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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 25 2009**
WAC 07 101 50564

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:

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) remanded the matter for consideration under new regulations. The director again denied the petition and, following the AAO's instructions, certified the decision to the AAO for review. The AAO will withdraw the director's decision; however, because the petition is not approvable, the AAO will again remand the matter for further action and consideration.

The petitioner is a retreat and hospital described as a supporting ministry of the Seventh-day Adventist 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 lifestyle counselor/instructor therapist. 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 response to the certified decision, the petitioner requests oral argument under 8 C.F.R. § 103.3(b). We need not discuss the merits of this request here, because the petitioner seeks oral argument in order to contest the stated grounds for denial. Because we are withdrawing the director's decision, the petitioner's request for oral argument is moot.

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 March 6, 2009, 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 March 6, 2009, 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 regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation, either abroad or in lawful immigration status in the United States, continuously for at least the two-year period immediately preceding the filing of the petition. The petition was filed on February 23, 2007. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work throughout the two years immediately prior to that date.

The director originally denied the petition on July 13, 2007, under regulations then in effect. While the appeal was pending, USCIS published new, superseding regulations on November 26, 2008. The AAO remanded the petition to the director for a new decision under the new regulations. Because the old regulations are no longer in effect, we will discuss only those elements of the proceeding that relate to the new regulations.

The USCIS regulation at 8 C.F.R. § 204.5(m)(11) contains the following requirements:

Evidence relating to the alien's prior employment. Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:

- (i) Received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns.
- (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.

The petitioner's initial submission included a letter from [REDACTED], Vice President of the petitioning entity, who stated that the beneficiary "has been working in our religious health care facility since 01/01/2004." The petitioner submitted photocopies of monthly pay receipts with the paychecks detached. Each monthly pay receipt shows base pay (usually \$275), a food allowance (usually \$130), and a \$100 rent allowance offset by a \$100 rent payment and a \$65 deduction marked "WW Curr." December pay receipts show net payments to the beneficiary totaling \$3,990 for 2004, \$4,080 for 2005, and \$4,080 for 2006. The most recent pay receipt submitted was dated January 31, 2007; the petition was filed several days before the issuance of the February 28, 2007 payments.

stated that the beneficiary “elected not to file federal income tax returns” for 2004-2006 because her “total income was below the amount required to file income tax returns.” Therefore, stated, “we are unable to send Form 1040 or the W-2’s for the relevant years.”

The petitioner also submitted a copy of its Internal Revenue Service (IRS) Form 990, Return of Organization Exempt From Income Tax, for 2005. On Schedule A, Line 1 of that return, the petitioner indicated: “All of our workers are volunteers and are given a small stipend. Housing + utilities are supplied. A food budget is given to be used at our on-campus commis[s]ary. Dept. heads, doctors, and officers are given an extra \$25/month.” Part II, lines 25 through 28 of the return indicated that the petitioner spent \$97,290.00 on compensation of officers and directors, \$595,832.44 on other salaries and wages, and \$255,096.53 on other employee benefits. On line 29, the petitioner claimed to have paid no payroll taxes.

On Part V-A of the return, the petitioner reported the following figures for compensation of officers and directors:

Title	Hours per week	Compensation
President	40	\$6,360.00
Administrative Vice President	40	6,360.00
Mission Vice President	20	3,180.00
Secretary	3	454.50
Treasurer	3	454.50

The figures quoted above are largely consistent with the petitioner’s description of the pay system. The salaries of the president and administrative vice president are proportional to those paid to the secretary and treasurer plus \$25 per month (equal to \$300 per year). Compared to the first two officials, the mission vice president worked half the hours per week and received half the pay.

On May 9, 2007, the director issued a request for evidence (RFE), instructing the petitioner to “[s]ubmit copies of the petitioner’s IRS Forms W-3 (Transmittal of Wage and Tax Statements) evidencing wages paid to employees for 2005 and 2006. **Please note that no W-2 or 1099 was submitted as proof that the beneficiary was employed by the petitioner. All documents for both years must list all paid employees**” (emphasis in original).

In response, stated that the beneficiary’s pay stubs show that she has received \$6,060 per year since 2004, and will continue to receive the same rate of pay. That figure refers to the beneficiary’s gross pay, without factoring in deductions. (Thus, referred to the beneficiary’s \$100 monthly rent credit, without taking into account the immediate collection of the same amount.) Also, the beneficiary’s gross pay in 2004 was \$5,940, not \$6,060. The stated figure is correct, however, for 2005 and 2006.

The director denied the petition on July 13, 2007, stating:

After a review of the evidence it is apparent that beneficiary has been a volunteer worker and/or a part time employee. No verifiable documented proof was submitted to illustrate that the beneficiary has been a paid full time employee for the petitioner. The petitioner was specifically asked to submit either W-2 forms or 1099's but failed to submit either. Instead they submitted pay check stubs. It should be noted that the beneficiary failed to report any of her income to the Federal Government and the petitioner claims on their 2005 Federal Tax return (Part 1, Schedule A, Form 990) that all their workers are volunteers. The petitioner also claims that they are providing free housing and health benefits to the beneficiary but failed to provide documented evidence to support those claims.

