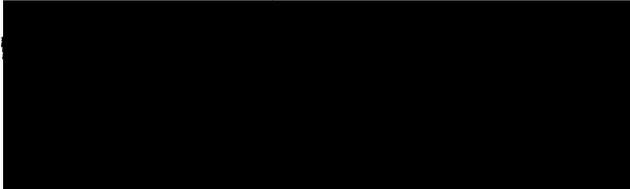


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FILE: WAC 01 219 52372 Office: CALIFORNIA SERVICE CENTER Date: MAR 01 2005

IN RE: Petitioner:  
Beneficiary:



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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based immigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the AAO's previous decision will be affirmed and the petition will be denied.

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 religious instructor. The director determined that the beneficiary had worked only part-time, and therefore lacked the requisite two years of continuous work experience as a religious instructor immediately preceding the filing date of the petition. The AAO affirmed the director's decision and dismissed the appeal, adding an additional finding that the petitioner had not established any compensation of the beneficiary during the qualifying period.

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--

\* \* \*

(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 May 1, 2001. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a religious instructor throughout the two years immediately prior to that date.

The petitioner's initial submission on May 1, 2001 contained little information about the position offered or the beneficiary's compensation. On November 5, 2001, the director instructed the petitioner to "[p]rovide evidence of the beneficiary's work history beginning May 01, 1999 and ending May 01, 2001. . . . Ideally, this evidence should come in a way that shows . . . the beneficiary received monetary payment."

In a letter dated January 18, 2002, Rev. [REDACTED] president of the petitioning church, described the beneficiary's work:

The hours of the position for the Religious Instructor are Monday to Saturday, 10:00 a.m. to 12:00 p.m. in morning prayer group, Monday to Saturday 8:00 p.m. to 10:00 p.m. for Bible studies; Saturday 5:00 p.m. to 7:00 p.m. for Fellowship and music, and Saturday 7:00 p.m. to 8:00 p.m. for fellowship, Sunday from 11:00 a.m. to 1:00 p.m. and 6:00 p.m. to 9:00 p.m. for Sunday services. There are also additional variable hours such as visits to schools, hospitals and members' homes.

The director denied the petition on the grounds that the itemized hours add up to 32 hours, three hours short of the 35-hour threshold for full-time work. On appeal, the petitioner's chief financial officer, [REDACTED] states:

As stated in our January 18<sup>th</sup> letter, while the work schedule provided listed the exact days and time for [the beneficiary] to perform her duties, there are additional hours besides those listed which [the beneficiary] must work as part of her duties to our church. Unlike the duties which [the beneficiary] performs at our church, the exact times and days of these additional hours cannot be set with certainty as they are outside of our church setting and they vary from week to week in order to accommodate the members' needs.

For example . . . [the beneficiary] is required to visit the universities and colleges attended by our youth members. . . . She must visit the university or college at least once a week during the weekday, with each visit lasting at least four hours. . . . Among the student members that [the beneficiary] visited on a weekly basis are [REDACTED] and [REDACTED] at the California State University of Fullerton. . .

[The beneficiary] is required to visit those members in their homes who were absent from . . . [or] could not attend our Sunday service. . . . These visits normally occur early in the week, usually Monday or Tuesday, and would take up [the beneficiary's] entire afternoon from 1:00 p.m. to 7:00 p.m.

In an accompanying letter, Frans Antony states that the beneficiary "regularly comes to my university. . . . She would visit us at least weekly . . . and her visits would last at least four hours each time."

The AAO, in dismissing the appeal, cited *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980) to indicate that part-time work cannot suffice as qualifying experience. The AAO rejected, as insufficiently corroborated, the petitioner's argument on appeal that the beneficiary worked several additional hours per week beyond those specified on the schedule. The AAO noted that Frans Antony provided no verifiable details about the beneficiary's claimed campus visits, and that Purnama Gunawan's letter lacked corroborating evidence. Finally, the AAO stated that, given the absence of tax or payroll documentation, there is no proof that the beneficiary was employed (i.e., working for remuneration) during the 1999-2001 qualifying period.

