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: VERMONT SERVICE CENTER Date: FEB 09 2005

EAC 03 103 51673

IN RE: Petitioner:
Beneficiary [redacted]

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 employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to be classified as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(4), to perform services as a Bible Instructor. The director denied the petition on October 30, 2003 based on a determination that the petitioner failed to establish the proffered position qualifies as a religious occupation.

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,
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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 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 being offered 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.

[redacted] of the church where the petitioner will be employed, states that that "[d]ue to the large and continuous flow of visitors to our weekly services we need someone to conduct our Bible classes, visit and study with our prospects and to assist in the preaching program of the church." [redacted] list the following as the petitioner's duties:

Monday	6:30 – 8:30	Teaching Bible studies to the Youth class.
Wednesday	7:00 – 8:00	Singing in the choir during the services and ministering through prayer with the youth.
Thursday	6:30 – 9:00	Teaching Bible studies and prayer.
Friday	5:00 – 10:00	Witnessing salvation and ministering to the hurting in the streets of the Bronx.
Saturday	9:00 – 6:00	Teaching Sabbath School and bringing new converts to church for the morning and evening services.
Sunday	11:00 – 4:00	Bringing new converts to church for evening services and preparing materials for Bible school.

[redacted] also states:

> [The petitioner] is to spend an average of 6 hrs a day – more or less full time. He has been providing all the above services for us, for about the last 3 month[s] on a voluntary basis. We are therefore offering the job to him on a permanent basis at a salary of $1500 per month.

The director requested further evidence that the petitioner's "primary duties, for the two years of qualifying employment, require specific religious training beyond that of a dedicated and caring member of the congregation or body," and that the job duties "are traditional religious functions above those performed routinely by other members."

We must note that though the petitioner must be qualified in his occupation, the regulation requires no specific religious training or theological education. We find, however, that the director did not impose any specific training or educational requirements on the petitioner, but instead only required proof that the

petitioner's duties were more than just the general duties that could be assigned to a member of the congregation.

In response to the director's request for evidence, Dr. Horace Russell, Senior Pastor of the sponsoring church, confirms the church's "desire to retain [the petitioner's] services . . . as an ordained Elder and Youth Bible instructor." In a separate letter, entitled, "Renewed Offer of Employment," Dr. Russell states:

> This offer for employment is presented to [the petitioner] for the position of Youth Bible Instructor. The remuneration for this position shall be at $25,000 per annum, and will commence on August 1, 2003 or as soon as authorization is obtained . . . .

Dr. Russell's statements only serve to confuse the nature of the position being offered to the petitioner. In addition, we find Dr. Russell's statements contradict the earlier statements and job offer described by Elder Patton. For instance, Elder Patton indicates that the petitioner will work on Monday, Wednesday, Thursday, Friday, Saturday and Sunday, while Dr. Russell indicates the petitioner's hours as Monday through Friday and on weekends, "as necessary." Further, while Dr. Russell indicates the petitioner will work from 9:00 am to 5:00 pm (an eight-hour day), Elder Patton indicates the petitioner will work an "average of 6 hours a day." Finally, Elder Patton indicates the petitioner's salary is $1500 per month ($18,000 per year), while Dr. Russell indicates a salary offer of $25,000 per year. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Despite the confusion and inconsistent statements noted, upon review of the documentation submitted in support of the petition, namely the described duties of the position being offered by the petitioner, we find that though Dr. Russell refers to the petitioner as an elder, and that the record contains evidence that the petitioner is an elder, the position being offered to the petitioner is that of a Bible Instructor.

On appeal, counsel submits previously submitted material with no additional evidence. Counsel argues that the petitioner's duties "qualify as that of a religious instructor, religious counselor, missionary and minister" and that he has been "called to perform . . . function[s] as Church Elder." Counsel further argues that the director "failed to take into consideration the full range of responsibilities that his position will extend . . . and purposely limited [his] decision to duties such as 'teaching Bible classes, singing in the church, and ministering to those in the streets.'" Counsel refers to the petitioner's manual and highlighted excerpts regarding the role of the elder in the petitioning church.

