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

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MAR 28 2005

FILE: [REDACTED]
WAC 97 082 53928

Office: CALIFORNIA SERVICE CENTER Date:

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.

Maui Johnson

& 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, and that subsequent developments disqualified the beneficiary for the immigration benefit sought via the petition. The director properly 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 (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 catechist, director/instructor of religious music and librarian. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience in the occupation sought immediately preceding the filing date of the petition. In addition, the director determined that the beneficiary had relied on secular employment following the approval of the petition. Finally, the director determined that the beneficiary's three criminal convictions demonstrated an indifference to the laws of the United States.

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 un rebutted, 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.

On appeal, counsel asserts that the beneficiary was not solely reliant on outside income, that her volunteer work is qualifying experience, and that her criminal convictions do not render her inadmissible.

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 first issue concerns the beneficiary's experience prior to the filing of the petition. 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 January 31, 1997. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a catechist, director/instructor of religious music and librarian throughout the two years immediately prior to that date.

The Form I-360 petition indicates that the beneficiary last entered the United States on April 13, 1995, less than two years before the filing date. Therefore, evidence of qualifying work must include acceptable documentation from overseas as well as from the petitioning church.

Various sources describe the beneficiary's activities during the qualifying period. Some of the letters were submitted after the approval of the petition, presumably in support of the beneficiary's I-485 adjustment application. A translated letter indicates that the beneficiary worked for a church in Pidkamin Brodivskogo, Ukraine, from September 10, 1991 to March 29, 1995. The author of the letter is not identified by name or title, and the record does not include the Ukrainian-language letter from which this translation was prepared.

Rev. [REDACTED] states that the beneficiary has worked at the petitioning church. Rev. [REDACTED] states "[w]hile I was not at the Los Angeles parish prior to June 12 [1996], my understanding, from reputable individuals, is that [the beneficiary] provided these services for the parish for a lengthy period of time prior to my arrival." Rev. [REDACTED] pastor of the petitioning church, states that the beneficiary "served as a volunteer in our parish for over two years, from May, 1995 to September, 1997, and was then hired as a full-time professional employee in October, 1997."

The above claims indicate that the beneficiary stopped working in the Ukraine in late March 1995, and did not resume again until May 1995, over a month later. There is no indication that this month consisted of paid leave or other vacation time, rather than simply a period of unemployment.

The director issued a notice of intent to revoke, informing the petitioner that "incidental volunteer activities do not constitute [qualifying] work experience" for the immigration benefit sought. In response, Rev. [REDACTED] states that the beneficiary "came to the U.S. on a guest Visa in 1995 to visit an ill uncle, thereby taking

sabbatical from her position in Ukraine. She did not relinquish her job in Ukraine." The record contains no first-hand corroboration for the new contention that the beneficiary "did not relinquish her job in Ukraine," or that the church in Ukraine considered the beneficiary to be on sabbatical in the United States. We note that the previously submitted employment letter specified that the beneficiary stopped working for the church in Ukraine on March 29, 1995, more than two weeks before the beneficiary arrived in the United States on April 13. These circumstances do not readily suggest that the beneficiary unexpectedly traveled to the United States due to a family emergency, expecting (at the time) to return to Ukraine.

Rev. [REDACTED] continues: "While visiting Los Angeles, she attended [the petitioning] church, and offered to help with religious education, the parish library, and the music department, just as many parishioners and guests volunteer their time for various activities. She was generally viewed as a person 'helping out' and not as an unpaid staff member." The assertion that the beneficiary was "helping out," "just as many parishioners and guests volunteer their time," does not rebut the director's finding that the beneficiary's activities amounted to "incidental volunteer activities." Rev. [REDACTED] asserts that the petitioner did not decide it required "a qualified, full-time professional" until "[n]ear the end of 1996." This further reinforces the director's conclusion that the beneficiary was "helping out" only on an occasional or part-time basis.

In revoking the approval of the petition, the director concluded that the beneficiary's work for the petitioner prior to October 1997 consisted of non-qualifying "incidental volunteer activities." On appeal, counsel argues that voluntary work can constitute qualifying work experience. Counsel does not address the petitioner's apparent stipulation that the beneficiary's work was part-time until, at the earliest, late 1996. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980), addressed the issue of what constitutes "continuous" qualifying religious work. In that decision, the Board of Immigration Appeals found that an alien "has not carried on the vocation of minister of the church . . . when only 9 hours per week are devoted to church activities, and he is not compensated." Here, as in *Varughese*, the alien was "helping out" on less than a full-time basis. We hold that only an implausibly broad reading of the statute and regulations would extend permanent immigration benefits to individuals whose religious work during the qualifying period is comparable to those of "parishioners and guests [who] volunteer their time for various activities."

