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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

JAN 25 2005

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 02 112 54902

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

DISCUSSION: The Director, Texas 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 assistant pastor. The director determined that the petitioner had not established: (1) that it had made a qualifying job offer to the beneficiary; (2) that the beneficiary had the requisite two years of continuous work experience as an assistant pastor immediately preceding the filing date of the petition; (3) its ability to pay the beneficiary's proffered wage; or (4) that the beneficiary had entered the United States in order to perform religious work.

On appeal, the petitioner submits a brief from counsel and an affidavit from the petitioner's senior pastor, attesting to the beneficiary's credentials as an assistant pastor.

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 concerns the nature of the position offered to the beneficiary. 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.
>
> *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.

Rev. Dr. senior pastor of the petitioning church, describes the terms of employment offered to the beneficiary:

> We would like to appoint [the beneficiary] as Assistant Pastor to be primarily responsible to help in all pastoral leadership duties including, but not limited to, preparing and conducting religious worship, weddings, funerals, baptisms, visiting the hospitals, visiting homes . . . , administering communion, leading prayer and Bible study meetings. He will also be responsible for acquiring and training additional staff members as they are needed. . . . [The beneficiary's] duties will occur from 8 am to 5 pm Tuesday through Friday, plus one worship service on Saturday, and two worship services on Sunday, plus prayer meetings at 5:30 am and some evening prayer and Bible studies. . . .
>
> We offer him a wage of $500 per week, plus housing and utility allowances. [The beneficiary's] faithful service to our Church until now gives us the solid confidence that he will be with us in the future.

The director instructed the petitioner to submit further information regarding the position offered to the beneficiary. The petitioner submitted another job description, this time adding references to Sunday school classes and removing references to weddings and funerals (although elsewhere, the petitioner claims that the beneficiary's *past* duties include funerals, never previously claimed). Rev. indicates that the beneficiary has been compensated through "love offerings" "in the form of a check from the Church." Copies of bank records and of the actual checks show that the beneficiary did receive such payments, albeit sporadically.

The director, in denying the petition, found that the petitioner had not clearly defined the nature of the proffered position. The director stated that the beneficiary's "receipt of love offerings, benevolence funds, or any other type of requested offering by definition is the solicitation of funds." There is, however, no indication that the beneficiary personally solicited these funds from the public. The beneficiary's duties do not include solicitation of funds. All churches solicit donations from their own congregations; it is not clear how the churches would support themselves otherwise, as churches do not sell goods or services. The beneficiary's receipt of funds already collected by the church does not compel a finding that the beneficiary's job consists of soliciting donations.

The position offered to the beneficiary appears to conform to the regulatory definition of "minister." The director's evident uncertainty as to whether the position is the vocation of a minister, or a religious occupation, is of little practical importance for this proceeding, as both types of position would, upon approval, yield the same immigrant classification. We hereby withdraw this finding by the director.

The next issue relates to 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 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 February 25, 2002. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of an assistant pastor throughout the two years immediately prior to that date.

On January 5, 1999, Florida Theological Seminary, Inc., issued the beneficiary "Ministerial Credentials" indicating that the beneficiary had been ordained on December 23, 1998. According to the beneficiary, Rev. Oliveira was vice president and treasurer of that seminary at the time the certificate was issued, and did not return to the petitioning church in Texas until six months before the end of the two-year qualifying period.

Rev. states that the beneficiary "has worked full-time for the Church continuously since 1998." For further details, Rev. refers to the beneficiary's own affidavit. The beneficiary states:

> Since 1998 and continuously to the present, I have undertaken, on a full-time basis, the following duties on behalf of [the petitioner]: conducted religious services, including giving the sermon, offering communion, and otherwise speaking from the podium at Sunday worship services. . . . I conducted religious services about once a month. I also took turns leading a Wednesday evening Bible study and a Friday evening prayer service. . . . I also officiated and/or assisted at worship services at [the petitioner's satellite churches]. . . . I officiated and/or assisted at a Youth Meeting . . . on Saturday. Each morning, Monday through Friday, I led, or took turns leading, a prayer meeting. . . . I visited members in their homes. . . . I regularly arranged for the shipment of Bibles, evangelical materials, and goods to our missionaries in Africa. . . . I have baptized about 12 persons so far in the Church.

A photocopied church bulletin from April 2000 identifies the beneficiary as one of three presbyters. The petitioner's initial submission did not indicate whether the petitioner considers its several presbyters to be clergy, or lay elders of the congregation.

The director instructed the petitioner to submit additional evidence regarding the beneficiary's past work and means of support, as well as copies of payroll or tax records to substantiate the beneficiary's past work. In response, Rev. states that the beneficiary "serves as Pastor at [the petitioning church] from 12/1998 until the present." The petitioner had, however, previously referred to the beneficiary consistently and repeatedly as a "presbyter" rather than as a "pastor." The April 2000 church bulletin, written in Portuguese, identifies three "*presbiteros*" (including the beneficiary) and one "*pastor*." This evidence shows that the church does not consider the terms "*presbitero*" and "*pastor*" to be identical or interchangeable; otherwise, there would be no point in differentiating between the two. As a presbyter, the beneficiary only "conducted religious services about once a month," and therefore that was clearly not his primary responsibility.

