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

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PUBLIC COPY

[redacted]

JAN 31 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 02 070 52611

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center initially approved the special immigrant religious worker petition. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and exercised his discretion to revoke the approval of the petition on September 30, 2003. The petitioner filed an appeal to this decision, and the petitioner's timely appeal is now before the Administrative Appeals Office (AAO) for review. The AAO will dismiss the appeal.

We note that though the petitioner may file only one appeal, two appeals from the director's decision were filed on the petitioner's behalf. The first appeal, dated October 10, 2003, was filed by of and accompanied by a Form G-28, Notice of Entry of Appearance as Attorney or Representative, dated October 9, 2003. The second appeal, dated October 15, 2003, was filed by but was not accompanied by a Form G-28. The record does contain a Form G-28 submitted by with the original filing, dated December 2, 2001. Because Mr. Form G-28 bears the more recent date, it supersedes any previous Forms G-28 and establishes Mr s the attorney of record.

Furthermore, Mr. filing arrived at the California Service Center on October 14, 2003, while Mr. filing arrived on October 17, 2003. Thus, by the time Mr. appeal arrived at the Service Center, the superseding Form G-28 had already arrived. Therefore, Mr no longer had standing to appeal the decision, and we must reject his appeal pursuant to 8 C.F.R. § 103.3(a)(2)(v).

For the above reasons, we shall limit consideration in this matter to the appeal filed by Mr

The petitioner 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). The director determined that as the beneficiary's services were performed on a volunteer basis, she could not have been considered to have been continuously working during the two-year period prior to the filing of the petition.

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 Dec. 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*, 19 I&N Dec. at 590. 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. *Matter of Ho*, 19 I&N Dec. at 590.

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 regulation at 8 C.F.R. § 204.5(m)(1) echoes the above statutory language, and states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file an I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States." The regulation 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) states, in pertinent part, that each petition for a religious worker must be accompanied by:

> (ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:
>
> (A) 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 December 20, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working in the same position as being offered by the petitioner for two years immediately prior to that date; the period covering December 20, 1999 to December 20, 2001. The Form I-94, Arrival and Departure Record, indicates that the beneficiary initially entered the United States on January 15, 1999, as a B-2 nonimmigrant with permission to remain in the United States until July 14, 1999. The record also contains a copy of the beneficiary's Form I-797A Approval Notice indicating the beneficiary's approval as an R-1 nonimmigrant from July 13, 1999 to July 12, 2002. Thus, the record reflects that the beneficiary was in the United States for the entire qualifying period.

In support of the initial filing, Tom Goetz, Elder of the petitioning church, states:

> If granted her permanent resident visa, [the beneficiary] would be required to perform the following religious duties on a permanent, full-time basis: serve the Lord in Irvine by preaching gospel to nonbelievers to bring them to salvation, including daily visitations, nourish and shepherd new believers from the campuses and community in home meetings, gain a comprehensive knowledge of the Bible and key spiritual books to administer the truth to others, provide care for new Christians and for members of the Church, conduct small group Bible studies on campus and in the community, attend all large Church meetings, attend all the coordinating meetings of the other full-time religious workers and pray for the needs of the Church.
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> * * *
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> [The beneficiary] returned to the U.S. in January 1999 to visit and join The Church in Irvine. During that time she participated in our meetings as well as helped our College workers in shepherding the college students on a full-time volunteer basis until February 2001, when she was granted a change to R-1 visa status . . . Since February 2001 to the present time, she has continuously served The Church in Irvine in its religious functions.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." *See* H.R. Rpt. 101-723, at 75 (Sept. 19, 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/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 take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca,* 10 I&N Dec. 712 (Reg. Com. 1963) and *Matter of Sinha,* 10 I&N Dec. 758 (Reg. Com 1963).

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).

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/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 hold otherwise would be contrary to the intent of Congress.

In the director's notice of intent to revoke and the revocation, the director noted that the beneficiary worked as a volunteer until February 2001, and therefore, could not be considered to have the requisite continuous experience during the two-year period immediately preceding the filing of the petition.

