U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

C1

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 3 2004

IN RE: Petitioner: [redacted]
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:

[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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and 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, 8 U.S.C. § 1153(b)(4), to perform services as its educational director. The director determined that the petitioner had not established (1) that the beneficiary had the requisite two years of continuous work experience as an educational director immediately preceding the filing date of the petition; (2) that the position amounts to a qualifying religious occupation; (3) its ability to pay the beneficiary's proffered wage; or (4) that the beneficiary entered the United States in order to perform qualifying religious work.

On appeal, the petitioner submits arguments from counsel and a financial document.

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--
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> > (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
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> (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 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 April 26, 2001. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of an educational director throughout the two years immediately prior to that date.

In the initial filing, the petitioner made no mention of the beneficiary's past experience. Rather, Rev. Obed Jauregui, pastor and chairman of the board of the petitioning church, states that, pursuant to the outcome of a "meeting recently held," the church board has "extended an employment contract" to the beneficiary. Rev.

Jauregui lists the responsibilities that the beneficiary "will have," but does not state that the beneficiary has already undertaken these responsibilities.

The director requested evidence to establish that the beneficiary possesses the necessary experience in the position offered. Specifically, the director requested "a detailed description of the beneficiary's prior work experience . . . for the prior 2 years." In response, Rev. Jauregui states that the beneficiary's "prior work experience has consisted of the following: fifth and six [sic] grade teacher from 1991 to June of 1997. . . . [The beneficiary] was employed by the Peniel Church of the Nazarene from 1991 to 1994 as Minister of Education." Elsewhere in this letter, Rev. Jauregui states that the beneficiary "has also served as a Sunday School Teacher, Church Steward and in the different age ministries of the church," but he provides no details or corroborating evidence to establish the nature or extent of these duties, or that the beneficiary performed these duties continuously during the 1999-2001 qualifying period. He does not state that the beneficiary already occupies the position offered; rather, he consistently discusses the duties of the position in terms of what the beneficiary *will* do.

The director denied the petition, in part because the petitioner had failed to provide "a detailed description of the beneficiary's prior work experience for the 2 years prior to filing the instant petition." On appeal, counsel states "[t]he Beneficiary has met the necessary requirements of prior experience and qualifications as a religious worker," but does not elaborate except to reiterate the petitioner's vague assertion that the petitioner has provided services to the beneficiary.

We concur with the director that the evidence of record is not sufficient to demonstrate that the beneficiary has continuously carried on the occupation of an educational director throughout the two-year qualifying period.

The next 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) offers the following pertinent definitions:

> *Minister* means an individual duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion. In all cases, there must be a reasonable connection between the activities performed and the religious calling of the minister. The term does not include a lay preacher not authorized to perform such duties.
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> *Religious occupation* means 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.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a "religious occupation" and the regulation at 8 C.F.R. § 204.5(m)(2) states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The list reveals that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as cantor, missionary, or religious instructor are examples of qualifying

religious occupations. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

Citizenship and Immigration Services therefore interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

i states that the beneficiary "will have the following responsibilities:"

- Prepare and maintain the curriculum for our Sunday School, Disciple Training Program, and Leadership School
- Coordinate and schedule classes in the above mentioned areas.
- Supervise and direct our Summer school.
- Train teachers to serve at the various levels – children, youth and adults – for our Ministry Training Program.
- Supervise weekly classes.
- Serve as editor of the church weekly educational bulletin.
- Serve as school counselor to teachers and/or students having difficulties.
- Serve as official educational advisor to the Church Board.
- Serve as director for children's church and its special programs.

Following a request for additional information, Rev. Jauregui repeats the above list, with added details, and the petitioner submits a copy of a "Minister's License," reflecting the beneficiary's "Preparation for Ordination" as an "Elder." The certificate is dated May 20, 2002, and thus it does not reflect the beneficiary's qualifications or position as of the petition's filing date over a year earlier. We must examine the beneficiary's qualifications and situation as of the petition's filing date, rather than subsequent developments. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998).