On motion, counsel notes "back in 1996 [sic], the [Immigration and Naturalization] Service submitted a Proposed Rule . . . expressly changing the wording from 'continuous' to 'full-time' experience," and that "such a change to 8 CFR 204.5(m)(1) did not take place." The proposed rule was published at 60 Fed. Reg. 29771, 29781 (June 6, 1995). The proposed rule and accompanying commentary occupied over nine pages of the Federal Register, and incorporated changes to a variety of employment-based immigrant classifications; it was not, as implied, simply a proposed and rejected one-word change.

Furthermore, the commentary on page 29778 indicates that the insertion of the word “full-time” represents a *clarification*, rather than an *alteration*, of policy: “The Service proposes to amend the regulation to *expressly* require that the 2 years of experience be full-time” (emphasis added). The same commentary explains why this technical change to the regulations is entirely in keeping with the statute and case law.

Counsel cites *Perez v. Ashcroft*, F. Supp. 2d 899 (N.D. Ill., 2002) to show “the Service’s interpretation of ‘continuously’ as full time employment is in direct violation of the Administrative Procedure[s] Act.” In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Here, the matter did not even arise within the same district. Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. In contrast, the AAO is bound by precedent administrative decisions. The Board of Immigration Appeals, in *Matter of Varughese*, found that an alien’s religious work was not qualifying experience, in part because the beneficiary did not work full time.

That being said, the letter of January 18, 2002 indicates that, beyond the 32 hours per week specified in the itemized weekly schedule, “[t]here are also additional variable hours such as visits to schools, hospitals, and members’ homes.” Thus, the petitioner has consistently indicated that the beneficiary’s work includes “visits to schools, hospitals and members’ homes” not spelled out on the itemized schedule; the later references to such visits are not a completely new claim formulated specifically for the purpose of the appeal. While lacking in precise detail, the letters submitted on appeal contain plausible claims not contradicted by the other evidence of record. While further details and corroborating evidence would be ideal, the preponderance of available evidence tends to support the claim that the beneficiary’s visits to schools, hospitals and homes occupied three or more hours in a typical week.

The beneficiary’s work hours, however, did not form the sole basis for dismissal cited in the appellate decision. The AAO had stated “[w]ithout income tax returns and W-2’s, [Citizenship and Immigration Services] is unable to determine how and whether the beneficiary has been employed.” The director first duly served notice in the November 1, 2001 request for information that the petitioner should demonstrate how the beneficiary was compensated and supported during the 1999-2001 qualifying period.

In his January 18, 2002 letter, Rev. ██████ states: “[i]n exchange for [the beneficiary’s] services as a Religious Instructor at our church, we will pay her a monthly salary of \$200.00, in addition to transportation expenses worth \$80.00 per month and room and board worth \$500.00 per month, for a total of \$780.00 in monthly salary and benefits.” Rev. ██████ stated that the beneficiary “has been working as a Religious Instructor for our church since December 1998,” but did not indicate that the beneficiary was already receiving compensation; rather, the letter described what the petitioner “will pay her” (emphasis added). The subsequent letter from ██████ contains no discussion at all of the beneficiary’s compensation, even though, as the petitioner’s chief financial officer, the author of that letter is, presumably, in a position to verify payments to the beneficiary.

As noted above, the director, prior to the denial, instructed the petitioner to submit evidence to show the beneficiary’s source of income and/or support. In response, counsel had stated “Petitioner offered Beneficiary \$200.00 as well as room and board,” but did not expressly indicate that the petitioner actually paid the beneficiary. Counsel had stated that the beneficiary received financial support from her father, and the petitioner submitted copies of tax documents showing that the petitioner paid the beneficiary’s father \$12,000 in 2000. The 2000 tax return identifies the beneficiary’s father’s occupation as “Pastor.” There is no

explanation as to why the petitioner is able to document payments to the beneficiary's father, but not to the beneficiary herself.

