U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 05 2008
WAC 07 004 50683

IN RE: Petitioner: [redacted]
Beneficiary:

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a member congregation of the Lutheran Church – Missouri Synod. 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 its director of Christian Growth. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a director of Christian Growth immediately preceding the filing date of the petition.

On appeal, the petitioner submits new evidence and arguments from counsel.

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) 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)(ii)(A) requires the petitioner to demonstrate that, immediately prior to the filing of the petition, the alien has the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on October 2, 2006. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a director of Christian Growth throughout the two years immediately prior to that date.

In a September 7, 2006 letter, [redacted], Director of the petitioner's Board of Lay Ministry, stated that the beneficiary "has been working in a paid religious vocation[1] for this Church since November 1, 2001 . . . [under] a consulting agreement with annual compensation ranging from $43,089.36 in 2003 to $45,489.44 in 2006. When she returns, she will be converted to a full-time employee at an equivalent salary." The reference to "when [the beneficiary] returns" indicated that the beneficiary was not at the petitioning church as of the date of the letter.

Part 3 of the Form I-360 petition includes a section labeled: "Complete the items below if this person [the beneficiary] is in the United States." The petitioner left the section blank, indicating that the beneficiary was not in the United States. The Form I-360 also provided an address in Eritrea for the beneficiary, indicating that the beneficiary was in eastern Africa at the time of filing. The petitioner did not indicate how long the beneficiary had been in Eritrea, or explain how the beneficiary was actively carrying on the occupation of the petitioner's director of Christian Growth while she was in Africa.

The consulting agreement reads, in part:

> [The beneficiary] will make herself available to [the petitioner] on a full time basis (40 hours per week) for not less than 50 weeks per year. Up to 5 daily absences per year will be allowed for illness of her or her family with out decrement to the annual compensation indicated herein. . . . Should absences occur beyond those indicated above, [the petitioner] may reduce the annual compensation by the indicated daily rate . . . for each days [sic] for which [the beneficiary] is not available.

The consulting agreement, thus, stipulates that interruptions in the beneficiary's work will reduce her pay.

On December 11, 2006, the director issued a request for evidence (RFE), instructing the petitioner to submit "evidence of the beneficiary's work history for the years 2004, 2005 and 2006," including "evidence that shows monetary payment" and copies of the beneficiary's tax documents including Internal Revenue Service (IRS) Form 1040 tax returns and IRS Form W-2 Wage and Tax Statements. The director also requested letters from officials at every location where the beneficiary had worked during the qualifying period. In response, the petitioner submitted copies of previously submitted materials.

On May 8, 2007, the director issued a second RFE, again requesting detailed evidence of the beneficiary's work history throughout the 2004-2006 qualifying period and copies of the beneficiary's tax documents for those years. The director also specifically requested evidence to show how the beneficiary supported herself during any periods in which she worked as a volunteer. In response, the petitioner submitted copies of IRS Form 1099-MISC Miscellaneous Income statements. These forms show that the petitioner paid the

[1] We note that counsel and the petitioner repeatedly refer to the beneficiary's work as a "vocation." There is no evidence, however, that the beneficiary's position with the petitioner meets the regulatory definition of a "religious vocation" at 8 C.F.R. § 204.5(m)(2): "a calling to religious life evidenced by the demonstration of commitment practiced in the religious denomination, such as the taking of vows. Examples of individuals with a religious vocation include, but are not limited to, nuns, monks, and religious brothers and sisters."

beneficiary "nonemployee compensation" (as a contractor) $43,089.36 in 2004 and $45,846.00 in 2005. These amounts are in keeping with the consulting agreement. In 2006, however, the petitioner paid the beneficiary only $23,187.67, which is barely half the amount specified in the consulting agreement. The shortfall suggests a major interruption in the continuity of the beneficiary's work. We reiterate, here, that the petitioner had previously stated that the beneficiary was in Eritrea on the date of filing, a situation that presumably interfered with her ability to perform her duties at the petitioning church in Virginia. The petitioner's response to the second RFE contained no indication that the petitioner had performed any religious work, paid or unpaid, for any church other than the petitioner.

The petitioner also submitted copies of the beneficiary's 2004 and 2005 income tax returns, which are consistent with the Forms 1099-MISC, and documentation showing that the beneficiary had sought an extension to file her 2006 income tax return (again, possibly attributable to her absence from the United States).

The director denied the petition on September 20, 2007, citing the beneficiary's low compensation in 2006 as evidence that she did not work continuously for the petitioner throughout the two-year qualifying period.