Although the beneficiary possibly has been involved with the aforementioned ministry, in what capacity is not clear. The petitioner has provided no evidence of a legitimate job offer and the beneficiary has never filed Federal Tax returns. . . . It is presumed that any work that the beneficiary has performed has been . . . on a volunteer basis.

Therefore, the evidence is insufficient to establish that the beneficiary has been performing full-time work as a religious worker for the two-year period immediately preceding the filing of the petition.

We will discuss the petitioner's appellate submission further below.

The AAO remanded the petition to the director on December 11, 2008, for consideration under new regulations published on November 26, 2008. On February 4, 2009, the director advised the petitioner of the new regulations and instructed the petitioner to submit newly required documentation. The director received a timely response to this notice on March 3, 2009.

The director again denied the petition on May 5, 2009, using language almost identical to the above-quoted passages from the first decision, and certified the decision to the AAO. [REDACTED] noted as the similarities in response to the certified denial, asking "whether the director took the time to review the new evidence."

On appeal from the first decision, [REDACTED] indicated that the petitioner's full time workers receive "a cash stipend varying from \$265 - \$325 a month," and that the beneficiary "has been working for our organization in a full-time capacity (8 hours a day, 40 hours a week) since August 01, 2003." [REDACTED] asserted that the petitioner does not withhold taxes or issue IRS Forms W-2 to its workers because "[f]or purposes of the Internal Revenue Code our organization possesses the characteristics in Rev. Proc. 91-20 1991-1C.B.524 to a substantial degree and, accordingly . . . they consider [the petitioner to be an] organization similar to a religious order." The IRS document thus mentioned (available at http://www.irs.gov/pub/irs-tege/rp_1991-20.pdf) sets forth the following criteria for a religious order:

[The IRS] will use these characteristics, as set forth below, in determining whether an organization is a religious order.

1. The organization is described in section 501(c)(3) of the Code.
2. The numbers [*sic*] of the organization vow to live under a strict set of rules requiring moral and spiritual self-sacrifice and dedication to the goals of the organization at the expense of their material well-being.
3. The members of the organization, after successful completion of the organization's training program and probationary period, make a long-term commitment to the organization (normally more than two years).
4. The organization is, directly or indirectly, under the control and supervision of a church or convention or association of churches, or is significantly funded by a church or convention or association of churches.
5. The members of the organization normally live together as part of a community and are held to a significantly stricter level of moral and religious discipline than that required of lay church members.
6. The members of the organization work or serve full-time on behalf of the religious, educational, or charitable goals of the organization.
7. The members of the organization participate regularly in activities such as public or private prayer, religious study, teaching, care of the aging, missionary work, or church reform or renewal.

In determining whether an organization is a religious order, all the facts and circumstances must be considered.

Rev. Proc. 91-20, 1991-1 C.B. 524 further states: "Organizations and individuals may request rulings from the Service on whether they are religious orders, or members of a religious order, for FICA tax, self-employment tax, and federal income tax withholding purposes by following the procedures in Rev. Proc. 91-1, 1991-1 I.R.B. 9." The record contains no evidence that the petitioner has requested such a ruling from the IRS. A May 31, 2003 letter from the IRS indicates that the petitioner "is liable for taxes under the Federal Insurance Contributions Act (social security taxes) on remuneration of \$100 or more the organization pays to each of its employees during a calendar year."

While it is not clear whether the IRS recognizes the petitioner as a religious order, because the petitioner has provided no evidence to that effect, it appears that the petitioner has acted under the good faith impression that it qualifies, or would qualify, as a religious order under the terms set forth above. Even if the petitioner is mistaken in its belief that it qualifies as a religious order, this would not show or imply that the beneficiary has been a part-time worker or an uncompensated employee.

The decision about whether the petitioner qualifies as a religious order lies with the IRS, not with USCIS or the AAO, and therefore we will attempt no analysis of the petitioner's organization relating to the seven listed attributes of a religious order. We submit, however, that the petitioner

could avoid much unnecessary confusion in the future by obtaining an IRS ruling on this issue, or by providing documentation of an existing ruling. In the alternative, if the IRS should find that the petitioner is not a religious order, then the petitioner would be on notice that it must change its compensation practices.

The regulation at 8 C.F.R. § 204.5(m)(10) does not absolutely require IRS Forms W-2 in all cases. Rather, the regulation states: “If IRS documentation, such as IRS Form W-2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.” The director cannot dismiss the petitioner’s evidence simply because the petitioner did not submit Forms W-2. At the same time, however, an organization cannot account for the lack of IRS Forms W-2 merely by claiming that it qualifies as a religious order. The organization must also provide “comparable, verifiable documentation” of the alien’s work for the organization. The director must evaluate this alternative evidence. The petitioner in this proceeding has submitted ample secondary evidence of the beneficiary’s work at the petitioning organization, including detailed payroll records.

