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

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 17 2005

WAC 02 288 52021

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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 employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The Form I-360, Petition for Amerasian, Widow or Special Immigrant, filed with Citizenship and Immigration Services (CIS), indicates that the Tabernáculo de Santidad "Church of God" is the petitioner. The petition, however, is signed by [redacted] Further, the G-28, Notice of Entry of Appearance as Attorney or Representative, is signed by [redacted] as the applicant. Therefore, the Tabernaculo de Santidad "Church of God" cannot be considered as having filed the petition on behalf of [redacted] shall be considered as the self-petitioner.

The self-petitioner seeks classification 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 a pastor. The director determined that the petitioner had not established that he had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition, that the prospective U.S. employer had the ability to pay him the proffered wage, or that he had been extended a qualifying job offer.

On appeal, counsel submits a brief and copies of previously submitted documentation.

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--
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> > (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,
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> > (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 on appeal is whether the petitioner established that he had been continuously employed in a qualifying religious vocation or occupation for two full years prior to the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file a Form 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 years 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."

The regulation at 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:
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> > (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 September 26, 2002. Therefore, the petitioner must establish that he was continuously working as a pastor throughout the two-year period immediately preceding that date.

With the petition, the petitioner submitted an August 14, 2002 letter from [redacted] superintendent of the Southwestern Hispanic Territory of the Church of God. According [redacted] the petitioner has been the pastor of the "Tabernáculo de Santidad" for nine years, and that he has an "assigned salary of $1,600 a month, plus the usual fringe benefits." In a separate letter dated August 20, 2002 [redacted] identified himself as the administrative bishop for the Southwestern Hispanic Territory of the Church of God, and provided a weekly work schedule for the petitioner, which reflected that he worked approximately 40 hours per week.[1] The petitioner also submitted copies of documents entitled "Ministers Statistical Summary" for 2000, 2001 and 2002. These documents indicate that the petitioner was paid $18,000 in each of these years, and also contained the number of pastoral visitations, special services, revivals, sermons, and baptisms that he performed during the year.

In response to the director's request for evidence (RFE) dated May 13, 2003, the petitioner provided a more detailed summary of the duties that he performed in each of his job categories. The petitioner also submitted copies of checks from the Church of Christ for the relevant periods of March through November 2001, and January through September 2002. Through The checks are drawn in the amount of $1,500, and were signed by the petitioner and another individual identified from documentation in the record as an elder in the church.[2]

The petitioner also submitted selected schedules and forms from his 2000, 2001 and 2002 federal income tax returns. However, these documents indicate they are "not for filing" and the petitioner failed to submit complete

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[1] The schedule included periods for prayer and bible reading. However, as the petitioner submitted no evidence that these periods of time were associated job duties as opposed to personal time, they were excluded from the computation of work hours.

[2] Checks issued in November 2002 and subsequent months are in the amount of $1,600.

copies of his signed and dated Forms 1040, U.S. Individual Income Tax Returns. A letter of June 23, 2003 from Mr. Burgueño indicated that the petitioner's salary was $1,500 per month.

In response to a second RFE from the director, dated October 9, 2003, the petitioner submitted the original canceled checks for the periods previously provided plus a check for $1,500 issued in December 2001. The petitioner also submitted verification from the Internal Revenue Service that he had filed tax returns in 2000, 2001 and 2002, reporting self-employment income of $18,000 in 2000 and 2001, and $18,400 in 2002. We note that the "Ministers Statistical Summary" provided for 2002, reflects that the petitioner was only compensated in the amount of $16,800; therefore, it appears that the petitioner earned approximately $1,600 from other self-employment.

We note also that in each of the years, the petitioner's wife reported self-employment income This is of particular concern as the Forms 1040 submitted in connection with a previous petition filed on behalf of the petitioner (WAC 94 146 52522) indicated that the petitioner's primary occupation was that of "watch repairer" and seller, and that his spouse was a "housewife." As the petitioner failed to submit complete copies of his Forms 1040 for the years 2000 through 2002, the record is unclear as to the type of work now performed by the petitioner's spouse. Additionally, the petitioner submitted no evidence to explain the difference in the amount of self-employment he reported on his Form 1040 and the amount of compensation that the Church of Christ reported that it paid him in 2002.

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. 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/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).

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. Comm. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 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 generally salaried. To hold otherwise would be contrary to the intent of Congress.

Because the petitioner had signed the checks made payable to him, the director questioned their validity. On appeal, counsel asserts that the petitioner, as the pastor and employee of the church, was authorized by his role to pay himself his monthly salary. However, counsel submitted no documentary evidence to support her statement. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

Nonetheless, we disagree with the director that the validity of the checks is questionable. The checks were drawn on the account of the Church of God and were countersigned by an elder of the church. Copies of bank statements for 2002 reflect that the checks were presented timely to the bank and were paid. The statements do not reflect an irregularity that would raise a question regarding the legitimacy of the transactions.

However, the record is deficient in that it does not contain sufficient evidence to establish the source of the self-employment income reported by the petitioner in 2002, and by his wife in the relevant years of 2000 through 2002. Although a statement by counsel on the previous petition indicated that the petitioner's wife carried out the day-to-day business of the shop that they owned, the evidence of record did not support counsel's statement.

The record is remanded. The director should give the petitioner an opportunity to explain the inconsistencies in his financial documentation and to provide the source of self-employment income of his wife.

The second issue on appeal is whether the petitioner established that his prospective U.S. employer has the ability to pay him the proffered wage.

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 proffered salary was $1,500 at the time the petition was filed in September 2002, and subsequently rose to $1,600 per month. Questioning the validity of the checks paid by the church to the petitioner, the director

determined that the bank statements submitted by the petitioner did not constitute sufficient evidence to establish its ability to pay the petitioner the proffered wage.

We withdraw this determination by the director. As discussed above, the evidence does not indicate that the checks drawn on the church's account to the petitioner are other than what they purport to be. We find no issue as to the validity of the payments made to the petitioner, and find that the record sufficiently establishes that the prospective U.S. employer had the continuing ability to pay the petitioner the proffered wage.

The third issue on appeal is whether the petitioner has received a qualifying job offer.

The regulation at 8 C.F.R. § 204.5(m)(4) states, in pertinent part, that:

> *Job offer.* The letter from the authorized official of the religious organization in the United States must state how the alien will be solely carrying on the vocation of a minister, or how the alien will be paid or remunerated if the alien will work in a professional capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support.

The record reflects that the petitioner was offered $1,500 per month for his services as a minister and that he was expected to work at least 40 hours per week. The director determined that, based on the previous petition filed on behalf of the petitioner, the record did not establish that the position offered full-time employment. We withdraw this determination by the director. The evidence referred to by the director are statements that the petitioner made in 1995, and evidence in the record of the previous petition that, from 1995 to 1998, his primary source of income was from his watch repair business.

We note that the time indicated to be spent on the duties for the proffered position are different from those indicated in the previous petition. The evidence relied upon by the director is stale and cannot be used in establishing whether the petitioner has been extended a qualifying job offer seven years later.

This matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.