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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 7 2004

IN RE: Petitioner: [redacted]
Beneficiary:

APPLICATION: 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 APPLICANT:

[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

DISCUSSION: The director of the Texas Service Center approved the petition and certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn. The petition will be denied.

The petitioner is a church. It seeks classification of 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) in order to employ her as a church organist.

On May 23, 2002, the center director issued a notice approving the petition and certifying the petition to the AAO for review. The petitioner has not submitted a brief or any additional evidence in response to the Notice of Certification. Therefore, the record will be considered complete.

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 non-profit, 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).

Pursuant to 8 C.F.R. § 204.5(m)(1):

> 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 non-profit religious organization in the United States. The alien must be coming to the United States solely for

> the purpose of carrying on the vocation of a minister of that religious denomination, working for the organization at the organization's request in a professional capacity in a religious vocation or occupation for the organization or 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. All three types of 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.

Upon review of the record, it is concluded that the petition was approved in error. The first reason the petition may not be approved relates to the question of whether the petitioner has established that it has the ability to pay the beneficiary the proffered wage.

The center director noted that the beneficiary had been receiving remuneration from the petitioning organization throughout the two-year period immediately preceding the filing date of the petition and had filed federal income tax returns with the Internal Revenue Service (IRS). The center director concluded that the petitioner had established that it had the ability to pay the beneficiary the proffered salary.

Pursuant to 8 C.F.R. § 204.5(g)(2):

> Any petition filed by or for an employment-based immigrant petition which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the 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 annual reports, federal tax returns, or audited financial statements.

Although the petitioner provided copies its bank statements for the months of June and July of 2002 and its internally generated balance sheets for the year 2001, the petitioner has not provided copies of its annual reports, federal income tax returns, or audited financial statements, as required. Therefore, the petitioner has not established that it has the ability to pay the beneficiary the proffered salary, and the petition must be denied for this reason.

The second reason the petition may not be approved relates to the question of whether the petitioner has established that the proffered position qualifies as that of a religious worker. The director concluded that the petitioner had demonstrated the inherent nature of music in the denomination's worship services and that the petitioner had established that the proffered position qualified as that of a religious worker.

The term "religious occupation" is defined at 8 C.F.R. § 204.5(m)(2) as follows:

> 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.

The statute is silent on what constitutes a "religious occupation" and the regulation states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function," but instead provides a brief list of examples. A review of 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 non-qualifying positions are those that are primarily administrative or secular in nature, such as janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

The AAO interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed or beliefs 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 or the petitioning religious organization.

The petitioner has not submitted sufficient evidence to establish that the duties of the position are directly related to the religious creed or beliefs of the denomination, that the position is defined and recognized by the governing body of the denomination, or that the position is traditionally a full-time, salaried occupation within the denomination or the petitioning religious organization. It is concluded that the petitioner has failed to establish that the position qualifies as that of a religious worker, and the petition also must be denied for this reason.

The third reason the petition may not be approved relates to the question of whether the petitioner has established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing date of the petition.

The center director determined that the petitioner had established that the beneficiary was employed professionally in the same position for at least two years prior to the filing date of the petition. The center director referred to prior AAO decisions in which it was determined that an ordained minister pursuing advanced theological studies in the United States in nonimmigrant F-1 student status may be considered to be carrying on the vocation of minister if it can be demonstrated that such study is consistent with the ministerial vocation, and provided that the alien continues to perform the duties of a minister of religion.

Pursuant to 8 C.F.R. § 204.5(m)(1):

> All three types of religious worker 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 petition was filed on September 10, 2002. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a religious vocation or occupation during the period from September 10, 2000 to September 10, 2002.

The petitioner states that the beneficiary was first admitted to the United States on June 13, 1998, as a nonimmigrant F-1 student. The petitioner indicates on the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, that the beneficiary has not engaged in unauthorized employment in the United States.

The record shows that the beneficiary was initially admitted to attend but subsequently transferred to Georgia State University. The beneficiary began studies at Georgia State in the spring semester of 1999, and was awarded a Master of Music degree in Keyboard Performance on May 17, 2002. The record contains the beneficiary's Form I-20, Certificate of Eligibility, from Georgia State University, indicating that she was authorized part-time employment as a co-op student for the periods from: June 7, 2000 to August 20, 2000; August 24, 2000 to January 6, 2001; and, February 15, 2001 to May 8, 2001. The record also contains an employment authorization card issued to the beneficiary by the Service [now Citizenship and Immigration Services (CIS)] valid from July 24, 2002 to July 8, 2003. Finally, the record contains the beneficiary's IRS Forms W-2, Wage and Tax Statement, for the years 2000 and 2001, and the beneficiary's pay statement for the pay period from August 16, 2001 to August 31, 2001. According to these documents, the petitioning church paid the beneficiary $2,050.00 in 2000 and $8,200.08 in 2001, for her services as church organist.

The legislative history of the religious worker provision of the Immigration Act of 1990 reflects that a substantial amount of case law has developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision. *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 or 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).

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).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he or 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.

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 or 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 salaried. To find otherwise would be outside the intent of Congress.

In this case, the beneficiary served the petitioning church as a part-time church organist during the two-year qualifying period. The beneficiary's work experience in the position cannot be considered experience in a qualifying religious vocation or occupation because it was not full-time employment.

It was held in *Matter of Z*, 5 I&N Dec. 70 (Comm. 1954), that an ordained minister who is engaged in advanced theological education while continuing to perform the duties of a minister meets the two-year eligibility requirement set forth at 8 C.F.R. § 204.5(m)(1). In this case, however, the beneficiary was a church organist who was authorized part-time employment as a co-op student during the requisite period, not an ordained minister who continued to perform the duties of a minister while pursuing advanced theological education. Further, the beneficiary's studies were in "music," and not in advanced theological education. Therefore, this precedent decision is not pertinent to the facts at issue in this proceeding. In view of the foregoing, it is concluded that the petitioner has not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing date of the petition, and the petition must be denied for this reason as well.

In reviewing an immigrant visa petition, CIS must consider the extent of the documentation furnished and the credibility of that documentation as a whole. The petitioner bears the burden of proof in an employment-based visa petition to establish that it will employ the alien in the manner stated. See *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966); *Matter of Semerjian*, 11I&N Dec. 751 (Reg. Comm. 1966).

The burden of proof in these proceedings rests solely on the petitioner. Section 291 of the Act, 8 U.S.C. §1361. Here, the petitioner has not sustained that burden.

ORDER: The center director's decision is withdrawn. The petition is denied.