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

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 04 2005
WAC 98 029 51059

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. On further review, the director determined that the petitioner was not eligible for the visa preference classification. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke the approval of the preference visa petition and his reasons therefore, and subsequently exercised his discretion to revoke the approval of the petition on April 5, 2004. The petition is now before the Administrative Appeals Office (AAO) 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 a religious education 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 beneficiary was qualified for the position within the organization. The director further determined that the petitioner had not established that it had extended a qualifying job offer to the beneficiary.

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

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department of Homeland Security "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 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. *Id.*

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 November 10, 1997. Therefore, the petitioner must establish that the beneficiary was continuously working in the religious occupation throughout the two-year period immediately preceding that date.

In a "Certificate of Employment" dated October 24, 1997, the petitioner stated that the beneficiary had been working for the petitioning organization since January 1993 as a religious instructor. In a separate letter of the same date, the petitioner stated that the duties of the position would include "guidance, counseling to students and

church member[s] . . . responsible and [sic] develop church school's program, plan religious study, conducts Bible Study session[s]." The petitioner submitted no documentary evidence to corroborate the beneficiary's employment with the petitioning organization. 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).

In another "Certificate of Employment" dated January 31, 2001, the petitioner listed the duties of the position as follows:

> Her duties are [to] conduct Bible Study Sessions, discussion groups, and retreats. Also plan religious mission studies and activities. Responsible to [sic] develop, organize, and [sic] religious program and promote religious education to church members. Creates religious study courses and program, and guidance and assistance to church members. Also make Bible Study Book on text, and other material for Sunday School and Academy after School Program.

The record also contains an undated document entitled "Curriculum and Hours of Instruction," which presumably outlines the beneficiary's work schedule. The duties as outlined in the work schedule are vague and do not reflect that the beneficiary engages in the depth of work suggested by the description of her duties. For example, there is no evidence of how and what new religious programs are developed by the beneficiary and what is involved in the after school programs. Although the work schedule includes Bible study sessions, the beneficiary's role in these sessions is unclear.

Additionally, we note that the petitioner stated that the beneficiary worked a 40-hour week and was compensated at the rate of $1,500 per month. However, as noted by the director, when asked on her Form G-325A, Biographic Information, for employment information for the past five years, the beneficiary indicated that she had been a student. Although the Form G-325A is undated, it was filed in conjunction with the beneficiary's Form I-485, Application to Register Permanent Resident or Adjust Status, that was received by Citizenship and Immigration Services (CIS) on October 31, 1996.[1] The petitioner submitted no evidence to explain this inconsistency in the record. 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).

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).

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[1] In the block for the applicant's last five years of residence, the beneficiary indicated she had lived at one address in Torrance, California from July 1995 "to the present time," therefore also establishing that the Form G-325A was completed subsequent to the filing date of the visa preference petition.

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.

In response to the director's Notice of Intent to Revoke dated January 31, 2001, the petitioner submitted copies of "appointment letters," indicating that the beneficiary had been appointed a "Sunday Kindergarten School" instructor in January 1995, and a "Chief of Elementary School as well as Instructor" in January 1996 and January 1997. These documents do not reflect the nature of the duties accompanying the job titles and do not reflect that they are permanent, full-time salaried positions within the petitioning organization.

Although the petitioner submitted a "weekly breakdown" of the beneficiary's activities, it again failed to submit documentary evidence, such as canceled checks, payroll vouchers, or any other documentation, of the beneficiary's employment during the two-year qualifying period. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190. Furthermore, the petitioner stated that the beneficiary was supported by her parents in addition to receiving a $1,500 per month salary. The petitioner does not provide evidence of any financial support received by the beneficiary during the qualifying period. *Id.*

On appeal, counsel takes issue with the director's determination that volunteer work cannot provide a basis for establishing the required work experience. However, counsel submits no documentary evidence to establish that the beneficiary worked, even in a voluntary capacity, during the qualifying period.

The evidence does not establish that the beneficiary was continuously employed in the religious occupation for two full years prior to the filing of the visa petition.

The director also determined that the petitioner had not established that the position qualified as that of a religious worker. Pursuant 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).

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 noted above, the petitioner states that the duties of the proffered position are to develop and organize the church school's religious program and promote religious education to church members; create religious study courses and programs; provide counseling, guidance and assistance to church members; and conduct Bible study sessions, discussion groups and retreats.

On appeal, counsel asserts that the regulation recognizes religious instructor as a religious occupation, and therefore, the proffered position qualifies as a religious occupation. Nonetheless, the evidence does not establish that the petitioner's description of what the job allegedly entails corresponds to the duties that the beneficiary allegedly performs in that position. The evidence does not establish that the position is traditionally a full, time salaried position within the petitioner's denomination. The record does not reflect that the position existed in the petitioning organization prior to the beneficiary purportedly filling the role, or that it is a position that is defined and recognized by the Presbyterian Church.

Further, while the determination of an individual's status or duties within a religious organization is not under CIS's purview, the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests with CIS. Authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States. *Matter of Hall*, 18 I&N, Dec. 203 (BIA 1982); *Matter of Rhee*, 16 I&N Dec. 607 (BIA 1978).

The petitioner has not established that the proffered position is a religious occupation within the meaning of the statute and regulation.

The director determined that the proffered position is that of a religious professional and that, as such, the position requires a baccalaureate degree equivalent. The director further determined that the petitioner had not submitted

evidence that the beneficiary held the appropriate degree and therefore the petitioner had not established that the beneficiary was qualified for the position within the organization.

We withdraw this statement by the director. The duties as outlined by the petitioner do not reflect that the position requires a college degree or that the position is that of a religious professional as defined in 8 C.F.R. § 204.5(m)(3)(ii)(C).

The director also determined that the petitioner had not established that it had extended 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 petitioner stated that the position would require the beneficiary to work at least 40 hours per week and that it would compensate her at the rate of $1,500 per month. While the initial offer provided prima facie evidence that the job offer qualified under the regulation, the record establishes that the offer did not, in fact, meet the regulatory requirements. The evidence reflects that the petition was initially approved on January 6, 1998. However, the petitioner submitted no evidence that it compensated the beneficiary in any manner until 1999. Further, the evidence reflects that the petitioner paid the beneficiary as a nonemployee. The beneficiary's Form 1040, U.S. Individual Income Tax Return, for the years 1999 through 2002 reflect that she reported herself as self-employed. Self-employment is not qualifying employment for purposes of this visa preference classification.

The evidence does not establish that the petitioner intended to hire the beneficiary as an employee and does not establish that the petitioner extended a qualifying job offer to the beneficiary.

Beyond the decision of the director, the petitioner has not established that it had the ability to pay the proffered wage as of the date the petition was filed. 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 evidence of this regulatory requirement consisted of a July 16, 1997 statement from its bank, listing the petitioner's average and current balances in its checking account. In response to the director's Notice of Intent to Revoke, the petitioner submitted copies of the beneficiary's income tax returns for 1999 and subsequent years, and copies of canceled checks reflecting monthly payments from 2001 through 2003. The petitioner submitted no additional evidence on appeal.

The above-cited regulation states that evidence of ability to pay "shall be" in the form of tax returns, audited financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only in addition to, rather than in place of, the types of documentation required by the regulation. In this instance, the petitioner submitted none of the required types of evidence to establish its ability to pay in 1997, the year the petition was filed. This deficiency forms an additional ground for dismissal of the appeal.

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.