

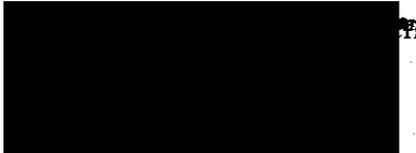


C1

U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File: [Redacted] Office: NEBRASKA SERVICE CENTER

Date: AUG 14 2001

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: 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)

IN BEHALF OF APPLICANT: [Redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
for Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks classification of 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), in order to employ him as a "gospel musician/liturgical worker."

The director denied the petition determining that the petitioner failed to establish that the proposed position constituted a qualifying religious occupation for the purpose of special immigrant classification.

On appeal, counsel for the petitioner submitted a written brief arguing, in pertinent part, that a gospel musician is a traditional religious function similar to that of a cantor or religious instructor, and that the Service had already determined that the position was a religious occupation in approving a prior application for temporary religious worker classification.

Section 203(b)(4) of the Act provides classification as a special immigrant religious worker to a qualified alien 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, 2003, 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, 2003, 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 petitioner is an independent church recognized by the Internal Revenue Service with the appropriate tax exempt status. The petitioner did not indicate the size of its congregation, but claimed total 1998 expenses of \$68,112. The beneficiary is a native and citizen of Trinidad who was last admitted to the United States on July 27, 1995, in B-2 visitor classification, as a member of a church band. The record shows that the beneficiary was granted R-1 nonimmigrant religious worker status valid from April 27, 1999 to April 25, 2001. The petitioner asserted that the beneficiary is one of a four-member gospel music band that it has employed since April 1997.

At issue in the director's decision is whether a member of a gospel band employed by the church constitutes a religious occupation for the purposes of this visa petition proceeding.

8 C.F.R. 204.5(m)(2) states, in pertinent part, that:

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The examples listed reflect that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as religious counselor, catechist, and cantor, are examples of qualifying religious occupations. Persons in such positions must complete prescribed courses of training established by the governing body of the denomination and their services are directly related to the creed and practice of the religion. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature. Persons in such positions must be qualified in their occupation, but they require no specific religious training or theological education.

The Service therefore interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that specific prescribed religious training or theological education is required, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

In this case, the duties of the position were described as being a member of a gospel band that performed at the petitioner's Sunday and weekday services. The record reflects that the group, called "Livin' Version," also performs at events with other area churches and at secular events. The record also indicates that the group has recorded a compact disc album of gospel music. The petitioner further asserted that the members of the group engage in Bible study groups and are part of the church's outreach youth ministry to urban young people. The petitioner asserted that the beneficiary and other band members are compensated with housing, transportation, and approximately \$10,000 per year and have not engaged in supplemental employment.

Counsel argued that the beneficiary's and Livin' Versions':

...R-1 employment is in the capacity of Gospel Musicians/Liturgical Workers, which is a traditional religious occupation pursuant to 8 CFR 204.5(m)(2). The acceptance of the beneficiaries by MHF's faith community and the inner-city youths who attend MHF's youth ministries has been truly remarkable. The beneficiaries' youth ministry liturgy duties include instilling a desire to worship in the inner-city youths and aiding them in that worship through the use of gospel music, drama, and sharing the word of God by preaching the gospel. The beneficiaries also have standard liturgical duties at MHF's weekday and weekend worship services.

Counsel disputed the director's decision and argued that the proposed position is qualifying in that:

Clearly, it was not the intent of Congress to extend visas to those performing purely administrative or secular work, even if the individual was employed by a religious institution. However, Congress did intend to afford special immigrant status to those individuals performing work of the type related to traditional religious functions, such as religious instructors, missionaries, cantors, and liturgical workers. Such is the case here.

As noted above, the regulations do not provide a specific definition of a qualifying lay religious occupation. The regulation was broadly worded as a "traditional religious function" as a means to accommodate the range of religious occupations in various religious traditions. The Service interprets its own regulation as stated above.

In this case, there is no claim that the beneficiary has any formal theological training. The petitioner asserted that the beneficiary has engaged in Bible study over the course of the last ten years, but there is no indication that this entailed any greater degree of study than an average member of the congregation. Nor has the petitioner demonstrated that employing a gospel band is a traditional practice in its independent organization or other similar religious denominations. Furthermore, the petitioner failed to provide a detailed description of the Bible study groups it claims are led by members of the band.