We are not persuaded by counsel's argument as a review of the job description provided by the petitioner with the original filing shows the only duties listed by the petitioner are: "[t]eaching Bible studies to the Youth class . . .[s]inging in the choir during the services and ministering through prayer with the youth . . . [t]eaching Bible studies and prayer . . . [wi]tnessing salvation and ministering to the hurting in the streets of the Bronx . . . [t]eaching Sabbath School and bringing new converts to church for the morning and evening services . . . [b]ringing new converts to church for evening services and preparing materials for Bible school." Thus, counsel's allegation that the director "purposefully limited" the petitioner's duties cannot be supported.

Like Dr. Russell, it appears that counsel is confusing the petitioner's qualifications with the position actually being offered to the petitioner. While the petitioner may be qualified to act in the position of an elder, counselor, missionary or minister, the position being offered to the petitioner is that of a Bible Instructor. Thus, the issue here is not whether the petitioner is qualified to act in other positions, but whether the position being offered to the petitioner as Bible Instructor is considered by the church as a religious occupation.

We are also not persuaded that the director's mistaken reference to the petitioner's employment teaching "Sunday school," rather than "Sabbath school," is an "egregious error." While an unfortunate oversight, we find the error was not a factor in the director's decision.

The record remains absent evidence that the petitioner received any compensation for any of his work as a Bible Instructor. That the petitioner performed services for the petitioner as an unpaid volunteer is not evidence that the petitioner's denomination considers the petitioner's duties as a Bible Instructor 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.

We note that when filing his income taxes for the years 2001 and 2002, the petitioner described himself as a "taxicab driver" and "taxi driver, respectively." These claims, while further evidence that the petitioner received no compensation from the church, also indicate that the petitioner himself viewed his church work as an activity rather than as a job or occupation. It must further be noted that as the petitioner has not submitted any evidence of the petitioner's authorization to work in the United States, the petitioner's employment as a taxi cab driver appears to be in contravention of the immigration laws.

Combined with the discrepancies and confusion contained in the record, the fact that the sponsoring church was able to provide services and operate as a church without the petitioner serving in a full-time, paid capacity, does not support the assertion that the petitioner's position is considered a traditional religious function by the church's denomination. Accordingly, based on the present record, the petitioner has not established that the proposed position qualifies as a traditional occupation.

Beyond the decision of the district director is the issue of whether the petitioner was continuously working for the church during the requisite two-year period. 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 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 April 30, 2001.[1] Therefore, the petitioner must establish that he was continuously working as a Bible Instructor for two years immediately prior to that date. The Form I-94, Arrival and Departure Record, indicates that the petitioner initially entered the United States on March 31, 1994 as a B-2 nonimmigrant. The record contains no evidence that the petitioner received authorization to remain in the United States beyond September 30, 1994. Thus, though the petitioner was in the United States during the entire qualifying period, as noted previously, any work performed by the petitioner appears to have been performed without authorization.

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.

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[1] The director indicated the date of filing as June 8, 2001. Though the petition contains several receipt stamps, the earliest date recorded is April 30, 2001. In accordance with 8 C.F.R. § 103.2(a)(7), as April 30, 2001 is the earliest date the petition was stamped, it is considered the date of filing.

As it relates to the petitioner's actual work experience with the sponsoring church, Elder Patton's original letter indicates that the petitioner "has been providing . . . services for us, for about the last 3 month[s] on a voluntary basis." Dr. Russell's letter confirms that the petitioner was working as a "full-time volunteer." In addition, Dr. Russell's August 5, 2003 letter, which indicates that "in January of 1998 [the petitioner] joined [the petitioner's] efforts," contradicts his January 21, 2003 letter which states the petitioner has been "doing a wonderful job, since May 1998."

We can make no affirmative finding in the petitioner's favor based on such contradictory statements. The petitioner has not submitted any documentation at all from the qualifying period that establishes his full-time work as a Bible Instructor. As the record does not demonstrate the petitioner received remuneration for his services, the petitioner is unable to show that he had the requisite two years experience as an Bible Instructor immediately preceding the filing date of the petition.

The remaining issue beyond the decision of the director is whether the sponsoring church has established its ability to pay the petitioner the proffered wage. The record contains two bank statements, dated December 1 – December 31, 2000 and December 1 – December 31, 2002, 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 petitioner 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, as the financial statements are from December 2000 and December 2002, such evidence is insufficient to demonstrate that the church had the ability to pay the petitioner from the time of filing in April 2001, continuing to the time the petitioner 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.