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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 07 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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The director rejected the appeal as untimely. The petitioner appealed the rejection. The director rejected that appeal as well, because rejections cannot be appealed; but the director also reopened the underlying appeal, and withdrew the initial rejection and the finding that the appeal had been filed untimely. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

The petitioner is a missionary society, which also operates a church and other religious entities. 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). Initially, the petitioner indicated that the beneficiary would serve as an evangelist; later descriptions portray him as a minister. The director determined that the petitioner had not established (1) that the beneficiary had the requisite two years of continuous work experience as a minister or evangelist immediately preceding the filing date of the petition; (2) that the petitioner had not established that it had made a qualifying job offer to the beneficiary; or (3) its ability to pay the beneficiary's proffered wage.

On appeal, counsel asserts that the petitioner has requested a copy of the record of proceeding, pursuant to the Freedom of Information Act (FOIA). Counsel states that the petitioner has not yet received this copy, and therefore "the Service has violated petitioner's 6th Amendment protections against the use of secret evidence." The record contains copies of numerous FOIA requests, filed by the petitioner and by the beneficiary.

The record of proceeding contains no "secret evidence." The majority of the evidence in the record consists of the petitioner's own submissions. Other documents, pertaining to the beneficiary's adjustment application, were prepared by counsel and bear counsel's signature. The director's decision rests not on "secret evidence" undisclosed to the petitioner, but rather on the insufficiency of the petitioner's own evidence. Furthermore, counsel cites no authority to indicate that adjudication of a petition or an appeal must be suspended once a FOIA

request is filed. Such automatic suspensions provide an obvious potential for abuse, in which a petitioner can delay indefinitely an expected unfavorable result simply by filing multiple FOIA requests (as noted above, the record contains evidence of at least three FOIA requests).

Finally, while the AAO does not have jurisdiction over constitutional questions, we note that the Sixth Amendment pertains to criminal prosecutions. The instant proceeding is not a criminal prosecution, in which the government must prove the guilt of the accused. Rather, the petitioner initiated this proceeding in order to obtain a government benefit for the beneficiary, and the petitioner bears the burden of demonstrating that the beneficiary qualifies for that benefit.

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;
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> (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
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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 September 16, 1996. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of the position offered throughout the two years immediately prior to that date. The beneficiary admits that he entered the United States in 1988 unlawfully, without inspection, and there is no evidence that the beneficiary had ever been lawfully present in the United States before the petition's filing date.

In a letter dated May 15, 1996, [redacted] pastor of the petitioning church, states that the beneficiary has worked for the church part-time, without pay, for three and a half years. The director approved the petition on April 27, 1997. Subsequently, on April 17, 2001, the beneficiary applied for adjustment to permanent resident status. The Form I-485 adjustment application and many of the

accompanying documents were prepared by counsel (who was, therefore, demonstrably aware of these materials). The adjustment application included a Form G-325A Biographic Information sheet. On this form, the beneficiary stated that he had worked as a from February 1993 onward, and as a "Carpenter" from June 1996 onward. In subsequent letters, states that the beneficiary "will work solely as a minister when legally admitted as a resident." We will further discuss the issue of the beneficiary's experience in the context of the revocation and appeal, below.

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.

The initial filing includes a copy of a "Certificate of Ordination," issued by the petitioner, that indicates the beneficiary was "ordained to the work of The Gospel Ministry" on August 22, 1993. signed the certificate. The petitioner's initial submission contained no information about the job offered to the beneficiary, nor any indication that the above ordination was required for, or relevant to, the position of evangelist (which is the job title that peatedly used in the letter that accompanied the initial filing).

In various letters written during 2002, states that the beneficiary "is an ordained minister of our church, following completion of his theological studies." does not indicate where or when these studies took place. In these letters repeatedly and consistently refers to the beneficiary

as a "minister" rather than as an "evangelist," which is the title he had earlier used in reference to the beneficiary.

The petitioner has submitted copies of certificates and other documents from the "Dominical School" of the Evangelica Emmanuel Church, dated 1998 and 1999. The entity that issued the certificates is affiliated with the petitioner, and name and signature appear on some of the related documentation. Some of these documents identify the beneficiary as the "Secretary" of the Dominical School. The sparse and inconsistent information regarding the beneficiary's occupation is part of the director's decision, to be discussed later in this notice.

