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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: APR 06 2005  
WAC 98 034 54345

IN RE: Petitioner: [REDACTED]  
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:



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*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office 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 missionary worker. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience in the occupation immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established that it had made a qualifying job offer to the beneficiary, or that it has been able to pay the beneficiary's salary.

On appeal, counsel contends that an appeal cannot be revoked after an alien applies for adjustment of status. Counsel also contests the grounds for revocation.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary 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. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

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 various grounds for revocation all pertain, in some way, to the issue of the beneficiary's compensation.

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 November 18, 1997. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of the proffered position throughout the two years immediately prior to that date.

8 C.F.R. § 204.5(m)(4) requires the prospective employer to state how the alien will be paid or remunerated if the alien will work in a professional religious capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or solicitation of funds for support.

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.

Rev. Pai, pastor and administrator of the petitioning church, states that the beneficiary "has been serving at our church as a Religious Education Missionary Worker since November 1992 to the present time [November 1997], without any monetary compensation, in charge of the church's religious-educational program." Rev. Pai states that the beneficiary "is currently dedicating many hours per week" to her religious duties, but does not specify or even approximate the number of hours the beneficiary worked in a typical week. Rev. Pai states: "It is only fair that we should start [to] pay [the beneficiary] as soon as we are permitted to by law. . . . [The beneficiary] will be paid with a monthly salary of \$1,700 for her services to our church." This salary is equal to \$20,400 per year.

The petitioner's initial submission includes an itemized "income & expense" statement for the fiscal year ending June 30, 1997, containing the following information:

Income Subtotal	\$1,472,549.21
Previous Balance	69,983.81
Grand Total	1,542,533.02
Expense Subtotal	1,541,918.21
Cash Balance	614.81

The above statement does not meet the documentary requirements to establish ability to pay, and even if it did, on its face it does not show that the petitioner, in November 1997, had sufficient surplus resources to pay the beneficiary's \$20,400 annual salary. The assertion that the petitioner has budgeted for the beneficiary's future salary payments is not persuasive without evidence that the petitioner's past history justifies the expectation that the necessary funds will, in fact, become available.

The director approved the petition in April 1998, and the beneficiary subsequently applied for adjustment to permanent resident status. In a February 2001 letter submitted in conjunction with the beneficiary's adjustment application, Rev. Pai states that the beneficiary "works 40 hours per week, and is compensated with [a] wage of \$1,800 per month." The petitioner submits copies of paychecks and tax documents establishing payments to the beneficiary in 1999 and 2000. The petitioner paid the beneficiary \$19,800 in 1999 and \$21,600 in 2000; the 1999 amount is reflected as wages on that year's income tax return (which is also the most recent return in the record). The beneficiary identified herself as a "homemaker" on her federal tax returns from 1991 to 1995, and as "self-employed" on her 1996 and 1998 income tax returns (the "occupation" line is blank on the 1997 return). The sole reported source of income for the beneficiary and her spouse, before 1999, is a wholesale meat company. On her 1999 tax return, she is identified as a "director."

Subsequently, on July 7, 2003, the director issued a notice of intent to revoke, stating "incidental volunteer activities do not constitute qualifying work experience [for the purposes of] an employment-based visa petition." The director stated that "tax documents show no evidence that the beneficiary was [supported] by the petitioning church," and that noted that the beneficiary's 1999 tax return identifies her as a "director." The director concluded "the beneficiary will be dependent on supplemental employment or solicitation of funds for support," and found that the petitioner failed to demonstrate its ability to pay the beneficiary's proffered wage.

The petitioner's response to the notice of intent to revoke consisted of a letter from counsel. Much of this letter is repeated on appeal, and we shall therefore address counsel's arguments in that context. The director revoked the approval of the petition on January 21, 2004, essentially repeating the assertions from the earlier notice of intent. On appeal, the petitioner submits a brief from counsel. Counsel contends that the revocation notice fails to articulate the grounds for denial. Such grounds are, however, evident from review of the notice. Counsel's lengthy response to those grounds is, itself, ample evidence that the director made those grounds known.

Counsel claims "Section 205 revocation is no longer available when a properly filed adjustment application is pending." Counsel quotes the version of section 205 of the Act then in effect. That wording was crafted before the introduction of adjustment of status, at a time when the only means for an alien to become a permanent resident was to obtain a visa at a consulate and then physically enter the United States at a port of entry. Congress has since amended section 205 of the Act to delete the passage emphasized by counsel (H.R.

108-796, § 5304(d), enacted December 17, 2004). Because this amendment is retroactive, counsel's argument is now moot.

Counsel states: "In 1992, . . . [the beneficiary] started offering her full time service to the petitioner on a non-compensated basis. . . . These services were not in the nature of 'incidental volunteer activities.' . . . At the time of her adjustment interview in early 2001, evidence was submitted that [the beneficiary] was paid the offered salary throughout 1999 and 2000." Counsel asserts that the available evidence, including tax documents, does not support the director's contentions.