The director stated that the evidence was insufficient to establish eligibility, because "most teacher positions also include secular activities." The director added "this issue will not be pursued further since the position is not approvable." Thus, the director did not address the specifics of this particular claim; the director made only a general assertion about teaching positions, and asserted that further discussion would be unnecessary. This is insufficient to support this particular finding as a basis for denial, but (as the director has noted) the denial rests on other factors as well.

On appeal, counsel asserts that, while teaching unavoidably includes certain secular aspects, the beneficiary's work is primarily religious in nature. We agree that the content taught is inherently religious, and therefore the position offered to the beneficiary is not inherently a secular occupation. It remains, however, that the petitioner has the burden of demonstrating that the religious denomination traditionally regards this position as a paid, full-time occupation, rather than a function typically delegated to a volunteer from the congregation or a part-time worker. The documentation regarding the beneficiary's past experience shows only part-time work, and the beneficiary has not shown that churches in the denomination routinely employ full-time workers in the same job that the petitioner now offers to the beneficiary.

Counsel cites, but does not submit a copy of, the 2001-2005 *Manual* of the Church of the Nazarene. Counsel states that, according to the *Manual*, "a member of the clergy employed in a ministerial capacity in a Christian education program of a local church may be assigned as a minister of Christian Education." There is no evidence, however, that the beneficiary is "a member of the clergy." Her "minister's license" is dated 2002, after the April 2001 end of the two-year qualifying period. The petitioner has never referred to the beneficiary as a "minister," much less "a minister of Christian Education," and there is no evidence that "a minister of Christian Education" would perform essentially the same duties that the petitioner seeks to assign to the beneficiary. Thus, there is no support for counsel's argument. 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 next issue concerns the petitioner's ability to pay the beneficiary the proffered salary of $18,900 per year (including benefits). 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 initial submission contained no financial documentation. After the director requested evidence of the petitioner's ability to pay, the petitioner has submitted a copy of its annual budget for 2000-2001 and 2001-2002. This budget shows that the petitioner plans to pay the beneficiary the full amount, but the document does not demonstrate that the petitioner actually has the funds available to do so.

The director, in denying the petition, listed the acceptable evidence of ability to pay, and observed that the petitioner had submitted only "a self-made annual budget," which was not sufficient to meet the petitioner's burden of proof. On appeal, the petitioner submits a copy of a "Financial Chart," which counsel calls the petitioner's annual report to the denominational headquarters. This chart indicates that the beneficiary raised $167,178 in 2002, and paid out $160,912, leaving a net balance of $6,266. The chart does not show any payments to the beneficiary, so those payments were not included in the petitioner's expenses, and would have to come out of the remaining balance. That balance is over twelve thousand dollars short of the salary and benefits promised to the beneficiary. Therefore, regardless of whether this document is acceptable evidence under 8 C.F.R. § 204.5(g)(2), this document on its face does not establish the petitioner's ability to pay the beneficiary $18,900 per year in salary and benefits.

The final issue raised in the director's decision concerns the beneficiary's entry into the United States. Section 101(a)(27)(C)(ii)(I) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii)(), requires that the alien seeking classification "seeks to enter the United States" for the purpose of carrying on a religious vocation or religious occupation. In this instance, the beneficiary entered the United States in 1997 as a nonimmigrant visitor, and remained in the United States illegally after her nonimmigrant visa expired. Thus, the director concluded, the beneficiary did not enter the United States solely for the purpose of working as a religious worker.

This finding is not defensible. The AAO interprets the language of the statute, when it refers to "entry" into the United States, to refer to the alien's intended *future* entry *as an immigrant*, either by crossing the border with an

immigrant visa, or by adjusting status within the United States. This is consistent with the phrase "*seeks* to enter," which describes the entry as a future act. We therefore withdraw this particular finding by the director.

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.