The petitioner had indicated that the beneficiary would earn an "initial salary" of $1,500 per month, once the beneficiary was legally able to work for compensation in the United States. 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 included a "Receipts & Disbursements" statements, prepared by the petitioner's treasurer, This statement indicates that the church, during the first quarter of 1996, had an excess of $15,471 of receipts after disbursements. As of March 31, 1996, the petitioner had $9,188 in cash; the remainder of the petitioner's assets were in the form of inventory, equipment, and a vehicle.

As part of the beneficiary's adjustment of status application, the director requested a copy of the beneficiary's tax documents, as well as evidence of payment. The record documents gross weekly payments to the beneficiary in the amount of $375 (consistent with the earlier claimed salary), but these documents only show payments to the beneficiary in 2002. The beneficiary's income tax return for 2001 shows net income of $13,914 from the petitioner, as well as $6,500 in other income from an unidentified source.

The petitioner has submitted copies of quarterly financial reports for the petitioner's "Dominical School." These reports show minimal income, and no salary payments to the beneficiary. It appears that the petitioner submitted these reports as evidence that the beneficiary is the "secretary" of the school, rather than as evidence of the petitioner's ability to pay the beneficiary's proffered salary of $18,000 per year.

"Financial Reports," signed by and the petitioner's general treasurer indicate net income of $49,053.74 as of January 2001, and $102,710.51 as of November 2002. The itemized lists of expenses shows no item clearly labeled "salaries" or any comparable term, although they do show, respectively, $18,600 and $29,930 in "Ministry Expenses." The list of "incomes" includes "Inventory" and "Furniture & Equipment," suggesting that the list of "incomes" might more accurately be labeled "assets," unless the bulk of the petitioner's income (over $90,000) in 2002 was, in fact, in the form of furniture and equipment rather than cash donations.

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). Furthermore, the petitioner has provided incomplete financial documentation from 1996 and 2001-2002, with nothing for the other relevant years. The petitioner must establish its ability to pay from the petition's filing date onward, until the date of adjustment.

On March 30, 2004, the director issued a notice of intent to revoke the approval of the petition, stating that the beneficiary's unpaid, part-time work was non-qualifying, and that the petitioner had not established its ability to pay, or that the position of evangelist qualifies as a religious occupation. Citing information on the beneficiary's 2001 income tax return, the director also observed that the beneficiary's earnings from the petitioning church place him below the poverty line, and therefore it appeared that the beneficiary would have to engage in supplementary employment.

In response, the petitioner submits a two-page statement signed by Counsel submits this same statement, word for word, under counsel's own signature on appeal. We will address the statement in the context of the appeal. It appears likely that counsel, rather than wrote this statement, and therefore we will attribute the assertions in the statement to counsel.

The submission of an appeal statement that is an exact duplicate of an earlier submission would, under some circumstances, justify the summary dismissal of the appeal. In this instance, however, it appears that the director's notice of revocation essentially repeats the notice of intent to revoke, with no apparent effort to address any of the assertions in the petitioner's statement. Because the director did not address these assertions, we will address them here in the context of the appeal.

Counsel asserts that the beneficiary "was ordained as a Minister on August 22, 1993 after completing a 30 month seminary course and receiving a Bachelors degree from the Emmanuel Bible Institute." At the time the petition was filed, the petitioner represented the beneficiary not as a minister, but as an evangelist. The beneficiary's ordination does not imply that the position of an evangelist is equivalent to that of a minister, or that an evangelist must be a minister. Significantly, the response to the notice of intent contained nothing to clarify the nature of the beneficiary's never-explained duties as an evangelist.