On appeal, counsel for the petitioner argues that the director's decision "goes against existing precedent that the provision of room and board constitutes sufficient remuneration." Counsel then asserts that the beneficiary "was provided with housing at [the petitioner's] expense, plus travel allowance as compensation for her full-time services to the [petitioner]." Counsel further contends that "shortly following the approval of her religious visa, [the beneficiary] started receiving a monthly salary for her full-time service." The record contains no evidence to support counsel's assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, the petitioner submits a letter making the same claims as counsel that the beneficiary received remuneration in the form of "paid housing, travel and training/education at Church expense." The new letter from Tom Goetz states:

> During the period of December 1999 to July 2001, the beneficiary was provided with housing at Church expense, plus travel allowance as compensation for her full-time service to the Church. The market value for her housing was $600 per month. The address of the home where [the beneficiary] resided at Church expense is: 23 Wellesley, Irvine, CA 92612.
>
> Shortly after the approval of her religious visa, she started receiving a monthly salary for her full-time service. For this reason, full-time service before that date was not deemed by the Church to be regular employment as a staff member, but instead as paid volunteer employment. There is a distinction between staff members on salary and paid volunteers.
>
> The Church also paid additional benefits for [the beneficiary] including religious seminars and trainings; semi-annual international Bible training in Anaheim, Ca ($100/person); semi-annual Coworkers and Responsible Ones' training in Ventura, CA ($500/person for hotel, accommodation, meals and fees), and the semi-annual intercollegiate mountain retreats ($75/person). Other Church members and followers are

> required to pay for their attendance at these programs from their own resources. So, again this expense was a form of compensation paid to [the beneficiary] during the period from December 1999 to July 2001.

The record contains no contemporaneous, documentary evidence to support the petitioner's assertion that the beneficiary was remunerated in the form of "paid housing, travel and training/education at Church expense." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

We are also not persuaded by the petitioner's argument that had the director "asked . . .whether or not [the beneficiary] had received any form of compensation for her services from December 1999 to July 2001, [it] certainly could have provided this information in response to [the] notice." The petitioner had the opportunity to submit this evidence on appeal, and yet the record remains wholly lacking any such evidence.

Finally, even if the petitioner were able to establish it remunerated the beneficiary from December 1999 to July 2001, the record remains absent evidence to establish remuneration for the remainder of the qualifying period. Though the petitioner claims that "after the approval of her religious visa, [the beneficiary] started receiving a monthly salary for her full-time service," the record does not contain evidence of paychecks or other documentation to support this contention. As noted previously, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.

As the record does not demonstrate the beneficiary received remuneration for her services, the petitioner is unable to show that the beneficiary had the requisite two years experience immediately preceding the filing date of the petition. The petitioner has not submitted any documentation at all from the qualifying period that unambiguously establishes the beneficiary's full-time, continuous work for the petitioner.

Beyond the decision of the district director is the issue of whether the beneficiary's position constitutes a qualifying religious occupation for the purpose of special immigrant classification.

The regulation at 8 C.F.R. § 204.5(m)(2) offers the following pertinent definition:

> *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, fundraisers, or persons solely involved in the solicitation of donations.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position it is offering qualifies as a religious occupation as defined in the regulation. 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" 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 reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature

Citizenship and Immigration Services (CIS), 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.

In this instance, the petitioner never defines the petitioner's position, and instead refers to her position with the generic term of "religious worker." The fact that the beneficiary is not given a specific position and that the beneficiary performed services for the petitioner as an unpaid volunteer cannot lead to a finding that the petitioner considers the beneficiary's position to be a traditional religious function, routinely assigned to a full-time paid employee, rather than tasks usually delegated to a part-time worker or a volunteer from the congregation.

The remaining issue, beyond the decision of the district director, is whether the petitioner has established its ability to pay the beneficiary the proffered wage.

The only evidence related to the petitioner's financial viability is six bank statements dated March 31, 2001, April 30, 2001, May 31, 2001, June 30, 2001, July 31, 2001, and August 31, 2001, respectively.

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.*

[Emphasis added].

Though the petitioner is free to submit other kinds of documentation, such submissions must only be *in addition to*, rather than *in place of*, the type of documentation required by 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).

Moreover, even if the banks statements met the regulatory requirements, as they only cover the period from March 2001 through August 2001, they are insufficient to demonstrate that the petitioner had the ability to pay the beneficiary from the time of filing in December 2001, continuing to the time the beneficiary obtains lawful permanent residence.

For these additional reasons, the petition may not be approved.

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.