On appeal, counsel states:

> [T]he beneficiary has been employed full time in a religious worker capacity since 2001. She had departed the U.S. on March 26, 2006 to attend a visa interview at the U.S. Embassy in Asmara, Eritrea pursuant to a previous I-360 filed by this same Church on March 1, 2002 and approved by the USCIS on February 7, 2003 [with receipt number] EAC-02-149-51996. Unfortunately, the U.S. Consul determined that the USCIS issued its approval in error as the beneficiary did not have two years of full time religious worker experience prior to the filing of that petition in 2002. Accordingly, that previous petition was returned to the USCIS and revoked.
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> . . . [W]hen the beneficiary left for her Consulate interview in 2006, she had been working full time as a religious worker for the petitioning Church since 2001. Upon learning of the Consulate's denial of the visa, the petitioning Church filed the instant I-360 petition on October 2, 2006. . . . Moreover, even after her departure for the visa interview, the Church kept paying the beneficiary throughout the remainder of 2006. . . .
>
> Of course, the intention of the requirement of two years of full time religious work experience is to assure that the beneficiary is committed to her religious vocation and is not merely deciding at the last minute to be fraudulently processed for a green card. Her Church's confirmation of her five years of full time dedication to her religion leaves no doubt about the bona fides of this petition.

A letter from [redacted] echoes the basic assertions in counsel's appellate statement.

The beneficiary's previous employment may well establish her *bona fide* intent to continue working in a religious occupation. Eligibility, however, hinges on more than just the sincerity of the beneficiary's "dedication to her religion." Even the most devoted religious worker must meet certain objective statutory and regulatory standards of eligibility.

Citizenship and Immigration Services (CIS), including the AAO, is constrained by the language of the statute and the implementing regulations. The statute, at section 101(a)(27)(C)(i) of the Act, refers specifically to the period of "at least 2 years *immediately preceding the time of application for admission*" (emphasis added).[2] Section 101(a)(27)(C)(iii) of the Act requires the beneficiary to have "been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i)." Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990).

Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). Where the language of a statute is clear on its face, there is no need in inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984).

Another point arises with regard to the plain wording of the statute. Counsel argues that the petitioner continued to pay the beneficiary even while she was outside the United States, and therefore the beneficiary remained effectively in the petitioner's employ. Section 101(a)(27)(C)(iii) of the Act limits eligibility to an alien who "has been *carrying on* such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i)" (emphasis added). The petitioner has produced no evidence, either on appeal or in response to two prior RFEs, to show that the beneficiary actively performed the work of a director of Christian Growth while in Eritrea between March 2006 and October 2006. This is not simply a routine case of a brief, paid vacation. The beneficiary ceased working for the petitioner church for over six months of the two-year qualifying period. Whether the petitioner paid her during that time or not, we cannot realistically conclude that she was "carrying on such . . . work" on the petitioner's behalf during that period.

[2] CIS, in its implementing regulations at 8 C.F.R. §§ 204.5(k)(1) and (4), has construed the phrase "application for admission" to refer to the filing of the immigrant visa petition, because CIS must perform its adjudication, and make its finding of eligibility, before the alien can file a visa application overseas or an adjustment application in the United States. Because CIS cannot predict exactly when an alien will file a visa application or adjustment application, CIS cannot use the potential future application date as the ending point of the two-year experience requirement.

The petitioner, on appeal, submits a letter from [redacted]el of the Evangelical Lutheran Church of Eritrea, claiming that the beneficiary "has been volunteering" for an unspecified number of hours per week at that church "since April, 2006." The petitioner does not explain its failure to mention this newly-claimed volunteer work in response to the director's two detailed RFEs. 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, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (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.

With regard to the petitioner's compensation of the beneficiary during 2006, the director twice instructed the petitioner to submit evidence payroll and tax documentation pertaining to the entire two-year period ending October 2, 2006. The response to the first RFE introduced no substantive new information into the record. The response to the second RFE included the aforementioned IRS Form 1099-MISC, showing that the petitioner paid the beneficiary $23,187.67 in 2006. At the time the petitioner submitted that document, the petitioner did not state or imply that the petitioner had paid the beneficiary anything beyond the amount shown on the Form 1099-MISC.

On appeal, for the first time, the petitioner asserts that it made additional payments beyond those reflected on the Form 1099-MISC. Copies of checks indicate that the petitioner paid the beneficiary at a reduced rate of $1,800 per month during the second half of 2006. The checks are marked "retainer." The petitioner did not mention or document these additional payments in response to either of the two RFEs, despite the director's specific and detailed request for payroll and tax documents. The petitioner, on appeal, does not explain why the $1,800 monthly "retainer" checks were not reported to the IRS on Form 1099-MISC.

The record amply demonstrates that the beneficiary was not continuously carrying on the duties of a director of Christian Growth throughout the entire two-year qualifying period ending October 2, 2006. Prior to the denial of the petition, the petitioner repeatedly withheld information about the beneficiary's other activities, despite repeated and specific requests for information about her work history during that period.

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.