U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

C1

FILE: LIN 06 031 51294 Office: NEBRASKA SERVICE CENTER Date: JUN 20 2007

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:

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.

Laura Dradnck
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is an interdenominational church and ministry. 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 the director of the petitioner's Women's Discipleship Program. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established its ability to compensate the beneficiary.

On appeal, the petitioner offers a statement and copies of documents.

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).

First, we consider the issue of the beneficiary's past experience. 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 December 5, 2005.

In an introductory letter, [redacted] and [redacted]ch, Senior Pastors of the petitioning entity, stated:

> [The beneficiary] has been a part of our ministry on a permanent basis since October 9th, 2003. . . . During this time she has volunteered her services full time in many areas of our work here in Spokane. . . .
>
> [The beneficiary] is an ordained Minister of the Gospel, and it is our intention to employ her full time as the Director of our Women's Discipleship Program. She is specifically qualified to do this. Over the past two years she has helped us minister weekly at a women's secular Drug Rehab facility here in town, and has also taught Bible studies at our men's Discipleship facility, as well as being actively engaged in many other areas of ministry both spiritual and administrative on a daily basis. As she has not been eligible for employment on her current visa, she has done all this voluntarily. We are very fortunate that one of our church members owns many properties, and has allowed her to stay in them rent free, or for as little as $200 per month. The ministry also owns a number of vehicles, and one is available for her use.

The petitioner submits a copy of the beneficiary's Certificate of Ordination, showing that the beneficiary "is hereby set apart and Ordained to the Ministry of the Gospel, and all the rites and ordinances of the Church including marriage, burial of the dead, and feeding the flock of God." The certificate is dated May 1, 2005, indicating that the beneficiary was not an ordained minister prior to that date.

On March 7, 2006, the director instructed the petitioner to submit evidence that the beneficiary engaged in continuous, full-time, compensated religious work throughout the December 2003-December 2005 qualifying period. The director also requested "evidence that the alien will not be dependent on supplemental sources of income for support."

In response, [redacted] and [redacted] stated:

> [The beneficiary] has been with us on a permanent basis since October 9, 2003. She is on a non-immigrant B1 visa from her home country of New Zealand. She has worked with us continually since that time. She did return home to New Zealand for two short periods of time to renew her visa. . . .
>
> [The beneficiary] was not paid a salary by us, therefore no W-2 forms were provided. It was our understanding that [the beneficiary's] non-immigrant B1 visa prohibited her from being gainfully employed in the United States. When she applied for a visa in New Zealand, her request was for one that enabled her to do voluntary ministry work at our church. She was given a B1 visa, and therefore assumed it was on a strictly volunteer basis. Working on this basis has been possible for the following reasons:
>
> 1. [The beneficiary] is a single lady who sold her home in New Zealand and was able to live off the proceeds for a time.

2. One of the members of our congregation is a businessman who owns apartments and rental houses. He made available free of charge an apartment and then later a small house for her use.
3. Our Ministry owns a number of vehicles, and one is available for her use.
4. Since October 2005 she has been Director/Pastor of the Women's Discipleship Program. We have [the beneficiary] and four women living in the home, which was provided free of charge to this ministry until late next year or maybe longer. Food is provided by the ministry, and they use a van that was donated to us for this cause. A friend from her previous church in New Zealand has sent some finances from time to time. All her basic needs are met, but obviously she needs some kind of regular income and benefits. We would like to employ her full time, hence this petition for special immigrant status.

The director denied the petition on July 7, 2006, stating:

> Service records indicate the beneficiary was initially admitted to the United States under the visa waiver program on September 11, 2003 and departed the United States on December 9, 2003. The beneficiary was admitted to the United States again on December 16, 2004 with a B-1 nonimmigrant visa valid through June 15, 2005. There appears to be a time period from December 10, 2003 through December 15, 2004 which is un[ac]counted for, as far as employment purposes. The record does not establish the beneficiary has performed the duties of Director of Women's Discipleship Program continuously for the two-year period preceding the filing of this petition.

The director further stated: "volunteer activities do not constitute qualifying work experience in an employment-based visa petition."

On appeal, the petitioner submits copies of documents showing that the beneficiary was admitted to the United States on December 29, 2003, under a B-1 visa for "Missionary Work." The petitioner claims that the beneficiary remained in the United States until November 4, 2004, at which point she returned temporarily to New Zealand and returned on December 16, 2004. The record contains no direct proof of the claimed November 2004 departure date, but visa extension documents place the beneficiary in the United States in March 2004 and August 2004. The available evidence is sufficient to overcome the director's finding that the beneficiary was outside the United States for over a year from December 2003 to December 2004.

