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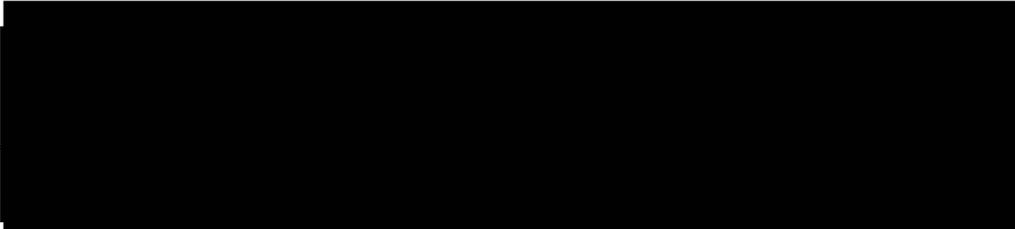
U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 17 2007
WAC 05 144 53597

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:
[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 [REDACTED] Catholic diocese. 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 at [REDACTED] a church under the jurisdiction of the petitioning diocese. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a catechist 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.

On appeal, counsel contends that the controlling regulations are unlawful and therefore cannot be used to deny the petition.

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 Citizenship and Immigration Services (CIS) 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 CIS regulation at 8 C.F.R. § 204.5(m)(4) reads, in pertinent part:

Job offer. The letter from the authorized official of the religious organization in the United States must also state how the alien will be solely carrying on the vocation of a minister (including any terms of payment for services or other remuneration), or 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 had previously filed another petition on the beneficiary's behalf on January 13, 1998. The director approved that petition on May 1, 1998, but revoked the approval on August 16, 2004. The present petition, filed on April 22, 2005, includes an introductory statement jointly signed by counsel and by Bishop [REDACTED] of the petitioning diocese. Counsel and [REDACTED] devote much of the introductory statement to contesting the 2004 revocation. The 2005 petition must be judged on its own merits. The claim that the 2004 revocation was improper does not somehow invest the 2005 petition with additional merit. The proper way to allege error in the revocation would have been to file an appeal, and the proper time to do so would have been immediately after the revocation during the period specified by regulation.¹ There is no indication that the petitioner filed such an appeal, and therefore the proceeding regarding the 1998 petition remains closed. The filing of a new petition does not compel the director or the AAO either to revisit the 1998 petition, or to look more favorably on the 2005 petition. Therefore, we will here concern ourselves solely with the 2005 petition, rather than the allegation that the earlier revocation is "void." Certain documents relating to the 1998 petition have been resubmitted with the 2005 petition. We will consider these documents insofar as they relate to the overall terms of employment, to the petitioner's credibility, and other factors relevant to the 2005 petition.

Counsel and Bishop [REDACTED] state: "Beneficiary works at the [REDACTED], and does not receive a salary for her services as a catechist. However, as recognized by the U.S. District Court for the Third Circuit in *Camphill Soltane*, the religious worker position need not be salaried" (citation omitted). Counsel again discusses *Camphill Soltane* on appeal and we will address it in that context.

The petitioner's initial submission includes a copy of a June 18, 2002 letter from Bishop [REDACTED], originally prepared in conjunction with the beneficiary's adjustment application following the approval of the 1998 petition. Bishop [REDACTED] states that the beneficiary "is currently employed by our diocese as a religious teacher. . . . Her currently [*sic*] salary is eight dollars per hour." The submission includes no first-hand documentation of such salary payments.

The initial submission also includes a copy of the last page of an October 29, 2003 letter from Bishop [REDACTED] originally submitted in response to a notice of intent to revoke that the director had issued on September 30, 2003. Bishop [REDACTED] states:

¹ The relevant regulation, at 8 C.F.R. § 205.2(d), allows a fifteen-day appeal period.

Although [the beneficiary] does not meet the necessary requirements of the “letter of the law,” it is requested that the unique circumstances of a newly erected diocese, the inability to pay any religious worker at all and her lack of proper documentation all should be given further consideration before her application is revoked. . . . Since [the beneficiary] has fulfilled every requirement with the exception of being remunerated, it seems that to hold her to a law which she could not ever fulfill seems to go against the “spirit of the law” which has been enacted.

Eligibility for classification as a special immigrant religious worker rests on several requirements, all of which the beneficiary and/or her prospective employer must meet. It cannot suffice to meet only most of the requirements. These requirements are not discretionary, to be followed or abandoned by administrative fiat or at the request of the beneficiary or the intending employer. If the petitioner stipulates that the beneficiary “could not ever fulfill” a basic requirement, the proper response is not simply to discard those requirements which are inconvenient to the petitioner or the beneficiary. Nowhere in this 2003 letter does Bishop [redacted] refer to his 2002 claim that the beneficiary “currently” earns a regular salary.

