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FILE: [REDACTED]
SRC 04 197 52652

Office: TEXAS SERVICE CENTER Date: JAN 20 2006

IN RE: Petitioner: [REDACTED]
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:

SELF-REPRESENTED

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.

2 Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The self-petitioner seeks classification 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 an associate minister of music. The director determined that the petitioner had not established that she had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition or that she had been extended a qualifying job offer.

On appeal, the petitioner submits additional documentation.

We note that throughout the proceedings, the petitioner indicates that she seeks entry into the United States pursuant to an R-1 nonimmigrant religious worker visa. However, the petitioner filed a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, which is the appropriate form for those aliens seeking to establish permanent residency in the United States. If the petitioner is seeking nonimmigrant status as a religious worker, she must file a Form I-129, Petition for a Nonimmigrant Worker. 8 C.F.R. § 214.2(r)(3). Accordingly, this appeal will be considered under the immigrant religious worker regulations at 8 C.F.R. § 204.5(m).

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 on appeal is whether the petitioner established that she 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 July 12, 2004. Therefore, the petitioner must establish that she was continuously working as an associate minister of music throughout the two-year period immediately preceding that date.

In a letter dated April 21, 2004, [REDACTED] the pastor of the Lebanon Baptist Church, in Lebanon, Kentucky, [REDACTED] the church's minister of music, stated that the petitioner had served as an associate minister of music with the Lebanon Baptist Church for over two years, in addition to working as an adjunct professor of music and staff accompanist at Campbellsville University. [REDACTED] stated that the beneficiary's job responsibilities included worship planning, serving as organist for all worship services, serving as accompanist for the choirs, serving as choral director during the absence of the minister of music, coordinating special music, serving as pianist for special presentations, and giving piano and organ lessons to members of the church.

The petitioner submitted no documentary evidence of her work with the Lebanon Baptist Church. 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)).

In response to the director's request for evidence (RFE) dated March 12, 2005, regarding her financial support during the qualifying period, the petitioner stated that, from 2001 to 2003, she received a music scholarship from Campbellsville University and participated in the school's meal plan. The petitioner stated that she worked in the school's library and cafeteria and received lodging from the school. The petitioner further stated that upon completion of her graduate studies, she began optional practical training (OPT) working for Campbellsville University in its music department.

The petitioner submitted a statement of her work history since entering the United States, indicating that she worked at Campbellsville University from August 15, 2003 to May 15, 2004, and for Seaton Corp, Inc. from November to December 2004. The petitioner also provided the following information regarding her work at the Lebanon Baptist Church:

Oct – Dec, 2001	Organist/pianist	\$75/wk
Jan – Dec, 2002	Organist/pianist	\$75/wk
Jan – Jun, 2003	Organist/pianist	\$100/wk
Jul, '03 – Dec, 2004	Assoc. Music Dir.	\$100/wk*
Jan – Dec, 2005	Assoc. Music Dir.	\$125/wk*

*Housing: rent-free equivalent of \$350/month, and
Automobile: free use equivalent of \$500/month (payment and insurance)
Total of \$1,350 equivalent salary/month, \$16,200 per year

The petitioner did not indicate the hours that she worked in the proffered position; however, the position description indicated that the position required no more than 20 hours per week. The petitioner also submitted a computer printout from the Lebanon Baptist Church, signed by the church financial secretary, indicating payments made to the petitioner from August 26, 2002 through July 12, 2004.¹ In 2002, the amounts ranged from \$37.50 to \$337.50 and indicated that the petitioner was paid, not on a weekly basis, but on a per job basis of \$37.50. Individual payments in 2003 and 2004 ranged from \$36.89 to \$100 and were not a consistent rate of pay. The petitioner submitted her Forms 1040, U.S. Individual Income Tax Returns, for the years 2003 and 2004, on which she reported income from the Lebanon Baptist Church of \$4,542 and \$3,560, respectively. All other financial documentation submitted by the petitioner was for her work, tuition and fees at Campbellsville University.

The petitioner submitted copies of “daily attendance records” of the Lebanon Baptist Church for 2002, 2003 and 2004. The church’s financial secretary certified the forms to be true; however, the evidence is unclear as to what the annotations on the forms actually represent. They appear to reflect that the petitioner worked less than ten days each month with “primary responsibilities [] on Sundays & Wednesdays.” They suggest that she did not work for the Lebanon Baptist Church between July 2002 and August 21, 2002. The petitioner submitted no other evidence to corroborate her work with the Lebanon Baptist Church in 2002. *Id.*

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).

¹ The document indicates that it is a detailed transaction report for the period of July 12, 2002 through July 12, 2004. The document does not reflect any payments to the petitioner in July 2002.

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.