Regarding the beneficiary's compensation, Rev. states that the beneficiary "receives periodic 'love offerings,' which is [sic] similar to a salary, during his time as Pastor. These 'love offerings' ranges [sic] from $200 to $800 per month. All 'love offerings' are in the form of a check from the Church to [the beneficiary]." This compensation is discussed in further detail elsewhere in this decision. The petitioner shows that it paid the beneficiary roughly $7,100 between December 2001 and May 2003, but this amount does not readily suggest full-time work, and the beneficiary sometimes went unpaid for two months or more.

In denying the petition, the director stated that the evidence submitted is not sufficient to establish that the beneficiary worked continuously for the petitioner. Counsel's brief on appeal begins with a "statement of facts" which includes the assertion "[t]he beneficiary has been serving as Assistant Pastor . . . and has been

working for the Petitioner full-time from December 1998 until the present." This is not a stipulated "fact," however; rather, the extent of the beneficiary's work during the qualifying period is very much at issue in this decision.

Counsel, on appeal, asserts that the regulations do not specifically require churches to issue Forms W-2 to ministers. Leaving aside larger questions regarding how tax and employment laws apply to churches in general, in this particular case the senior pastor of the petitioning church specifically said that the church's quarterly tax returns reported wages paid to the beneficiary. By signing and submitting the petition form, the petitioner affirmed under penalty of perjury that all claims relating to the petition are true. If the claims in a petition cannot be verified as true, then the petition cannot be approved. *See* section 204(b) of the Act. If what the petitioner claims is true, then additional documentation (such as Forms W-2 or 1099) ought to exist to corroborate that claim. If what the petitioner claims is not true, the consequences ought to be obvious. In this instance, all the available evidence contradicts the claim that the beneficiary is the one employee cited on the quarterly returns. Observations and speculation regarding the specific wording of the regulations does not relieve the petitioner of the responsibility for making credible, verifiable assertions.

Furthermore, the regulations require that the beneficiary continuously carried on the religious work for which he seeks classification. Case law indicates that religious work is not continuous if it is part-time or interrupted by secular employment. *See Matter of B*, 3 I&N Dec. 162 (CO 1948) and *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980). The beneficiary sometimes went months without being paid, suggesting either that the petitioner was unable to pay him, or that the beneficiary was not working during those periods. Either of these two possibilities could be disqualifying factors. There is no record that the beneficiary received any payments at all prior to late 2001, and only fragmentary evidence placing the beneficiary at the church before that time.

Even if the petitioner had established the beneficiary's continuous work for the church, which the petitioner has not done, there is another issue that arises from the petitioner's evidence and claims. The list of beneficiary's past job duties includes some, but not all, of the proposed future job duties listed by Rev. Oliveira. The change in responsibilities is consistent with a shift from one position (presbyter) to another (assistant pastor), but it does not indicate that the beneficiary has two years of continuous experience in the religious work for which the petitioner seeks to employ him. The regulations at 8 C.F.R. § 204.5(m)(1) and (3)(ii)(A) require that the beneficiary must have carried on *the* vocation or occupation, rather than *a* vocation or occupation, indicating that the work performed during the qualifying period should be substantially similar to the intended future religious work. The underlying statute, at section 101(a)(27)(C)(iii), requires that the alien "has been carrying on such . . . work" throughout the qualifying period. An alien who seeks to work in the vocation of a minister has not been carrying on "such work" if employed in the occupation of a presbyter for the past two years. Uncorroborated modifications in the job descriptions do not assist in clarifying matters.

What evidence exists to establish the beneficiary's past work is incomplete, and inconsistent with the petitioner's interpretation of that evidence. We concur with the director's finding that the petitioner has not established that the beneficiary continuously performed the duties of the proffered position throughout the two-year qualifying period.

The next issue concerns the petitioner's ability to pay the beneficiary's proffered wage of "$500 per week plus housing and utility allowances." 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 petitioner's initial submission contained no financial documentation. The director instructed the petitioner to submit evidence to establish the petitioner's ability to pay the proffered wage. In response, the petitioner submits copies of canceled checks establishing the beneficiary's receipt of "periodic love offerings of approximately $200 - $800 per month." This is substantially less than the $500 per week initially offered, and the petitioner must establish its ability to pay the beneficiary's entire proffered wage.

