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

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[Redacted]

FILE: [Redacted]
EAC 02 079 52416

Office: VERMONT SERVICE CENTER

Date: **MAR 16 2005**

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:

SELF-REPRESENTED

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

R 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 an associate deacon and custodian. The director determined that the petitioner had not established that the beneficiary's position qualifies as a religious occupation; that the beneficiary had the requisite two years of continuous work experience as an associate deacon and custodian immediately preceding the filing date of the petition; or that the petitioner is able to pay the beneficiary's proffered salary.

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 is whether the petitioner seeks to employ the beneficiary 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. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

A letter signed by [REDACTED] pastor of the petitioning church, and by the beneficiary, contains the following description of the beneficiary's work as an "Associate Deacon and Custodian": "A job description of his duties includes: cleaning all areas of the church, the floors, windows, bathrooms, kitchen and the sanctuary. As an Associate Deacon, [the beneficiary's] responsibility is to assist the Pastor in ministry which includes: serving the Holy Communion, Baptismal service, visit the sick and shut-in, minister

to the saved and unsaved in the community. . . . [The beneficiary's] job description is taken from the [petitioner's] manual/by laws."

The director denied the petition on May 22, 2003, in part because the beneficiary's duties, as described, are largely secular. On appeal, the petitioner submits a letter from the beneficiary, also signed by [REDACTED]. The beneficiary states that, in addition to his duties as an associate deacon and custodian, he "also served faithfully in the Religious Occupation as a Missionary Worker." This attempt, at the appellate stage, to revise the beneficiary's job description does not show that the director made the wrong decision based on the job description available at the time of the decision. 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), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

The regulatory definition of "religious occupation" at 8 C.F.R. § 204.5(m)(2) specifically excludes janitors, and many of the beneficiary's described duties are clearly janitorial. As shall be discussed in greater detail below, the beneficiary's remaining duties amount to only a few hours a week, whether or not the beneficiary asserts that he is a missionary when performing those duties.

The next issue concerns the beneficiary'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 26, 2001. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of an associate deacon and custodian throughout the two years immediately prior to that date.

[REDACTED] in the letter also signed by the beneficiary, indicates that the beneficiary "is a part-time worker, and is being compensated \$100.00 per month.¹ However, his hours are expected to be upgraded to 25-30 hours weekly, and he will be earning \$400.00 per month in the near future." Given that an "upgrade" to a 25-30 hour work week would quadruple the beneficiary's pay, it appears that the beneficiary previously worked roughly seven hours per week. The petitioner has submitted copies of paychecks issued to the beneficiary, but these checks were all issued in 2002 and 2003, and thus do not corroborate the beneficiary's claimed employment during the 1999-2001 qualifying period.

The director, in the denial notice, stated that the 2002-2003 paychecks do not establish employment during or before 2001. The director also observed that, to qualify, the petitioner's "supporting evidence must specifically demonstrate that the qualifying religious work has been and will be full-time."

On appeal, the petitioner repeats the claim that the beneficiary is currently "a part-time worker" who will soon begin working longer hours. Even the longer hours fall short of what is generally considered full-time. Part-

¹ The assertion that the beneficiary has worked for, and been compensated by, the petitioner seems to contradict the petitioner's assertion on the I-360 petition form that the beneficiary has never worked in the United States without authorization. The petitioner does not claim or demonstrate that the beneficiary possesses a classification of nonimmigrant visa that would permit him to work in the United States.

time experience is not sufficient to meet the two-year experience requirement. *See Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980), involving an alien whose religious duties occupied only nine hours per week.

Furthermore, at no time has the petitioner clearly claimed, let alone documented, that the beneficiary worked throughout the 1999-2001 qualifying period. The beneficiary entered the United States on June 29, 2000, and thus appears to have been abroad during the first several months of the qualifying period. Thus, the beneficiary's employment with the petitioner after his entry could not establish the necessary experience, even if it had been full-time (which it was not). The petitioner has not established, or even claimed, that the beneficiary has performed qualifying religious duties continuously since late December 1999. Therefore, the petition cannot be approved and the director acted properly in denying the petition.

The final issue concerns the petitioner's ability to pay the beneficiary's proposed salary of \$400 per month. 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 instructed the petitioner to submit financial statements or tax records to substantiate the petitioner's ability to pay the beneficiary's proffered wage. The petitioner responded with a document showing a bank balance of \$8,045.38 as of December 12, 2002. This document does not show the petitioner's income, expenses or cash flow, nor does it guarantee that the full balance will remain available for payments to the beneficiary. The petitioner also submitted copies of past paychecks issued to the beneficiary, but these were in the lesser amount of \$100 per week. While past payments of the beneficiary's *full* proffered wage would be persuasive evidence of ability to pay, these checks reflect only a small fraction of that wage, in payment for greatly reduced hours.

In denying the petition, the director determined that the petitioner had failed to submit satisfactory evidence to show ability to pay the beneficiary's proffered wage. On appeal, the petitioner submits copies of previously submitted materials, as well as an unsigned letter, dated December 12, 2002, indicating that the petitioner does not require the services of an accountant "due to the church[']s low budget and income."

The above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be" in the form of tax returns, *audited* financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only *in addition to*, rather than *in place of*, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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.