U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

L 2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 2 4 2005
WAC 03 207 53115

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:

[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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office 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 an assistant pastor. The director determined that the petitioner had not established (1) that the beneficiary had the requisite two years of continuous work experience as an assistant pastor immediately preceding the filing date of the petition; (2) that the beneficiary has the required two years of membership in the petitioner's denomination; or (3) the petitioner's ability to pay the beneficiary the proffered wage.

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 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)(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 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 8, 2003. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of an assistant pastor and that the beneficiary was a member of the petitioner's denomination throughout the two years immediately prior to that date; from July 8, 2001 through July 8, 2003.

The Form I-94, Arrival and Departure Record, indicates that the beneficiary initially entered the United States on July 11, 2002 as a B-2 nonimmigrant with authorization to remain in the United States until January 10, 2003. On November 21, 2002, the beneficiary received approval to change her nonimmigrant status to that of an R-1 nonimmigrant with authorization to remain in the United States until November 14, 2005. As the

beneficiary was outside of the United States for at least half of the two-year period, her experience in the United States cannot suffice to meet the experience and denominational membership requirements.

With the initial filing, the petitioner provides a letter detailing the beneficiary's work experience. [redacted] Senior Pastor of the petitioning church, states:

> Since her graduation from the Seminary in 1998, [the beneficiary] has continuously, without interruption, ministered as an Assistant Pastor and comes with the highest recommendations from her former Church, i.e., [Ganseok] Jeil Church in Incheon, Korea.
>
> * * *
>
> In October 2002, we obtained permission from her home church, which agreed to dispatch [the beneficiary] to our church on a temporary basis; she has been with us, Concord Church, as an Assistant Pastor since November 2002 under R-1 status.

The petitioner also submits a translated copy of a document entitled "Certificate of Career," issued by [redacted] Senior Pastor of Ganseok Jeil Church, dated October 6, 2002. [redacted] asserts that the beneficiary worked as an Assistant Pastor in the Children's Department from March 1, 1998 to the present and as an Instructor in the [redacted] from February 17, 2002 to the present. [redacted] assertion that the beneficiary worked as an Assistant Pastor until October 2002 is contradicted by the fact that the beneficiary entered the United States in July 2002. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director requested additional details and documentation regarding the beneficiary's work during the qualifying period, including "evidence to establish how the beneficiary has been supporting . . . herself."

In response, the petitioner states that the beneficiary "began to serve as a full-time Assistant Pastor for [Ganseok] Jeil Church from March 1998 until she transferred to our church in November 2002." The petitioner further states that the beneficiary received remuneration from [redacted] Church in the amount of "approximately US $9000 to 10,000 per annum."

Like the assertion made by [redacted] the petitioner's claim that the beneficiary "served as Assistant Pastor from March 1998 until she transferred to our church in November 2002" is not supported. The petitioner fails to account for the time the beneficiary entered the United States as a B-2 nonimmigrant when she was not working for either [redacted] Church or the petitioner, more than a four-month gap in the beneficiary's work history during the qualifying period.

On appeal, counsel for the petitioner argues that the regulation does not "exclude bona fide religious workers with several years of service from obtaining I-360 benefits by virtue of minor breaks, including vacations, or even for a 'leave.'" As it relates to this case, counsel states, "an overseas trip for a visit to the U.S. does not indicate any significant interruption with the continuous performance of her religious vocation (especially where there was no new non-religious occupation interceding." We are not persuaded by counsel's argument. While we agree that minor interruptions in a beneficiary's employment such as a vacation may not preclude a

finding of continuous employment, in this case we do not find the interruption of more than six months[1] to be a minor or inconsequential break in the beneficiary's employment.

In addition to lacking evidence of the beneficiary's continuous work experience, the record also lacks evidence that the beneficiary was remunerated during the requisite period either by the petitioner or by [redacted] Church.

The record contains a translated document entitled "Payroll Record," submitted by [redacted] In this document, [redacted] provides the following information related to the beneficiary's pay:

1998: 700,000 (KRW)/month
March – Dec. (10 months): Total 7,000,000 (KRW)

1999: 750,000 (KRW)/month
Jan. – Dec. (12 months): Total 9,000,000 (KRW)

2000: 800,000 (KRW)/month
Jan.- Dec. (12 months): Total 9,600,000 (KRW)

2001: 800,000 (KRW)/month
Jan. – Dec. (12 months): Total 9,600,000 (KRW)

2002: 850,000 (KRW)/month
Jan. – Oct. (10 months): Total 8,500,000 (KRW)

The petitioner does not provide any contemporaneous, documentary evidence to support [redacted] claims of the beneficiary's pay. We note that [redacted] continues to assert that the beneficiary was working and, in fact, receiving pay from [redacted] Church from July of 2002 until October 2002 although she was no longer in Korea. Given these inconsistencies, we cannot accept [redacted] unsubstantiated assertions of payments to the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

As it relates to the petitioner's remuneration of the beneficiary, the petitioner states that as an R-1 nonimmigrant, the beneficiary "received a monthly stipend of $2000 as well as non-monetary benefits." To support this assertion, the petitioner submits copies of pay stubs showing the beneficiary's receipt of $2165.67 for the periods covering: 1/1/2003 – 1/31/2003; 2/8/2003 – 2/28/2003; 3/1/2003 – 3/31/2003; 4/3/2003 – 5/2/2003; 5/28/2003 – 6/27/2003; 6/26/2003 – 7/25/2003; and 8/27/2003 – 9/26/2003. It is important to note that the petitioner has not submitted any evidence of payment made to the beneficiary in November or December 2002, although the petitioner claims the beneficiary was working and being remunerated for full-time employment.