The next issue concerns the beneficiary's means of support subsequent to the filing of the petition. 8 C.F.R. § 204.5(m)(4) requires the petitioner 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 petitioner indicated that it would pay the beneficiary \$1,000 per month.

In conjunction with the beneficiary's I-485 adjustment application, the director instructed the beneficiary to document her earnings from 1997 to 2002. The director also requested copies of recent pay stubs, and added: "If you are not currently working for the petitioner, explain why."

Tax documentation from 1997 indicates that the petitioner paid the beneficiary \$5,592, which the beneficiary supplemented with \$1,644 in business income. The payments from the petitioner were reported on a Form W-2 Wage and Tax Statement. The beneficiary identified her "principal business or occupation" as "teacher," and listed her residential address as her business address.

In 1998, the beneficiary reported \$9,773 in wages, salaries, and tips. Forms W-2 show that the beneficiary received \$720 from a physician's office, and \$9,053 from a hospital; these two jobs account for all of the beneficiary's 1998 wages. From 1999 to 2002, all of the beneficiary's reported earnings were from a chiropractor's office. The beneficiary listed her occupation as "teacher/medical." On Form G-325A,

Biographic Information, dated December 2003, the beneficiary indicates that she works as a physical therapy assistant, but claims that she has also continued to work for the petitioner.

A letter attributed to Rev. [REDACTED] indicates that the beneficiary "is currently working for and has been working as a full-time professional for this Ukrainian Catholic parish since October 1997. . . . She is paid \$1,000 monthly." The beneficiary did explain as to why she has not reported, or paid taxes on, income from the petitioner since 1997. The petitioner submitted what purport to be copies of monthly \$1,000 paychecks from the petitioning church (with no taxes withheld), but the copies do not show that the checks were cashed.

The director, in the notice of intent to revoke, observed that the record contains no credible documentary evidence to show that the petitioner has paid the beneficiary since 1997. The director specifically mentioned that the purported paychecks showed no sign of having been cashed. In response, Rev. [REDACTED] states "these checks were cashed by the beneficiary, and we will provide appropriate two-sided copies if requested." Rev. [REDACTED] did not explain why he did not simply provide the copies at that time.

The director revoked the petition, having determined that the beneficiary had apparently relied entirely on secular employment following the approval of the petition in 1997. On appeal, the petitioner submits new copies of the 2003 paychecks. These copies are canceled, showing that the beneficiary cashed them. Counsel notes that the regulations only prohibit *sole* reliance on secular employment, not partial reliance. The canceled checks, counsel argues, demonstrate that the beneficiary has not solely relied on secular employment.

The paychecks only document payments made during 2003, a period not covered by the tax documents in the record. These 2003 paychecks do not contradict or rebut the finding that the beneficiary was entirely dependent on secular employment from 1998 through 2002. The petitioner has claimed, after the fact, that it has employed the beneficiary continuously since 1997, but the petitioner has not provided any contemporaneous evidence that it employed the beneficiary from 1998 to 2002, despite repeated notices from the director that that period was at issue in this matter.

The only *contemporaneous* evidence regarding the beneficiary's income from 1998 to 2002 is the aforementioned tax documentation, and during those years, all of the beneficiary's reported income came from secular employers. This does not categorically prove that the beneficiary did not work for the petitioner during those years, but if she did, she failed to report that income on her taxes, despite being demonstrably aware as early as 1997 that income from the petitioning church is taxable. The petitioner issued the beneficiary a Form W-2 for 1997, but there is no evidence that the petitioner issued such forms in any subsequent year. The petitioner does not even mention, let alone explain, the lack of Forms W-2 from subsequent years.

Given the above, there is no credible evidence that the beneficiary worked for the petitioner from 1998 through 2002. The preponderance of evidence leads to the conclusion that the beneficiary was solely dependent on supplemental, secular employment for several years after the petition was filed. New evidence of payments to the beneficiary came into existence only after the director first made this observation. Overall, the record indicates that the petitioner supported the beneficiary for only a small fraction of the eight years that elapsed between mid-1995 and mid-2003.