On appeal, the petitioner submits an August 3, 2005 letter signed by Dr. Whitlock and Mr. Gaddis, who state:

According to the standards as was the understanding of Lebanon Baptist Church, if [the petitioner] had held the position of full-time Associate Minister of Music for two years prior to the application, she would have been in violation of the U.S. Citizenship and Immigration Services laws. [The petitioner] renewed her student visa and maintained a full-time student status at Campbellsville University, a near-by Baptist university, to protect her legal status as a resident of the United States.

The petitioner submits a “revised” job description reflecting that the proffered position now requires at least a 35-hour workweek.

Nonetheless, the evidence clearly establishes that the petitioner was not fully engaged as an associate minister of music for two full years preceding the filing of the visa petition. According to the petitioner, she assumed the role of associate minister of music in July 2003, a year before the petition was filed. Prior to that, she served with the Lebanon Baptist Church as an organist/pianist. The petitioner provided no details of her work as an organist/pianist but the evidence reflects that the church distinguishes between the two positions. Additionally, the petitioner admits that she worked only 20 hours per week as an associate minister of music. As discussed above, part-time employment is not qualifying experience for the purpose of this employed based visa petition.

Accordingly, the petitioner has not established that she worked continuously as an associate minister of music for two full years prior to the filing of the visa petition.

The second issue is whether the petitioner established that she has received a qualifying job offer.

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.

In her initial submission, the petitioner did not indicate the specific terms of her proffered employment with the Lebanon Baptist Church. In their letter of April 21, 2004, Dr. Whitlock and Mr. Gaddis stated that in the proffered position, the petitioner “will be financially supported by the Lebanon Baptist Church through her salary. She will also be supported through the provision of free lodging in a church-owned house adjacent to the church. An automobile will also be provided to [the petitioner].”

In response to the RFE, the petitioner submitted a job description reflecting that the duties of the proffered position would encompass no more than 20 hours per week, and that compensation would be at the rate of \$16,200 annually including salary, housing and transportation.

The director determined that, as the position did not offer full-time employment, the petitioner had not established that she had received a qualifying job offer.

On appeal, the petitioner submits a “revised” work schedule that expands upon the hours, duties and salary of the proffered position in the stated attempt to make the offer comply with the regulation.

A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); 8 C.F.R. § 103.2(b)(12).

The evidence submitted by the petitioner indicated that the proffered job requires 20 hours of work per week. Consistent with the requirements of the U.S. Department of Labor’s Bureau of Labor Statistics and other regulations pertaining to employment based visa petitions, CIS holds that employment of less than 35 hours per week is not full time employment. Part-time employment is not a qualifying job offer for the purpose of this employment based visa petition.

Therefore, the petitioner has not established that she received a qualifying job offer.

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).

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 petitioner submitted no evidence to establish that the position of associate minister of music is a position that is defined and recognized by the Southern Baptist Convention, the governing body of the Lebanon Baptist Church, or that the position is traditionally a permanent, full-time, salaried occupation within the denomination. The record reflects that the position did not exist in the Lebanon Baptist Church until 2002 at the earliest. Further, as evidenced by the job description submitted in response to the RFE, the position is not a full-time occupation.

Accordingly, the petitioner has not established that the position qualifies as that of a religious worker within the meaning of the statute and regulation. This deficiency constitutes an additional ground for denial of the petition.

Further beyond director's decision, the petitioner has not established that her prospective U.S. employer, the Lebanon Baptist Church, has the ability to pay her 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.

According to the petitioner, her compensation will consist of a salary of \$125 per week, plus housing of \$350 and transportation of \$500 per month. As evidence, the petitioner submitted a statement signed by the chairman of the stewardship committee of the Lebanon Baptist Church, copies of reports to the Kentucky Baptist Churches and Missions reporting the church's monetary receipts for 2002 through 2004, and copies of the church's Forms 941, Employer's Quarterly Federal Tax Returns, for the period September 30, 2002 through December 2004. While the Forms 941 reflect the number of employees of Lebanon Baptist Church, they do not identify the petitioner as one of those employees or the amount of a salary that the church may have paid her.

The petitioner submitted computer printouts indicating that the church had paid her from August 2002 through July 2004. However, these documents do not reflect that the petitioner received a salary of \$125 per

week prior to time the petition was filed. Further, the petitioner submitted no evidence of any housing or transportation provided to her by the Lebanon Baptist Church.

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.

Although the petitioner submitted copies of the church’s Forms 941, they contain no evidence that the petitioner was paid by the Lebanon Baptist Church. As the petitioner has failed to establish that Lebanon Baptist Church has paid her the proffered wage in the past and failed to submit any of the required types of primary evidence that clearly establishes the church’s financial status, she has failed to establish that her prospective U.S. employer had the continuing ability to pay her the proffered wage as of the date the petition was filed. This deficiency forms 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.