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

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U.S. Citizenship and Immigration Services

C1

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 23 2006

WAC 04 100 53865

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

for 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 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 music director. 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.

On appeal, counsel submits a brief and 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 issue presented on appeal is whether the petitioner established that the beneficiary 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:
>
> > (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 27, 2004. Therefore, the petitioner must establish that the beneficiary was continuously working as a music director throughout the two-year period immediately preceding that date.

In a January 30, 2004 letter accompanying the petition, the petitioner's senior pastor, [redacted] that the beneficiary had been employed as music director with the petitioning organization since November 2002, and that in that capacity, the beneficiary supervised the "entire music program, both planning and conducting the music for worship services as well as inspiring, teaching and training of the musicians and youth . . . He has built a recording studio on the church premises . . . and is leading the music team in those aspects of the ministry." According to the pastor, the beneficiary's compensation consists of a "salary in the form of housing, food and schooling allowance in the amount of $38,200.00 per year." The petitioner submitted a photograph that it described as the beneficiary's house. However, it submitted no documentary evidence that the beneficiary lived in this house or that it was provided to the beneficiary by the petitioner. The petitioner submitted no other corroborative evidence of 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, the petitioner did not allege or provide any evidence that the beneficiary worked in any capacity from February 2002 through October 2002, the first nine months of the qualifying period.

In a request for evidence (RFE) dated December 6, 2004, the director instructed the petitioner to:

> Provide evidence of the beneficiary's work history beginning February 27, 2002 and ending February 27, 2004 only. Provide a breakdown of duties performed in the religious occupation for an average week. Include the employer's name, specific job duties, the number of hours worked, [and] remuneration . . . Ideally, this evidence should come in a way that shows monetary payment, such as W-2 forms, pay stubs, or other items showing the beneficiary received payment. Documentation showing the withholding of taxes is good evidence. However, you may also show payment through other forms of remuneration. If any work was on a volunteer basis, provide evidence to show how the beneficiary supported him or herself (and family members, if any) during the two-year period or what other activity the beneficiary was involved in that would show support.

In response, [redacted] in a letter dated February 4, 2005, provided the following information:

> I. Work History
>
> . . .
>
> c. Specific job duties:

i. Schedule and conduct practice times for the musicians, vocalists, choirs, ensembles, etc.
ii. Run the on-campus recording studio, producing materials and recordings.
iii. Oversee the sound technicians for in-sanctuary sound quality control.
iv. Train our musicians, including actual teaching sessions beyond scheduled practice times.
v. Teach others in the church, including youth [redacted]
vi. Play as primary musician for all church services, choirs, musicals, [and] music/drama productions.

d. Number of hours worked: Though the actual hours are variable . . . the number of hours are [sic] at least 40 hours per week. No time record is preserved because of the nature of the assignments.

e. Remuneration: The lion's share of [the beneficiary's] compensation is in [the petitioning organization] providing a salary in the form of housing, food and schooling allowance in the amount of $38,220.00 per year.

. . .

IV. Employment History: Since becoming a member of this congregation, [the beneficiary] has served as the lead musician, principally playing all forms of keyboard. He has served as the director of the choir, the teacher/instructor of the musicians, the organizer and scheduler of the persons performing for various church services.

The petitioner submitted a copy of a year 2004 Form 1099-MISC, Miscellaneous Income, reflecting that it paid the beneficiary $3,200 in nonemployee compensation. The petitioner also submitted copies of 13 checks in the amount of $100 that it paid to the beneficiary during November 2004 through February 2005. As these checks are after the filing date of the petition, however, they are not probative in establishing the beneficiary's prior work experience. The petitioner submitted no evidence of any other compensation that it provided to the beneficiary, and submitted no further documentary evidence of the beneficiary's work for the petitioner during the qualifying period. *Matter of Soffici*, 22 I&N Dec. at 165. The petitioner again failed to allege or submit any evidence of the work that the beneficiary performed from February 2002 through October 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).

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.

On appeal, counsel asserts that the copy of the beneficiary's visa submitted in response to the director's RFE constituted "objective evidence" of the beneficiary's work experience from February 2002 through October 2002, and that this evidence was ignored by the service center. Counsel's assertion is baseless. The visa authorizes the beneficiary to seek permission to enter the United States as a B-1 nonimmigrant temporary visitor for business for the purpose of attending the Filipino Evangelism Conference. Under the terms of a B-1 nonimmigrant visa, an alien is actually prohibited from engaging in employment. *See generally* 8 C.F.R. § 274a.12. The visa was valid from June 11, 2002 to September 9, 2002, and reflects that the beneficiary entered the United States on July 20, 2002. The petitioner submitted no evidence that the beneficiary worked or the type of work from February 2002 to October 2002.

The petitioner submits on appeal a letter [redacted] who states that the beneficiary first performed religious services for the petitioner in June 2002, when the petitioner hosted [redacted] from June 27 through June 30, 2002. [redacted] further states that the beneficiary "volunteered his music ministry leadership various times" with the petitioner between June and November 2002. The petitioner also submits a letter from the [redacted] that the beneficiary was "with us in our services the week of July 6-13 2002. He served our services in his [redacted]

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. The appeal will be adjudicated based on the record of proceeding before the director.

The evidence before the director did not establish that the beneficiary was continuously engaged as a music director for two full years prior to the filing of the visa petition.

Beyond the decision of the director, the petitioner has not established that the position qualifies as that of a religious worker.

According to the regulation at 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 as a religious worker. 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.

The duties of the proffered position of music director are described above. The petitioner submitted no evidence that the position of music director is defined and recognized by its governing body, or that the position is traditionally a permanent, full-time, salaried occupation within the denomination. The duties of the position are primarily secular in nature, and do not reflect that the holder of the position assumes an active role in shaping religious services within the church.

The evidence does not establish that the position is a religious worker within the meaning of the statute and regulation. This deficiency constitutes an additional ground for which the petition may not be approved.

Additionally beyond the director's decision, the petitioner has not established that it has the ability to pay the beneficiary 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.

As evidence of its ability to pay the proffered wage, the petitioner submitted an unaudited copy of its balance sheet as of February 3, 2004. Although the petitioner stated that the majority of the beneficiary's

compensation is in the form of housing, food, and an educational allowance, it submitted no evidence that it has provided this compensation to the beneficiary.

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 has not submitted any of the required types of primary evidence.

Accordingly, the petitioner has not established that it has the ability to pay the beneficiary the proffered wage. This deficiency is an additional ground for which the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.