Counsel states:

> The statutory requirement for qualification is continuous practice, not exclusive practice. . . . In fact, the BIA has held that in some circumstances, the applicant need not practice at all. In Matter of B, 3 I&N Dec. 162 (1948) the BIA held that a rabbi who had not practiced for about 9 years was still eligible where this was (1) caused by circumstances beyond his control, and (2) was accompanied by no intent to abandon his vocation, and (3) if he has not engaged in activities inconsistent with the theory that he was attempting to continuously carry on his vocation.
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> Before this petition was filed in 1996, [the beneficiary] was unable to practice his vocation as a full-time minister due to circumstances beyond his control: because of his lack of legal status, the petitioner . . . was prohibited from employing or paying him under the US immigration code. . . . Thus, he was compelled to work elsewhere to support his family.

Counsel does not explain how carpentry is consistent with attempts to carry on the vocation of a minister or the occupation of an evangelist. In *Matter of B*, the case cited by counsel (which was not a BIA decision[1]), the Immigration and Naturalization Service held that, if an alien takes up another occupation or vocation, then the alien's religious work is not continuous. Thus, the case law cited by counsel actually undermines counsel's argument. (We further note that the same "US immigration code" that forbids unauthorized work as a minister or evangelist also prohibits unauthorized work as a carpenter.)

With regard to the assertion that the beneficiary's lack of paid employment was "due to circumstances beyond his control," we note that the alien in *Matter of B* was a Jewish rabbi in wartime Europe, and the "circumstances beyond his control" consisted of World War II and the Nazi persecution of Jews that culminated in the Holocaust. Federal immigration law is, obviously, beyond the beneficiary's control, but those laws only affect an alien's ability to work *in the United States*. The beneficiary freely chose to enter the United States without inspection, and to remain here, when he could have remained in his native country with no legal impediment to gainful, lawful employment.

Furthermore, counsel offers no explanation as to why the petitioner apparently never sought to obtain an R-1 nonimmigrant religious worker visa on the beneficiary's behalf. The petitioner's failure to seek such a visa on the beneficiary's behalf does not, now, entitle the beneficiary to special consideration. The beneficiary's conscious decision to insert himself into a situation where he could not legally work does not amount to "circumstances beyond his control" sufficient to trigger the consideration contemplated in *Matter of B*. Counsel offers no rationally defensible comparison between the fact patterns of the cited precedent decision and the present proceeding.

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 seminary student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980). Here, counsel asserts that the beneficiary worked "about twenty (20) hours per week" as a minister, while "compelled to work elsewhere to support his family." If even inherently religious seminary study is a disqualifying interruption, then the facts of the proceeding now at hand do not point to continuous work.

If the petitioner seeks to employ the beneficiary as a *minister*, then the statute and regulations both require that the beneficiary worked *as a minister* continuously throughout the qualifying period (i.e., without interruption beyond his control, and without engaging in other work). Owing to the nebulous discussion of the beneficiary's activities during the qualifying period, we cannot conclude that the petitioner has met this requirement. (Even on appeal, counsel alternately describes the beneficiary as both a "minister" and an "evangelist.") The references to the beneficiary as the secretary of the petitioner's bible school raises still more questions regarding what the beneficiary has done and intends to do in the future.

Regarding the beneficiary's low rate of pay, counsel states "[p]ublic charge is a ground of inadmissibility, and not relevant to revocation of an I-360 petition." The director, however, did not cite the beneficiary's remuneration in the context of becoming an inadmissible public charge. Rather, the director concluded that the beneficiary's low salary would likely require outside employment to meet the beneficiary's needs (as demonstrated by the petitioner's stipulation that the beneficiary has, in fact, engaged in outside employment). By law, if the beneficiary seeks to enter the United States as a minister, he must seek to work *solely* as a minister. Here again, the exact nature of the beneficiary's position is an important consideration, and the lack

[1] The correct, complete citation is *Matter of B*, 3 I&N Dec. 162 (CO 1948).

of information regarding that position is a major deficiency in the record of proceeding. That being said, the director's findings regarding the beneficiary's earnings appears to have been essentially an offshoot of the director's findings concerning the petitioner's ability to pay the beneficiary's proffered wage. Counsel's statement on appeal includes no direct response to the director's findings regarding the petitioner's ability to pay this wage as of the filing date. (The petitioner's subsequent growth is of limited relevance when considering ability to pay *as of the filing date*).

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.