Baptist Churches of New Jersey would pay the beneficiary. With the petition, the petitioner submitted a copy of audited financial statements for the American Baptist Churches of New Jersey for the years 2000 and 2001. However, no evidence was submitted to support counsel's assertion that the beneficiary's compensation would be paid by the American Baptist Churches of New Jersey. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of

proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In response to the director's RFE, the petitioner stated that the beneficiary would be paid \$400 per week "including room and board." The petitioner submitted a copy of a January 25, 2005 letter to the petitioner from the American Baptist Churches of New Jersey stating that it would send the petitioning organization \$1,500 per month for the beneficiary's pastoral salary. The petitioner submitted copies of canceled checks reflecting that the beneficiary received \$400 on January 9 and 16, 2005, and \$500 on January 8, 2005. The petitioner submitted no evidence of its ability to pay the beneficiary the proffered wage in 2003, the year the petition was filed.

On appeal, the petitioner submits copies of checks reflecting that, beginning in November 2003, it paid the beneficiary \$300 approximately every week and that approximately once a month, it paid the beneficiary \$950. This suggests that the petitioner paid the beneficiary a salary of \$1,200 per month and a housing allowance of \$950. The checks do not indicate that the petitioner paid the beneficiary the proffered salary of \$1,900 per month plus a housing allowance as per its July 2, 2003 letter.

The petitioner also submitted a copy of an audited financial statement for the American Baptist Churches of New Jersey for the years 2002 and 2003.

While the financial statements of the American Baptist Churches of New Jersey indicates that it had the ability to pay the beneficiary the proffered wage in 2003, the year the petition was filed, the petitioner submitted no evidence that that organization had assumed responsibility for paying the beneficiary in 2003 and 2004. In fact, in its July 2, 2003 letter accompanying the petition, the petitioner stated that the beneficiary "is paid by a sister church in Brazil." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The record does not reflect that the petitioner has paid the beneficiary the proffered wage prior in the past or that it had the ability to pay the proffered wage as of the priority date. Additionally, the petitioner submitted conflicting evidence as to the source of the beneficiary's financial support. Accordingly, the record does not establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage as of the date the petition was filed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.