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U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

B6



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: NOV 22 2004

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a church. It seeks to employ the beneficiary permanently in the United States as a choir director. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the beneficiary would be employed in a permanent and full-time position and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

On the Form ETA-750A certified labor certification application, the proffered position would be performed for 40 hours per week with the following additional description of duties and scheduling:

Conduct, direct, plan, and lead performances by church choir at Sunday services, weddings, funerals and all other church functions that require music:

Sunday: 8:00 a.m. – 5:00 p.m.

Monday: 5:00 p.m. – 9:00 p.m.

Tuesday: 5:00 p.m. – 9:00 p.m.

Wednesday: 5:00 p.m. – 9:00 p.m.

Thursday: 5:00 p.m. – 9:00 p.m.

Friday: 5:00 p.m. – 9:00 p.m.

Saturday: 3:00 p.m. – 6:00 p.m.

Additional 8 hours per week necessary to select, arrange and rehearse music.

Because the director deemed the evidence submitted insufficient to demonstrate that the proffered position would be permanent and full-time, on May 5, 2003, the director requested additional evidence pertinent to that issue. The director requested the following:

[C]opies of the bulletin or news letter for the past 6 month [sic] that serves as notification to the congregation reflecting the time and date of the religious services that are conducted on Sundays or any other day of the week.

Submit an explanation with documentation as to why the choir director's services are required Monday through Saturday for a total of 23 hours per week. If the time is spent on rehearsal, submit documentation as to why it would be necessary to rehearse for this many hours, week after week. After spending 23 hours for choir duties, it is necessary for the director to spend another 8 hours per week on selecting, arrange and rehearse [sic] music. If the beneficiary is rehearsing music during the aforementioned 8 hours – what are her duties for the 23 hours – Monday through Sunday.

Submit a list of your total membership.

Additionally, the director asked why the beneficiary was already employed but not being paid the full proffered wage of \$28,016.00, as reflected on the Form ETA-750A.

In response, the petitioner submitted copies of its church bulletin in Korean with a partial English translation. The church bulletin reflects the following schedule for its congregation with respect to its music offerings:

Monday: Kid's music class, 5:00 p.m. – 9:00 p.m. (4 hours)
Tuesday: Music instrument class for community, 5:00 p.m. – 9:00 p.m. (4 hours)
Wednesday: Praise-choir team practice, 5:00 p.m. – 9:00 p.m. (4 hours)
Thursday: Praise and worship: 8:00 p.m. – 11:00 p.m.¹ (3 hours)
Friday: Women's vocal group practice: 5:00 p.m. – 9:00 p.m. (4 hours)
Saturday: Vocal lesson class: 5:00 p.m. – 9:00 p.m. (4 hours)
Sunday: Worship, 1:00 p.m.

Counsel's accompanying letter states that in addition to the 23 hours per week reflected in the above schedule for Monday through Saturday:

because the director must be available on a daily basis for funeral and other unplanned services, she must set aside her time and not engage in other activities to be available, just as on-duty firemen, when not performing maintenance work and other firehouse duties, must wait and be available to respond to sudden emergencies.

Additionally, counsel states that in response to the director's inquiry about rehearsal, the activities reflected in the above schedule are not rehearsals but:

music lessons, instrumental, vocal, harmonic, contemporary gospel, etc., to benefit the congregation as a whole. An additional eight hours, apart from the above duties, are required to 1) actually prepare various groups just to present successfully to the congregation on formal worships, and 2) study the planned sermon of the week and select the music appropriate or in harmony of the weekly message of the pastor or seasonal observance.

Finally, counsel submits a membership list, and states that since the beneficiary is working in an R-1, nonimmigrant visa category, the petitioner is not required to pay her the prevailing wage rate, and need not pay her the proffered wage until she adjusts to lawful permanent residence. Counsel submits the petitioning church's budget.

The director determined that the evidence submitted did not establish that the beneficiary would be employed in a permanent and full-time position, and, on September 3, 2003, denied the petition. Citing the statutory provisions governing the preference category that provides for skilled labor employment offers "not of [a] temporary or seasonal nature," as well as DOL regulations at 20 C.F.R. § 656.3, defining employment as "permanent full-time work by an employee for an employer other than oneself," the director was skeptical that the beneficiary would be

¹ Counsel states that this is a three-hour gathering, which is not reflected in the translated materials. Nothing was specifically provided concerning Sunday.

employed as a permanent, full-time employee. The director believed it would be difficult for children to engage in 16 hours per month in a nighttime music class, since children would also need to eat, do their homework, travel to their homes, and get ready for school the following day. Additionally, the director noted that the petitioner has 59 members and it had not been established how many children out of those 59 would volunteer for the music class. The director stated that the petitioner's response to the director's request for evidence altered the terms of the labor certification application since the petitioner initially stated working hours of 5:00 p.m. to 9:00 p.m. for Thursdays but then changed it to three hours beginning at 8:00 p.m. The director stated that 32 hours per month of vocal lessons, provided on both Fridays and Saturdays, seemed excessive for a congregation of 59. The director cited a lack of evidence that the beneficiary could be involved in three ceremonies held in different places on Sundays. Finally, the director stated that it was unrealistic to compare the proffered position's duties to a volunteer fireperson and the emergencies that arise since funerals typically occur in the morning or early afternoon but the proffered position's hours begin no earlier than 5 p.m. on most days.