The director acknowledged the petitioner’s submission of check stubs, but failed to explain why these documents are not, on their face, evidence that the petitioner compensated the beneficiary. The director simply discounted the check stubs because they are not IRS Forms W-2. We note that the record contains no bank documentation showing that the paychecks were processed for payment, but the record contains substantial other supporting evidence. We find that the petitioner has established by a preponderance of the evidence that the beneficiary received compensation, both monetary and otherwise. The petitioner has also established that the low level of the beneficiary’s compensation is a result of the petitioner’s payment practices, and not because the beneficiary works only part-time for the petitioner.

Certainly, there has been some confusion as a result of the petitioner’s choice to call its workers “volunteers” rather than “employees,” even though the workers clearly receive compensation. This choice of terminology, however, is not a valid ground for denial of the petition. The director correctly asserted that the IRS Form 990 return indicated that “all of [the petitioner’s] workers are volunteers,” but the director failed to acknowledge the passage immediately following the quoted phrase, indicating that workers receive a stipend, housing, utilities, and money for meals. The selective quotation of the “volunteers” reference, without the surrounding text, falsely suggested that the petitioner’s workers receive no compensation.

Because we have withdrawn the only stated ground for denial, the director’s decision cannot stand. Nevertheless, examination of the record reveals another issue of concern that prevents outright approval of the petition at this time. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The regulation at 8 C.F.R. § 204.5(m)(5) defines “religious occupation” as an occupation that meets all of the following requirements:

- (A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination.
- (B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.
- (C) The duties do not include positions that are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible.
- (D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

In a letter submitted with the initial filing of the petition, listed the beneficiary’s daily duties as follows:

- She will be giving many and varied hydrotherapy treatments and Swedish massage treatments as prescribed by the doctors.
- Explain the benefit of each treatment and teach the patient how to do similar types of treatment at home.
- She will counsel with patients on the close correlation between health of body and one[’]s relationship with God, encouraging them to seek God’s help in the healing process, and in Scripture reading.
- She will counsel with the patients on the need to change to a plant based diet for optimal health according to Bible principles of faith and trust.
- She will help the patients or guests on an individual basis with regard to exercises which will benefit their particular needs.
- Take special care to provide comfort and spiritual support for those suffering from depression and emotional instability.
- Attend to fomentations, stock with clean linen and set up booth for next treatment, disinfect showers, basins, buckets and pitchers after each use.
- Chart treatments and make out charges, taking note of untoward reactions and authorized substitution of treatments.
- Disinfect mattresses and treatment tables.
- She will teach the hydrotherapy course class each week.
- Continue in her advisory capacity in the health food store.
- She will teach the Health Evangelism classes to the Spanish students[.]
- Continue her ministry to the Hispanic churches in the community.

. . . As a lifestyle counselor her duties not only cover the physical aspects of our patients, but also their spiritual wellbeing and have a religious significance. . . .

Our therapists and health-care workers are all practicing Christians. . . . We consider all functions to be of a religious nature.

In a more recent submission, [REDACTED] Director of Adult Bible Study Guides at the General Conference of Seventh-day Adventists, Silver Spring, Maryland, contended:

It is clear for all Christian traditions that the duties of all personnel involved in Christian healing ministries can not be seen as mere medical techniques, and professional skills or certain rituals. All of them depend on Christian spirituality . . . and spiritual discipline which influences all aspects of their personal and professional life. Therefore they should be seen as part of a broader network of duties that include the medical, technical, social and psychological aspects, as well as religion and traditional approaches to healing constituting practice of religion.

. . . [The petitioner] is a religious entity and those employed there, in whatever job, function in a religious capacity.

added: "this letter does not speak for the General Conference as an institution," thereby indicating that his letter does not represent the official position of the denomination.

While the determination of an individual's status or duties within a religious organization is not under the purview of USCIS, the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests within USCIS. Authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States. *Matter of Hall*, 18 I&N Dec. 203 (BIA 1982); *Matter of Rhee*, 16 I&N Dec. 607, 608 n.2 (BIA 1978).

In keeping with Congressional intent, USCIS regulations restrict the definition of a religious occupation. The petitioner cannot sidestep these regulations by declaring that the religious nature of a given beneficiary's work is determined not by what she does, but by where she does it. The petitioner's overall institutional mission does not necessarily infuse all activities within the organization with religious significance.

We note that the petitioner's staff application, available at [REDACTED] asks this question:

CHURCH AFFILIATION

Seventh-day Adventist? No Yes Other _____

There is no indication that answering “no” would immediately disqualify applicants. Mr. [REDACTED] assertion that the petitioner’s “therapists and health-care workers are all practicing Christians” does not compel the narrower conclusion that they are all practicing Adventists. Hiring of staff members of other Christian denominations (whether called “volunteers” or “employees” or some other term) would contradict the claim that all duties performed within the petitioner’s walls are inherently traditional religious functions of the Adventist denomination.

It appears that additional evidence is necessary to show that the petitioner’s duties primarily relate to a traditional religious function within the Seventh-day Adventist Church. So long as this issue remains unresolved, the record as it now stands does not support approval of the petition.

Therefore, the AAO will remand this matter for a new decision, specifically addressing the nature (religious or otherwise) of the beneficiary's duties. The director must issue a new denial notice, containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. 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; however, the petition is currently unapprovable for the reasons discussed above, and therefore USCIS may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.