Given the provisions of 8 C.F.R. § 204.5(m)(4), the director was justified in revoking the approval of the petition once it became apparent that the beneficiary's sole means of support from 1998 through 2002 was employment at medical or chiropractic facilities, chiefly as a physical therapist assistant. We cannot assume

that the petitioner employed and paid the beneficiary during those years, without also assuming that the beneficiary committed tax-related offenses during each of those years.

Criminal activity by the beneficiary is also the basis for the final ground for revocation. On her Form I-485 adjustment application, in response to the question "have you ever been arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?," the beneficiary answered "no." During an interview, the beneficiary changed this answer, admitting to an arrest for petty theft.

Documentation in the record indicates that the beneficiary was charged with grand theft and petty theft on three occasions between May 1997 and April 2002, and was convicted each time (sometimes on lesser charges) after pleading either guilty or *nolo contendere*. Documentation relating to the beneficiary's second conviction, in 2000, states "the weapon involved in this case is ordered confiscated and destroyed by the arresting agency." The record does not describe the weapon.

The director, in the notice of intent to revoke, asserted that the beneficiary's "criminal history . . . is contradictory to the position of Religious Teacher." In response, Rev. [REDACTED] states "we do not condone such behavior," but "our focus is on repentance; that a person can change for the better." Rev. [REDACTED] also states "we are familiar with special circumstances related to these instances," but he does not elaborate.

The director, in revoking the approval of the petition, stated that the petitioner has not established that "the beneficiary has been obeying and following all the laws of the United States." Counsel interprets this as a finding that the beneficiary is inadmissible owing to her convictions, although the director did not mention inadmissibility; the director merely questioned the beneficiary's ability to abide by the law. Counsel correctly asserts that sentences imposed on the beneficiary were not sufficient to trigger the "multiple criminal convictions" clause at section 212(a)(2)(B) of the Act. The "multiple criminal convictions" clause, however, is not the only clause relating to inadmissibility arising from criminal conduct.

Section 212(a)(2)(A)(i)(I) of the Act states that an alien convicted of a crime involving moral turpitude is inadmissible. Counsel does not claim that theft (apparently involving a weapon) is not a crime of moral turpitude, but counsel claims that the beneficiary's offenses fall within statutory exceptions. Counsel submits a copy of a relevant portion of the statute, and has highlighted a portion of section 212(a)(2)(A)(ii) thereof. This highlighted section establishes an exception if "the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year." Section 212(a)(2)(A)(ii), however, applies only "to an alien who committed only one crime." The beneficiary has been convicted of three separate offenses, and therefore the exceptions listed at section 212(a)(2)(A)(ii) of the Act plainly do not apply to her. The fact that the beneficiary repeatedly committed the same *type* of crime does not reduce her criminal history to "only one crime."

The AAO has neither the need nor the jurisdiction definitively to settle the admissibility issue here. The visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws. When eligibility for the claimed status is established, the petition should be granted. *Matter of O*, 8 I&N Dec. 295 (BIA 1959). While the beneficiary's repeated criminal convictions certainly raise troubling questions regarding the beneficiary's fitness to instill religious values in others, we can find no statutory or regulatory provision to support the revocation of the approval of a special immigrant religious worker petition based on the beneficiary's criminal record. The convictions in question do not inherently contradict the petitioner's claims (for example, by showing that the beneficiary was incarcerated in Florida during a time when she claimed to be working in Oregon). Questions of admissibility are more properly

addressed at the adjustment stage, and thus criminal convictions ought to be considered when adjudicating I-485 applications rather than I-360 petitions. Beyond the technical issue of admissibility, counsel has cited no general or statutory requirement *directly relevant to I-360 petitions* that relates to the beneficiary's obeying and following the laws of the United States.

At most, the beneficiary's criminal record (or rather her false claim regarding that history on her I-485 application) leads us to question her credibility. We are not inclined to believe that, when asked about her arrest record, the beneficiary merely forgot that she had been repeatedly arrested and convicted. Even then, the beneficiary is not the petitioner in this case, and her own credibility issues do not necessarily translate to the petitioner.¹ Pursuant to the above, while making no definitive conclusions as to the beneficiary's admissibility or inadmissibility, we withdraw the director's finding that the beneficiary's criminal record *per se* is a ground for revocation. The other cited grounds for revocation, however, still stand.

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.

¹ This is not to state that the petitioner has no credibility problems of its own. As noted above, tax documents in the record lend no support to the claim that the petitioner has paid the beneficiary regularly since 1997.