Three documents which counsel identifies as "Petitioner's monthly debit/credit balance sheets for the months of October, November, and December 2001" show a monthly \$500 entry for "Love Gift Esther & Raquel," which *may* refer in part to the beneficiary (whose first name is [REDACTED]). The petitioner has not indicated which of the itemized expenses pertain to the beneficiary's \$780 monthly support. Even if these documents were proven to reflect payments to the beneficiary, such payments in the last months of 2001 fall outside the two-year qualifying period, which ended on the May 1, 2001 filing date. We note that none of the balance sheets shows the name of the petitioning church. Instead, each of the three documents bears the heading "GBI Bethany Southern California." The documents show monthly expenses of roughly \$35,000.

A document which *does* show the name of the petitioning church, and pertain to part of the qualifying period, is an "Income Statement For the [12-Month] Period Ended December 31, 2000." This document indicates that the petitioner's "Total Expenses" for the entire year were \$159,362.05, averaging \$13,280.17 per month, barely a third of the monthly expenses on the "GBI Bethany Southern California" balance sheets from one year later. The itemized expenses on the 2000 income statement include "Salaries – Officers" in the amount of \$18,930.90, presumably including the \$12,000 paid to the beneficiary's father that year. The petitioner has never claimed that the beneficiary, as a religious instructor, is or has been an "officer" of the church, and we are not obliged to presume as much. The only other entries that can be construed as referring to payment for services are \$347.51 for "Casual Labor" and \$1,617.50 for "Consulting." We see no reason to conclude that the petitioner's 2000 balance sheet reflects \$9,360 (\$780/month x 12 months) in compensation to the beneficiary.

On motion, counsel states "Petitioner paid Beneficiary a monthly salary of \$200.00 plus room and board as well as transportation," and that, due to the low level of compensation, "Beneficiary was not required to file tax returns."<sup>1</sup> This assertion does not overcome the AAO's finding that there is no evidence to show that the beneficiary has ever received compensation from the petitioner. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (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).

The petitioner's president has stated only that the beneficiary "will" receive such compensation, and even the petitioner's top financial official has evidently declined to assert that the beneficiary has been paid, even after the

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<sup>1</sup> The claim that the beneficiary's compensation is too low to require a tax return raises another issue. The petitioner asserts that the beneficiary is to work perhaps 42 or more hours a week – 32 hours as listed in the original itemized list; six hours of home or hospital visits; and four hours of campus visits. The petitioner claims that the beneficiary will receive remuneration worth \$780 per month. This calculates to less than \$4.30 per hour, well below the federal minimum wage in 2002. The same compensation, at 32 hours per week, calculates to over \$5.60 per hour. This exceeds the *federal* minimum wage in 2002, but is below *California's* minimum wage, which was \$6.75 per hour as of January 1, 2002. California's minimum wage law has no blanket provision to exempt religious workers. Section 1191.5 of the California Labor Code allows non-profit organizations to obtain annual licenses to pay lower wages, but the record contains no evidence that the petitioner has obtained such licenses.

Furthermore, the California Code of Regulations, title 8, chapter 5, group 1, article 1, section 11000, paragraph 3, states "Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee," and even then there are limits to the amounts that can be credited in this way. The record does not show that any such agreement exists now, or existed at the time of filing. Thus, the terms of employment, as described by the petitioner, appear to amount to an unlawful and therefore invalid job offer.

director specifically requested evidence to show such payments. *Matter of Varughese*, which, unlike counsel's cited decisions, is a precedent decision binding on this office, indicates that an alien's past religious work is not qualifying experience if the alien "is not compensated." *Id.* at 399. The petitioner's financial documents fail to corroborate counsel's claim on motion that the beneficiary was compensated. 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).<sup>2</sup>

Before the petition was denied, the director had put the beneficiary on notice to establish that it compensated the beneficiary during the qualifying period. The AAO, in its initial decision, found that the petitioner had failed to meet this requirement, and the petitioner has not overcome this finding on motion.

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 previous decision of the AAO will be affirmed in part, and the petition will be denied.

**ORDER:** The AAO's decision of September 2, 2003 is affirmed. The petition is denied.

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<sup>2</sup> To note another discrepancy in the record, the beneficiary's parents' tax return, dated February 10, 2001, shows a Social Security number for the beneficiary, but when the petition was filed three months later on May 1, 2001, the petitioner indicated, under penalty of perjury, that the beneficiary has no Social Security number.