Counsel offers no support for the assertion that the beneficiary's work from 1992 to 1997 was not "incidental." The petitioner did not state or prove that the beneficiary's work had been full-time. [REDACTED] had indicated only that the beneficiary worked "many hours per week." The burden is on the petitioner to prove, rather than on the director to disprove, that "many hours" refers to full-time employment. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the petitioner has not demonstrated that the beneficiary's experience during the 1995-1997 qualifying period was, in fact, full-time.

Counsel cites *Matter of M*, 1 I&N Dec. 147 (BIA 1941), to demonstrate that past experience need not have been compensated. In the cited case, the alien was a rabbi (and thus a "minister" for immigration purposes) who started out as a paid worker, but later "served without compensation, having received an inheritance in that year which made him financially independent." Even leaving aside the lack of evidence that the present beneficiary is "financially independent," the comparison is not persuasive. A rabbi works in the vocation of a minister (the statute and regulations repeatedly refer to the ministry as a "vocation"), whereas the beneficiary works in a religious *occupation*, a term which, unlike religious *vocation*, evokes monetary compensation. An unpaid activity is not an occupation for immigration purposes.

Counsel asserts that the beneficiary, as a dependent of an E-1 nonimmigrant, was not allowed to work in the United States, and therefore she could not accept compensation from the church. Counsel repeatedly asserts that "the rules imposed by the United States Government" prevented the petitioner to compensate the beneficiary for her work. An R-1 nonimmigrant visa would have permitted (indeed, required) the beneficiary to work for the church and lawfully accept a salary. Counsel, in arguing that "the law forbade" the petitioner to pay the beneficiary, does not even acknowledge the existence of the R-1 classification, let alone explain why the petitioner evidently sought no such visa for the beneficiary. Thus, counsel's argument is analogous to an individual who complains that he is not allowed to drive, but neglects to mention that he has never applied for a driver's license.

Upon consideration, we find that the available evidence does not support a finding that the beneficiary was engaged full-time in a qualifying religious occupation during the two-year qualifying period. The record contains only an uncorroborated claim that the beneficiary worked "many hours" for the petitioning church prior to becoming a paid employee in 1999.

Counsel correctly observes that, subsequent to the approval of the petition, the petitioner did eventually begin to compensate the beneficiary for her work. As noted above, the petitioner paid the beneficiary \$19,800 in 1999. Assuming that the petitioner began paying the beneficiary until February 1999, this amount is consistent with monthly \$1,800 payments as described in the petitioner's 2001 letter. Given these documented payments, there is no evident basis for the director's determination that the petitioner has failed to establish how it will compensate the beneficiary.

The director's claims regarding the beneficiary's tax returns are only partially correct. The tax documents from 1998 and earlier years show no support from the petitioner, but the beneficiary's wages reported on her 1999 federal income tax return match the amount reported on a Form W-2 Wage and Tax Statement that the petitioner issued to the beneficiary for the 1999 tax year. The "occupation" space on a federal tax return is quite small and can hold only one or two typed words; the space cannot accommodate the beneficiary's full job title. The reference to the beneficiary as a "director" is not inherently disqualifying; the beneficiary was perhaps referring to herself as the petitioner's *director* of education. Far more serious would be if the beneficiary had used a term that clearly does not match her duties for the petitioner, such as "secretary."

We withdraw the director's finding that the petitioner has not established the terms of employment. Nevertheless, a finding that the petitioner has paid the beneficiary since 1999 does not establish that the petitioner was able to pay the beneficiary's proffered wage as of the 1997 filing date.

Counsel notes "[a] review of the employment based regulations reveals that not all the employment-based classifications require an 'offer of employment.'" Counsel notes that an alien may self-petition for classification as a special immigrant religious worker, and contends that, therefore, "the religious worker category does not require an offer of employment." As a result, counsel claims, "the express provisions of 8 C.F.R. § 204.5(g)(2) are not applicable to religious worker [petitions]" (counsel's emphasis).

This argument is not persuasive. A job offer requirement is not synonymous with a requirement that the prospective employer, rather than the alien, must file the petition. The regulations clearly require a job offer. The term "job offer" appears at 8 C.F.R. § 204.5(m)(4), and 8 C.F.R. § 204.5(m)(3) lists several pieces of information that the prospective employer must provide. Obviously these sections of the regulations would be meaningless unless there were a specific employer that had offered a particular position to the alien. Unlike the classifications that truly lack a job offer requirement, it cannot suffice for an alien to establish his or her own credentials and simply declare the intent to pursue employment in the alien's area of expertise. The statute and regulations plainly *do* require an offer of employment for an alien seeking classification as a special immigrant religious worker in a religious occupation, and therefore the regulations governing ability to pay apply here.

The above-cited regulation at 8 C.F.R. § 204.5(g)(2) 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 evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner's sole evidence regarding its financial status in 1997 is an expense report showing that, without factoring in the beneficiary's salary of \$1,700 per month, the petitioner ended its 1996-1997 fiscal year with a cash balance of just over \$600, having exhausted most of the previous year's balance of nearly \$70,000. From the available evidence, we cannot conclude that the petitioner has consistently been able to pay the beneficiary's proffered salary from November 1997 onward.

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.