We further note numerous discrepancies in the pay stubs submitted by the petitioner. First, the salary amount in the year to date column shown in check number 25262 (January 1, 2003 through January 31, 2003) shows a

[1] Although the petitioner claims the beneficiary's employment with the petitioning church began in November 2002, the record contains no evidence of the beneficiary's employment prior to January 2003.

higher amount for the beneficiary's year to date salary than the following month's year to date salary amount. We note similar discrepancies in several other checks. For instance: checks numbered 25371 and 1313 contain the same year to date salary of $2165.67; the checks numbered 1040, 1151, 1221, and 1485 contain the same year to date salary of $6497.01; the checks numbered 25262, 25475, and 1431 contain the same year to date salary of $4331.34. There is no explanation as to how the beneficiary's year to date salary could have stagnated or decreased with each paycheck. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On appeal, counsel submits a copy of the beneficiary's 2003 Form W-2 Wage and Tax Statement, but no further evidence of remuneration from the beneficiary's previous employer in Korea or evidence of the beneficiary's remuneration by the petitioner in November and December 2002. In her brief, counsel indicates that record of the beneficiary's payments "was retrieved from her church's old books and the church provided an official statement." Although counsel states the documents in question were "sent by DHL several days ago" and would be forwarded to CIS "as soon as it arrives," to date, more than nine months later, no such documentation has been received.

Counsel also argues that the regulations make a "distinction between 'performing' and 'working'" and that CIS requirement of "full-time, formal employment . . . is clearly contrary to the legislative intent, the INA and the regulations, FAMs, and past interpretations, and does not reflect the reality of religious work or even many religions, religious vocations and cultures."

However, 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 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 take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

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. Com. 1963) and *Matter of Sinha,* 10 I&N Dec. 758 (Reg. Com 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 salaried. To hold otherwise would be contrary to the intent of Congress.

In this instance, the petitioner has failed to provide reliable evidence that the beneficiary was remunerated for her services during the requisite two-year period either by the petitioner or her former employer in Korea. This lack of evidence further precludes a finding that the beneficiary was continuously working and had the requisite two years experience as an Associate Pastor immediately preceding the filing date of the petition.

The next issue is whether the beneficiary has the requisite membership in the same denomination as the petitioner during the two-year period prior to filing.

In his decision, the director found the petitioner failed to establish a connection between the petitioner and the Ganseok Jeil Church in Korea. Specifically, the director found no "institutional relationship or common governing body" between the petitioner and [redacted] Church. The director noted that the petitioner is a "Protestant Christian Church" while the [redacted] Church is an "Evangelical Holiness Church."

On appeal, counsel argues that the two churches "share the same creed, statement of faith, form of worship, formal and informal code of doctrine, discipline, religious services and ceremonies, and established places of religious worship" but provides no documentation to support her argument. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record reflects that the petitioner is a part of the Church of the Nazarene, while the [redacted] Church is part of the Evangelical Holiness Church. A historical statement submitted with the petition indicates that between 1907 and 1908 the "Association of Pentecostal Churches of America, the Church of the Nazarene, and the Holiness Church of Christ were brought into association with one another," and that in 1919, the General Assembly "officially changed the name of the organization to the Church of the Nazarene . . . ." The record contains no evidence that the Evangelical Holiness Church is a part of, or even associated with, the Church of Nazarene. Accordingly, the record does not support a finding that the petitioner and Ganseok Jeil Church are the same denomination, and therefore, that the beneficiary has the requisite two-years membership in the same denomination as the petitioning church.

The remaining issue is whether the petitioner has demonstrated its ability to pay the beneficiary the proffered wage. In his denial, the director noted that the petitioner's submission of "unaudited balance sheets and a few bank statements" was insufficient to establish the petitioner's ability to pay.

On appeal, counsel argues the director failed to acknowledge the petitioner's submission of membership figures, DE6 Quarterly Wage and Withholding Reports, and an employee list." Counsel asserts:

> These documents, especially the DE6 forms, clearly indicate that the petitioner has been continuously supporting 10 – 11 employees, including the beneficiary . . . The petitioner has reported an annual payroll of $174,000+ to the State of California, [w]e believe this is also independent, objective, credible and clearly sufficient evidence . . .

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.*

[Emphasis added].

In this instance, the petitioner has not submitted any of the required types of evidence. As noted by the director in his decision, the petitioner's balance statements are not considered as audited financial statements as they are based only upon the representation of the petitioner. The petitioner's copy of a quarterly tax return, showing wages paid to workers, is not the type of "tax return" contemplated in the regulations. For a non-profit organization, the appropriate document would be Form 990, Return of Organization Exempt from Income Tax. The remaining evidence, including the additional evidence submitted on appeal are not the types of evidence required by the regulation. Though the petitioner is free to submit other kinds of documentation, such submissions must only be *in addition to*, rather than *in place of*, the type of documentation required by regulation. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

While the determination of an individual's status or duties within a religious organization is not under the purview of Citizenship and Immigration Services (CIS), the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests within CIS. 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 (BIA 1978).

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.