The petitioner has submitted copies of 20 checks paid to the beneficiary between late December 2001 and early January 2003. The petitioner also submits an itemized list of bank transactions from December 2001 through May 2003. Each check listed identifies the payee. The list shows 25 checks issued to the beneficiary (including the checks reproduced in the record), totaling $7,099.20. There are periods of two months or longer during which the beneficiary received no payments at all. Several months ended with a negative balance. These negative balances, combined with the fact that the petitioner paid the beneficiary considerably less than the proffered wage of $500 per week, do not readily suggest that the petitioner is, and has been, able to pay the beneficiary's full wage.

The petitioner submits copies of IRS Form 941, Employer's Quarterly Federal Tax Returns, for the first two quarters of 2003. Rev. [redacted] states that these returns "show . . . the Church pays for [the beneficiary's] salary." The returns indicate that the petitioner paid exactly $3,550 in wages per quarter to one employee during each of the first two quarters of 2003. Therefore, if Rev [redacted] assertion is correct, the beneficiary must be this one employee (notwithstanding Rev. [redacted] assertion that the church has three salaried employees including himself and the beneficiary). But the bank documents submitted by the petitioner do not show that the beneficiary received $3,550 in either of those two quarters. From January 1 to March 31, 2003, the petitioner's checks to the beneficiary totaled $3,628.91, including $1,400 paid to the beneficiary on a single day (January 7) following two months with no payments whatsoever (the last payment to the beneficiary being dated November 8, 2002). The bank records for the second quarter are incomplete, but from April 1 to May 31, 2003, the petitioner paid the beneficiary only $820. The bank documents list most of the checks to the beneficiary as "gifts." Other individuals, including Rev. [redacted] also repeatedly received "gifts" of comparable size; no one received checks marked "wages," "salary," or related terms.

Given the above evidence, we cannot conclude that the beneficiary was the one employee listed on the petitioner's quarterly wage reports. The petitioner's claim that the beneficiary *was* that one employee, despite evidence that conflicts with that claim, raises overall questions of credibility. 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).

The quarterly tax return indicates that taxes were withheld from the salary payments to the petitioner's one reported employee. The director, in denying the petition, noted that the petitioner did not submit Form W-2

Wage and Tax Statements to confirm that the beneficiary's wages were reported, and that taxes were withheld from those payments. (With regard to tax withholding, we note that most of the checks issued to the beneficiary were in exact multiples of $100.00, rather than the uneven amounts that generally remain after withholding of taxes.)

The director determined that the petitioner had not established its ability to pay the beneficiary's proffered wage. On appeal, counsel states that the petitioner's "annual Texas Corporation Franchise Tax Reports . . . show a steady increase in petitioner's income." The reports do not appear to address the petitioner's expenses.

Counsel states that the petitioner has submitted "[c]opies of its Quarterly Federal Tax return which show that the petitioner pays for the beneficiary's salary." Counsel, thus, echoes the petitioner's prior claim that the beneficiary is the one employee claimed on the quarterly returns. We have already demonstrated that the payments to the beneficiary do not match the payments shown on the quarterly returns. Furthermore, the quarterly returns show gross wages of $3,550 per quarter. The petitioner had initially stated the proffered wage at $500 per week, which equates to $26,000 per year, or $6,500 per quarter. Counsel repeatedly asserts that the proffered wage is the slightly lower $24,000 per year, or $6,000 per quarter. Even assuming that the beneficiary is the employee in the quarterly reports, counsel does not explain how quarterly payments of $3,550 establish the petitioner's ability to pay nearly twice that amount.

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. Counsel states "[e]vidence of this ability has been submitted in the form of copies of annual reports, federal tax returns, or audited financial statements," a statement clearly phrased to parallel the regulatory language. Counsel does not specify which form the petitioner's evidence has taken. The record contains no annual reports or audited financial statements. State franchise tax reports are, by definition, not federal tax returns. Counsel apparently means to refer to the petitioner's quarterly returns as "federal tax returns," but as discussed above, there is no reason to believe that these returns refer to the beneficiary at all, and even if they do, they reflect payments at barely half the level of the proffered wage. Submission of annual reports, audited statements, or federal tax returns does not automatically establish ability to pay; the information disclosed in those documents must be consistent with such ability.

Counsel claims "[t]he petitioner has already been paying the beneficiary's salary for the past 3 years," but there is nothing in the record to indicate that the petitioner has ever compensated the beneficiary at a level anywhere near the proffered wage. In the same brief, counsel admits that the petitioner's payments to the beneficiary have been "periodic" rather than regular or consistent. Either the petitioner has been unable to pay the beneficiary's full wage, or else the petitioner has been able to pay it but, for reasons unexplained, has simply chosen not to do so.

Based on the above, we concur with the director's finding that the petitioner has failed to establish its ability to pay the beneficiary the original proffered wage of $500 per week.

The final issue raised in the director's decision concerns the beneficiary's entry into the United States. Section 101(a)(27)(C)(ii) 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 several years before he began his career in religious work. Thus, the director concluded, the beneficiary did not enter the United States for the purpose of engaging in qualifying religious work.

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.