Pastor [redacted] of [redacted] states that the beneficiary “continues to serve as a Catechist approximately five – ten hours per week.” The letter is silent as to compensation or the lack thereof, and there is no indication as to how the beneficiary devotes the balance of her time.

On September 21, 2005, the director issued a request for evidence, instructing the petitioner to provide evidence about the beneficiary’s work during the two-year qualifying period, including the “number of hours worked per week [and] form and amount of compensation.” The director specifically instructed the petitioner to “submit evidence that shows monetary payments, such as pay stubs or **other items showing** the beneficiary received payment.” In response, the petitioner resubmitted a copy of Pastor [redacted] letter, quoted above. Counsel did not cite or acknowledge Bishop [redacted] 2002 claim that the beneficiary earns eight dollars per hour. Rather, counsel repeated the argument that the position need not be compensated, a claim that is relevant only if the beneficiary was not compensated. Given the line of argument counsel has chosen to pursue, we must conclude that, whether or not the petitioner paid the beneficiary a salary in 2002, there is no reason to believe that those payments continued in later years.

The director denied the petition on January 26, 2006, stating that the petitioner “must show that [the beneficiary] will be employed in the conventional sense of full-time salaried employment and will not be dependent on supplemental employment.” The director found that past work as a part-time unpaid volunteer cannot constitute qualifying experience to fulfill the two-year experience requirement.

On appeal, counsel for the third time quotes from *Camphill Soltane v. US Department of Justice, Immigration & Naturalization Service*, 381 F.3d 143, 2004:

The requirement that the position be “salaried” appears to be inconsistent with the list of religious occupations given in the regulation itself, which includes positions-perhaps most notably “missionaries”-who do not always receive salaries. We further note that in promulgating the final rules at issue, the agency explicitly stated that they had been “revised

to account more clearly for *uncompensated* volunteers, whose services are engaged but who are not technically employees.” 56 Fed.Reg. 66965 (Dec. 27, 1991) (emphasis added).

According to the record of proceeding, the beneficiary’s intended place of work is in California, which is not under the jurisdiction of the Third Circuit. *Camphill Soltane* was never a binding precedent for this case. Even then, we note that *Camphill Soltane* involved an alien who received room, board, and a stipend; she was not uncompensated.

It is also crucial to note that the cited passage from the Federal Register concerns a regulation that applies to R-1 nonimmigrant religious workers, not special immigrant religious workers. There is nothing in the implementing regulations for special immigrant religious workers to indicate that “uncompensated volunteers” can qualify for that classification. For nonimmigrants, the regulation at 8 C.F.R. § 214.2(r)(3)(ii)(D) requires petitioners to specify “[t]he arrangements made, *if any*, for remuneration for services to be rendered by the alien” (emphasis added). This “if any” clause was inserted “to account more clearly for uncompensated volunteers,” as reported at 56 Fed. Reg. 66965 (Dec. 27, 1991).

With regard to the immigrant classification, there is no comparable “if any” clause. Rather, 8 C.F.R. § 204.5(m)(4) requires religious institutions to specify “how the alien will be paid or remunerated” and to establish “that the alien will not be solely dependent on supplemental employment or solicitation of funds for support.” A volunteer who receives no compensation whatsoever will clearly be solely dependent on some other means of support. The burden of proof is on the petitioner to show that this support will not take the form of supplemental employment or solicitation of funds.

Counsel, on appeal, acknowledges the above regulation, but states: “The CIS regulation at 8 C.F.R. 204.5(m)(4), requiring that Beneficiary – a religious worker – demonstrate that she will not rely on supplemental income, is *ultra vires*.” While the AAO has the jurisdiction to find error when the director has *failed* to follow binding regulations, we cannot reasonably fault the director in instances where the director has duly adhered to them. The AAO has no authority to overturn CIS regulations. We note that the cited regulation begins with the phrase “Job offer,” a phrase that connotes paid employment rather than merely an activity in which an alien engages.

Counsel, in declaring the regulations to be unlawful, reads nonexistent provisions into the regulations. Counsel notes that the statute requires ministers to be “solely” engaged in ministerial work, but places no such restriction on other religious workers. Therefore, counsel argues, the regulations cannot properly prohibit non-ministers from engaging in supplemental employment. The regulation at 8 C.F.R. § 204.5(m)(4), however, states only that such workers cannot be “*solely* dependent” on such employment (emphasis added). Thus, the regulations permit non-ministers to engage, to some degree, in supplemental employment, but it cannot be their only means of support. This regulatory clause is an impediment only to aliens, such as the beneficiary, who receive no support at all from the religious institutions they serve.