On appeal, counsel asserts that the petitioner's congregation is comprised of 59 households, not members. Thus, the petitioner's total membership is approximately 100. Additionally, counsel submits attendance charts for the kid's music class, as well as a list of team members for the women's vocal team with statements of their participation. Finally, counsel submits a letter from the petitioner and states that the proffered position requires flexibility.

The petitioner's letter submitted on appeal states, in pertinent part, the following:

Our church is only four years old. Young as it is, it has steadily grown over the few years and has now become a promising home of faith for 59 families comprising about 100 members. . . . And [the beneficiary's] services as the music director have been pivotal in our church's development since its inception and will be so to a greater degree in the future. She not only directs our church's choir most graciously but also supervises many other music programs of the church in a most efficient way, including those for the youths and children. On Sundays she works all day, leading the congregation in preliminary chanting of humans, directing the choir, preparing the Bible class, etc. Her services for the church are not limited to Sundays. Her role in our midweek worships, usually offered on Thursdays, is also very important, because they are specially music-oriented services. And our daily dawn-prayer sessions held Mondays through Saturdays are usually preceded and enhanced by her music. Obviously, the music director spends a lot of time preparing for all these activities.

If Citizenship & Immigration Services (CIS) fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The director clearly believed facts in the instant petition to be untrue. However, the AAO has *de novo* review in this matter.² CIS policy has been to defer to DOL when DOL has certified the

² 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).

terms of a labor certification application.³ Additionally, in the context of revocations, an investigation must establish that the petitioner failed to meet the burden of proof on an essential element that would warrant the denial of the visa petition. Observations contained in an investigative report that are conclusory, speculative, equivocal, or irrelevant do not provide good and sufficient cause for the issuance of a notice of intent to revoke the approval of a visa petition and cannot serve as the basis for revocation. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988).

The AAO finds the director's decision to be irregular, speculative, and unfounded. The petitioner submitted evidence to corroborate its extensive musical offerings in connection with its organized religious worship. Attendance sheets and notarized statements, as well as a statement from the petitioner itself in addition to its attestations to DOL, certified by DOL, and subsequently on its visa petition, indicate that the proffered position will be permanent and full-time. No evidence in the record of proceeding indicates that the petitioner will offer a position contrary to the stated terms on the Form ETA-750A.

The director speculated about the petitioner's congregation's youth and their ability to juggle extracurricular activities with their home, school, and private life. This office is convinced as to the petitioner's response to the director's contention. The petitioner provided evidence that the four-hour kid's music program is broken into two classes with regular attendance. The director's concern about size is irrelevant as counsel correctly notes that it is the petitioner's needs that are evaluated in this preference visa context. The director's speculation about excessive vocal hours or the timeframes of funeral services is inappropriate absent investigated and observed dalliances. While the AAO notes that the petitioner responded with minor inconsistencies at times, such as the change from the 5:00 p.m. to 9:00 p.m. schedule on Thursdays to 8:00 p.m. to 11:00 p.m., counsel and the petitioner also conceded that flexibility is required for a choir director at its church. The petitioner has consistently maintained with corroborating evidence that a choir director is required to prepare, perform, and supervise its worship session on Thursday evenings. The translated church bulletin corroborates that music class hours change, also evidencing the flexibility of musical offerings. The overall substance of the proffered position's terms and conditions, however, retains its overall integrity and is corroborated with church bulletins, attendance sheets, and witness statements. The AAO is loath to deny the petition on a basis that would mean overturning DOL's review of the proffered position's terms set forth on the petitioner's labor certification application.

Beyond the decision of the director, there is not enough evidence in the record of proceeding to ascertain the petitioner's continuing ability to pay the proffered wage beginning on the priority date.⁴ The petitioner has provided proof of actual employment and payment of wages to the beneficiary that is \$11,800 less than the proffered wage in 2001. There is no evidence concerning the petitioner's ability to pay the proffered wage in 2001. The petitioner's budget for 2002 provided in response to the director's request for evidence only shows \$7,300 in income after expenses. Thus, the evidence, as currently constituted, does not demonstrate the

³ See a memorandum from the acting associate commissioner to the director of the AAO, dated February 17, 1993, denying the ability of CIS to confirm an alien's qualifying employment experience with the petitioning entity because it goes "behind the labor certification process."

⁴ 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).

petitioner's ability to pay the proffered wage in either 2001 or 2002. However, the director failed to explore this issue prior to the instant appeal.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 3, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.