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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

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 21 2005

SRC 03 101 51282

IN RE: Petitioner:
Beneficiary: [redacted]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an educational and spiritual center. 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 a religious instructor. The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition, that the position qualified as that of a religious worker, or that the petitioner had extended a qualifying job offer.

On appeal, counsel submits no brief or additional 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;
>
> (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 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:
>
> > (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 February 24, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a religious instructor throughout the two-year period immediately preceding that date.

In a December 9, 2002 letter, [redacted] apparently the petitioner's rabbi, stated that the petitioner has employed the beneficiary as a teacher of Judaic studies since August 1999. In a May 12, 2003, [redacted] stated that the beneficiary "has been working for our religious organization for the past three years, since, July 24, 2000." He stated that the beneficiary "has been responsible for an average of 24 children on a daily basis from 8:00-4:00, 5 days a week, 52 weeks a year" and that her gross pay is $200.00 per week.[1] According to the petitioner, the beneficiary has two children enrolled in its school and that their tuition ($7,039 and $2,259 for after school and camp) is deducted from her pay. The rabbi also stated that between June 5, 2001 and July 22, 2001, the beneficiary was out of the country on emergency leave due to an illness in her family.

In a June 2, 2000 letter, [redacted] stated that the petitioner's school "provides . . . children the opportunity to learn Hebrew as a second language and religious studies for half of the school day," while also providing a "state of the art general curriculum." With the petition, the petitioner submitted a "chart of hours" indicating that the beneficiary worked seven hours per day, 35 hours a week. The chart indicates that the beneficiary performed the following on a daily basis: reading, prayers and comprehension for one hour; religious Hebrew for one hour; Bible studies for 1.5 hours, Jewish hymns for 1.5 hours; Bible stories for one hour and observance of Jewish holidays and the Sabbath for one hour.

In response to the director's request for evidence (RFE) dated April 7, 2003, the petitioner submitted another "chart of hours," in which it states the beneficiary works eight hours a day, 40 hours per week as follows: prayers for two hours, Judaic arts and crafts for half an hour; Hebrew circle time for half an hour; Bible story for half an hour; Hebrew songs for half an hour; Hebrew gross motor skills for one hour; and snack, recess, nap, after school and free play for three hours.

Yet another work schedule for the beneficiary indicates she worked from 8:00 to 4:00 as follows: prayers from 8:00 to 8:30; Judaic arts and crafts from 8:30 to 9:00; snack and recess from 9:00 to 10:00; Hebrew circle time from 10:00 to 10:30; Bible story from 10:30 to 11:00; lunch, nap and free play from 11:00 to 1:00; Hebrew songs from 1:00 to 1:30; snack and drink from 1:30 to 2:00; gross motor skills from 2:00 to 3:00; and after school from 3:00 to 4:00.

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[1] The evidence indicates that the petitioner means the beneficiary's gross pay after deductions for her children's tuition and after school and camp fees.

The petitioner submitted no evidence to reconcile the inconsistencies in the work schedules. 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Further, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner submitted copies of payroll data indicating it paid the beneficiary in 2000, 2001, 2002 and 2003. It also provided copies of the Form W-2, Wage and Tax Statement, that it issued to the beneficiary in 2001 and 2002, and which indicate that it paid her $7,250.22 in 2001 and $10,389.63 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.

As noted by the director, the payroll data submitted by the petitioner reflects that, from November 2000 to April 2003, it paid the beneficiary amounts varying from a low of $130.89 on May 21, 2002 to a high of $276.25 in August 2002. This payroll data is inconsistent with the petitioner's statement that the beneficiary's gross salary was $200.00 per week, or that the work was permanent, full time employment.

On appeal, counsel stated that the beneficiary earns $17,680 per year, receiving higher salaries during the year to compensate for summer vacation. However, the evidence of record clearly does not support counsel's statement. The petitioner stated that the beneficiary worked 52 weeks per year and specifically stated it did not compensate her for the emergency leave she took in June and July of 2001.

The evidence is insufficient to establish that the beneficiary was continuously employed as a religious instructor for two full years prior to the filing of the visa petition.

The director determined that the petitioner had not established that the position qualified as that of a religious worker. According to 8 C.F.R. § 204.5(m)(1), the alien must be coming to the United States at the request of the religious organization to work in a religious occupation.

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 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. Persons in such positions would reasonably be expected to perform services directly related to the creed and practice of the religion. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature. The lists of qualifying and nonqualifying occupations derive from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

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.

As discussed above, the petitioner submitted three different work schedules for the beneficiary. The second and third schedules, although reflecting that the beneficiary would work a 40-hour workweek, indicate that the proffered position is primarily secular in nature. One schedule indicates the beneficiary would work, at most, 3.5 hours in religious related activity during her eight-hour workday. As further discussed above, the petitioner provided no evidence to explain this difference in the work schedules.

On appeal, counsel states that "every activity of a teacher in a Jewish religious school involves religious education . . . For example: meals involve blessings at the beginning and at the end of the meal and explanations of the blessing during the meals." However, the record contains no evidence to support counsel's assertions regarding the requirements of the proffered job. 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).

The petitioner has not established that the proffered position is primarily religious in nature, and is therefore a traditional religious function within its denomination.

The director also determined that the petitioner had not established that it had tendered a qualifying job offer to the beneficiary. 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 director determined that the payment history of the petitioner to the beneficiary reflects that the position is temporary and intermittent in nature and that the job offer is conditioned on enrollment and job performance.

The record contains a copy of the August 2001 and August 2002 contract between the petitioner and the beneficiary. The contracts indicate that the beneficiary's job assignments are "subject to change based on enrollment." The 2002 contract also includes a note that the job description is subject to change if agreed upon by the petitioner and the beneficiary.

The contracts do not indicate that the duties of the proffered position will, at all times, be primarily religious in nature or that it will remain a full time position. The petitioner has not established that the position it is offering is a permanent religious occupation as required by the statute and defined by the regulation. The documentation provided by the petitioner does not clearly indicate that the beneficiary will not be dependent upon supplemental income for her financial support.

The director stated that it could not be determined that the beneficiary's sole purpose in entering the United States was to work for the petitioner or to perform religious work. The regulation does not require that the alien's initial entry into the United States to be solely for the purpose of performing work as a religious worker. "Entry," for purposes of this classification, would include any entry under the immigrant visa granted under this category or would include the alien's adjustment of status to the immigrant visa. We withdraw this statement 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.