Going beyond the regulations to the underlying statute itself, we observe that the statutory provisions for special immigrant religious workers fall within section 203(b) of the Act, a section that, by its very wording, refers exclusively to “Employment-Based Immigrants.” Thus, the very statute links the classification with

“employment.” While there is some leeway in terms of the form that compensation may take,² there must nevertheless be some form of support. In *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980), the Board of Immigration Appeals found that an alien could not meet the two-year continuous experience requirement because he had worked only nine hours a week, as an unpaid volunteer, a fact pattern which closely matches this beneficiary’s five to ten hours per week of unpaid work.

Counsel states that section 101(a)(27)(C)(i) of the Act “only requires that the Beneficiary demonstrate that she has been ‘...a member...’ of the religious institution for two years immediately prior to filing the I-360 petition. The statute contains no requirement that she be working for or employed by the religious institution during the two years immediately prior to filing.” In supporting this argument, counsel quotes clause (i) of the section in its entirety, and almost all of clause (ii), ending with the phrase “in a religious vocation or occupation...” Counsel’s ellipsis masks the final “and” at the end of the clause. Counsel entirely omits clause (iii), which requires that the alien “has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).” Thus, the two-year experience requirement is in fact contained in the statute, in the clause that immediately follows counsel’s quoted excerpt. The statutory clause does not include the word “employed,” but clearly the alien must have been, in counsel’s words, “working for” a religious organization during the two-year period.

Standing case law shows that, if a given alien is to receive no salary for church work, the assumption is that the alien 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 stated terms of the beneficiary’s work as a catechist – five to ten hours a week, with no pay – reinforce this conclusion. The petitioner has made no effort to show how the beneficiary is to support herself by working minimal hours as a volunteer. We must conclude that she will solely support herself through other means, and presumably has been doing so previously as well. Pursuant to *Matter of Varughese*, *supra*, we cannot conclude that the beneficiary has continuously worked as a catechist throughout the qualifying period, or, for that matter, that the petitioner has presented a viable, qualifying job offer as required by 8 C.F.R. § 204.5(m)(4).

With further regard to the job offer, we note that the petitioner has stipulated to an additional basis for denial. As quoted above, Bishop [REDACTED] has attested to the petitioner’s “inability to pay any religious worker at all.” 8 C.F.R. § 204.5(g)(2) requires each prospective employer to submit annual reports, tax returns, or audited financial statements to establish its ability to compensate the beneficiary of a given employment-based immigrant visa petition. Counsel has argued that this regulation does not apply to religious institutions, relying on the illogical claim that a church’s tax-exempt status somehow precludes the existence of audited financial statements.

8 C.F.R. § 204.5(g)(2), by its plain wording, applies to “any petition filed by or for an employment-based immigrant which requires an offer of employment.” Because 8 C.F.R. § 204.5(m)(4) requires a “job offer,” special immigrant religious worker petitions fall within the compass of that regulation. Furthermore, pursuant

² To qualify as employment, the support provided by the church need not take the form of a fixed cash salary. An alien who “receives compensation in return for his efforts on behalf of the Church” is “employed” for immigration purposes, even if that compensation takes the form of material support rather than a cash wage. *See Matter of Hall*, 18 I&N Dec. 203, 205 (BIA 1982).

to 8 C.F.R. § 204.5(c), for most employment-based immigrant classifications that require an offer of employment, only the employer may file the petition. An alien cannot, for example, self-petition as an outstanding professor or researcher. The only employment-based immigrant classification that requires a job offer, and for which current regulations permit an alien to self-petition, is the special immigrant religious worker classification. Thus, the reference at 8 C.F.R. § 204.5(g)(2) to “any petition filed by . . . an employment-based immigrant which requires an offer of employment” can only refer to special immigrant religious worker petitions.

Whatever indications existed *circa* 2002 that the petitioner compensated the beneficiary were no longer in effect by 2005 when the petitioner filed the present petition. By 2003, Bishop [REDACTED] was asserting that the petitioner’s admitted “inability to pay” should be an *affirmative* factor to account for the petitioner’s failure to pay the beneficiary, or indeed any of its workers. Citing one ground of ineligibility as an excuse for a second such ground brings the petitioner no closer to a favorable finding.

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).

We cannot agree with the implied argument that volunteering at a church for a few hours a week constitutes an “occupation” or otherwise entitles the beneficiary to permanent “employment-based” immigration benefits.

The appeal will be dismissed 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. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.