The fact that a band performing gospel music may communicate the petitioner's religious beliefs and may attract new members to its church is not disputed. The argument that such duties rise to the level of a cantor or liturgical worker, however, is not persuasive. The Service interprets these examples in its own regulations to mean that such positions are clearly distinguished from the normal participation in religious life of an average member of the congregation. That is, that a distinct religious training is required and that the position is traditionally a full-time paid occupation within the religious denomination.

Here, musical ability is the principal qualification of a gospel musician, not any formal theological training. Many religious organizations sponsor "youth outreach" programs that include activities such as recreational activities, vocational training, remedial education, and mental health counseling. Volunteers and employees in such programs will often receive basic orientation or training from the sponsoring organization that is founded in the sponsor's religious tenets. While workers in such programs may be motivated by their religious beliefs, the performance of those duties do not require any specific theological training.

In addition, while the beneficiary may be employed by the church for performing at its worship services, there is no evidence of its employment at other church-sponsored and secular events. Part-time employment by a church does not satisfy the two-year prior experience requirement. A band that performs at multiple events on a contractual basis with multiple sponsors also cannot be considered to satisfy the requirement of continuously carrying on a religious occupation. The regulations contemplate regular employment with a single employer, not intermittent employment with multiple employers. Clearly, the recording of a commercial album

would be considered secular self-employment, not engaging in a religious occupation.

The additional argument that a gospel musician is equivalent to a cantor for the purpose of special immigrant classification is not persuasive. A "cantor" is listed as an example of a qualifying religious occupation at 8 C.F.R. 204.5(m)(2). The position of cantor is not defined in the regulation. Within the meaning of section 203(b)(4) of the Act, the Service interprets such a position as a well established traditional religious function in Judaism that requires specific theological training and recognition of a cantor's qualifications by authorities of the denomination. The training for a cantor is extensive and the duties of the position include leading the congregation in worship practices at a level very near that of a member of the clergy. A gospel musician does not receive equivalent theological training, does not go through a formal recognition/certification process, and the position is not recognized as part of traditional religious worship practices.

Furthermore, entertainment groups such as gospel bands are traditionally self-employed, not employed by an individual church. While the petitioner has argued that it has employed the beneficiary in such a capacity, such a claim is insufficient to establish that such employment is a traditional religious function as contemplated at 8 C.F.R. 204.5(m)(2).

Finally, the fact that the Service approved a nonimmigrant petition for the same position is not dispositive. The Service is not bound by past decisions which may have been issued in error. See National Labor Relations Bd. v. Seven-up Bottling Co. of Miami, 344 U.S. 344, 349 (1953).

The petition is deficient on additional grounds. A petitioner must establish that the beneficiary has at least two years of experience in the religious occupation.

8 C.F.R. 204.5(m)(1) states, in pertinent part, that:

All three types of 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.

The petition was filed on October 22, 1999. Therefore, the petitioner must establish that the beneficiary had been continuously engaged in a qualifying religious occupation for at least the two years from October 22, 1997 through the date of filing.

The petitioner claimed that it has employed the beneficiary since April 1997. The petitioner, however, provided no evidence of this claim. The petitioner did not submit evidence such as the beneficiary's tax records as proof that he was employed by the church for the two years claimed. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). In addition, any revenue generated by the beneficiary, as a member of Livin' Versions, from its performances in other venues would not be considered employment by the petitioning church. For this reason as well, the petition may not be approved.

In addition, the job offer for a special immigrant religious worker must state the terms of remuneration and establish that the beneficiary will not engage in supplemental employment. 8 C.F.R. 204.5(m)(4). The petitioner stated the beneficiary's past remuneration, but did not state the terms of the proposed remuneration. Nor did the petitioner provide any evidence that the beneficiary would not engage in supplemental employment.

A petitioner must also submit its federal tax returns, audited financial statements, or annual reports to establish its ability to pay the proffered wage. 8 C.F.R. 204.5(g)(2). The petitioner has not satisfied this documentary requirement. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.