Furthermore, while the petitioner has described the beneficiary as a "volunteer," the petitioner has not described the beneficiary's work as having been wholly uncompensated. The petitioner has claimed to have provided the beneficiary with free food, the use of a church-owned vehicle, and housing at little or no cost. The Board of Immigration Appeals ruled that 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). In that decision, the Board ruled that an alien could not escape the negative consequences of unauthorized

employment simply by accepting alternative methods of compensation. It is only logical that this reasoning should apply to both the negative and positive consequences of such employment.

The petitioner has, therefore, overcome the director's stated grounds for finding that the beneficiary lacked the required experience, and we must for that reason withdraw the director's finding. The director has not, heretofore, ruled on whether or not the very significant changes in the nature of the beneficiary's work between 2003 and 2005 affect the continuity of her work. The petitioner has stated that the beneficiary's duties as the "Director/Pastor" of the Women's Discipleship Program constitute "99%" of the beneficiary's work, but the beneficiary was not a pastor until May 2005, and the Women's Discipleship Program did not exist prior to October 2005.

The remaining issue concerns the petitioner's ability to compensate the beneficiary. 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.

The petitioner's initial submission was silent on the issue of the beneficiary's intended compensation. On March 7, 2006, the director requested "bank letters and or financial records for the religious organization, recent audits, church membership figures, and the number of individuals currently receiving compensation," and "evidence that the religious organization has the financial capability to pay the beneficiary's wage." The director did not cite or quote from 8 C.F.R. § 204.5(g)(2).

In response, the petitioner indicated that the beneficiary's compensation would amount to a salary of $1,000 per month, housing, food, medical benefits, and use of a vehicle. The petitioner submitted balance sheets showing net income of $15,591 for the first four months of 2006, offset by a net loss of $15,414 for calendar year 2005. The petitioner's stated net income in 2004 was $14,078.

The director, in denying the petition, cited 8 C.F.R. § 204.5(g)(2) and asserted that the beneficiary's self-prepared, unaudited balance sheets cannot satisfy the regulatory requirements. On appeal, the petitioner correctly argues that the types of evidence requested by the director in March 2006 were not the same types that the director later listed in the denial notice. The petitioner is also correct in asserting that it is problematic to base the denial on the petitioner's failure to submit specific types of evidence that the director had never previously requested. The petitioner asserts that the director's reference to "recent audits" was vague and did not obviously refer to audited financial statements. The petitioner asserts that additional time is necessary to obtain an audited financial statement. By regulation, the appeal period (30 days) is considerably shorter than the 12 weeks allowed for a request for evidence.

We concur with the petitioner that the director erred by providing a list of allegedly acceptable documents in the request for evidence, and then denying the petition based on the petitioner's failure to adhere to a completely different list of documents. The proper remedy here is to call for the issuance of a new request for evidence, to allow the petitioner the opportunity to obtain an audited financial statement. At the same time, we note that (a) the petitioner is already aware that an audited financial statement is necessary, and is thus in a position to make at least preliminary arrangements; and (b) the regulation at 8 C.F.R. § 103.2(b)(8) specifically states that there can be no extension of the 12-week response period to a request for evidence. Therefore, if the petitioner fails to produce an audited financial statement (or other evidence acceptable under 8 C.F.R. § 204.5(g)(2)) in response to a future request for evidence, it would be proper for the director to deny the petition on that ground.

Pursuant to the above, the director should instruct the petitioner to submit audited financial statements covering the period from the petition's filing date (calendar year 2005) to the present.

We raise, here, one more point. Apart from, but related to the issue of the petitioner's ability to pay is the petitioner's ability to employ the beneficiary. The petitioner asserts that "99%" of the beneficiary's work is as the live-in director/pastor of its Women's Discipleship Program. The petitioner has stated that the program operates from a "home, which was provided free of charge to this ministry until late next year or maybe longer." The petitioner has not explained what arrangements, if any, are in place in the event that this loaned home becomes unavailable in the future. If the church loses the use of the home (which seems a distinct possibility, given the apparently casual nature of the arrangement) and has no replacement site, then the overwhelming justification for the beneficiary's continued employment will disappear. Also, if the church plans to purchase or rent a structure for the program, it is valid to inquire as to how this additional expense would affect the petitioner's continued ability to compensate the beneficiary. The hope that a donated or borrowed structure would be available, however grounded in the petitioner's confidence in its parishioners, cannot suffice to establish the continued availability of a *bona fide* offer of employment. The director must raise, and the petitioner must address, this issue in any further actions arising within this proceeding.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.