

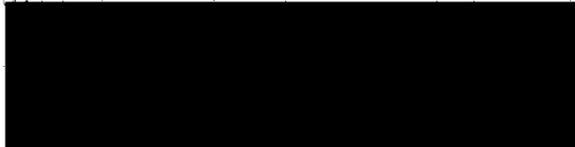


U.S. Department of Justice

Immigration and Naturalization Service

21

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



PUBLIC COPY

AUG 23 2001

File: [Redacted] Office: Nebraska Service Center

Date:

IN RE: Petitioner:
Beneficiary:



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)

identifying data deleted
prevent clearly unwarranted
invasion of personal privacy

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

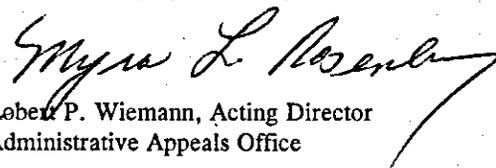
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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, Acting Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Nebraska Service Center. An appeal from the decision was dismissed by the Associate Commissioner for Examinations. A subsequent motion was dismissed as incomplete due to the failure to submit a brief. The matter is again before the Associate Commissioner on motion to reconsider. The motion will be granted; the prior decision will be affirmed.

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 "music director" at an annual salary of \$12,000.

The director denied the petition finding that the petitioner failed to establish that the proposed position constituted a qualifying religious occupation and failed to establish that the beneficiary had been employed in a religious occupation for the two years preceding the filing of the petition as required. The decision was affirmed by the Associate Commissioner on appeal in a decision dated March 30, 2000.

A motion to reconsider was dismissed on November 13, 2000, after it was determined that counsel for the petitioner failed to submit a timely brief in support of the motion. Counsel now argues that a brief was timely submitted and furnishes a copy of a mail receipt indicating delivery to the Service of an item from counsel. Based on this submission, the decision of November 13, 2000 is hereby withdrawn.

Counsel also argued that the petitioner's former representative provided ineffective assistance and submits a new brief disputing the analysis in the appellate decision of March 30, 2000. It is concluded that the brief meets the applicable requirements of a motion to reconsider. Based on this, the motion to reconsider is granted and the merits of the motion will be reviewed.

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, 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 in this matter is a church affiliated with the Church of God denomination headquartered in Cleveland, Tennessee. The beneficiary is a native and citizen of Romania last admitted to the United States on October 27, 1997, as a B-2 visitor. The record indicates that the beneficiary remained beyond his authorized stay and has remained since such time in an unlawful status.

The petition was denied on two grounds. The first issue is whether the petitioner has established that the proposed position of music director qualifies as a religious occupation necessary for special immigrant classification.

8 C.F.R. 204.5(m) (3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

(ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:

(A) 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.

* * *

(D) That, if the alien is to work in another religious vocation or occupation, he or she is qualified in the religious vocation or occupation. Evidence of such qualifications may include, but need not be limited to, evidence establishing that the alien is a nun, monk, or religious brother, or that the type of work to be done

relates to a traditional religious function.

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

Religious vocation means a calling to religious life evidenced by the demonstration of commitment practiced in the religious denomination, such as the taking of vows. Examples of individuals with a religious vocation include, but are not limited to, nuns, monks, and religious brothers and sisters.

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.

In the appellate decision, it was held that the petitioner's description of the duties of "music director" did not establish that it was a qualifying religious occupation based on the Service's interpretation of its own regulations defining the term. It was held that the petitioner failed to submit any documentation demonstrating that the position was a traditional religious occupation and that the duties of the position primarily involved musical ability, a secular function, and were thereby not qualifying as a religious occupation.

On motion, counsel conceded the Service's interpretation of its regulations, but argued that the proposed position may be distinguished from one involving only musical ability. Counsel now argues that the beneficiary has religious education and that the proposed position is that of a "Minister of Music," the duties of which involve teaching religion to the church's musicians and composing text and music for the church.

As noted in the prior decision, in order to determine if a position qualifies as a religious occupation eligible for special immigrant classification the Service must examine several factors. The Service must distinguish between the myriad of traditional functions in a religious organization that are filled by members of the congregation on an informal basis and positions that are traditionally a religious occupation filled by full-time permanent employees meeting specific qualifications. 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 and practice 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. Under this interpretation, the position of a professional musician/music director would not qualify as a religious occupation.

Counsel's arguments on appeal are not persuasive. First, counsel has amended the title and duties of the position from the petitioner's original job-offer letter(s) of February 28, 1998. It is argued that the position has been amended from music director to music minister and that the duties now include activities such as teaching religion, meeting with the ministerial staff, and composing original music for the worship services. These amendments constitute a material change to the original petition. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. Matter of Katigbak, 14 I&N Dec. 45 (Comm. 1971); Matter of Izumii, Int. Dec. 3360 (Assoc. Comm., Ex., July 13, 1998). In addition, the assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988); Matter of Laureano, 19 I&N Dec. 1 (BIA 1983); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980).

Second, counsel's argument that the Service's interpretation is too narrow and has the effect of discriminating against positions of protestant Christian denominations is a misinterpretation of the decision. Determining the status or the duties of an individual within a religious organization is not a matter under the Service's purview; determining whether that individual qualifies for status or benefits under our immigration laws is another matter. 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).

In this case, counsel argues that the position of music minister requires theological training and is employed in a primarily religious capacity and thereby would qualify for special immigrant classification. While the hypothetical argument may have merit, counsel failed to submit any documentation from an authority of the Church of God denomination establishing that the position of either music director or music minister is a traditional religious occupation within the denomination, that it has prescribed theological education requirements, and that it is recognized and regulated by the denomination similar to other paid positions in the denomination. 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).

Third, the Service must weigh the evidence of record as a whole and make a determination as to its sufficiency and credibility. The petitioner bears the burden of proof in an employment-based visa petition to establish that it will employ the alien in the manner stated. The petitioner's claims must be credible. See Matter of Izdebska, 12 I&N Dec. 54 (Reg. Comm. 1966); Matter of Semerjian, 11 I&N Dec. 751 (Reg. Comm. 1966).

In this case, the petitioner is a large established church. There is no indication that it has ever employed a music director and there is no explanation of its decision to do so at this time. The beneficiary had been a member of the church for approximately five months at the time the petition was filed and the filing of the petition roughly coincided with the expiration of his authorized stay. There is no indication that the position was advertised or that other candidates were considered for the position. Furthermore, there is no indication in the record of the beneficiary's customary occupation or means of financial support. Given these circumstances, it cannot be concluded that the petitioner has established its bona fide intent to employ the beneficiary as claimed in the petition for special immigrant classification.

It is further noted that 8 C.F.R. 204.5(m)(4) requires that the beneficiary will not be dependent on supplemental employment. There is no indication in the record that the beneficiary will not engage in supplemental secular employment, that would require labor certification under sections 203(b)(1), (2), or (3) of the Act, upon approval of the petition. Based on the record as constituted, the petitioner has not adequately demonstrated that it has the intention to employ the beneficiary in a permanent salaried position or that the beneficiary seeks to enter the United States to pursue this occupation.

The next issue is that the petitioner must establish that the beneficiary had had the requisite two years of continuous experience in a 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 March 24, 1998. Therefore, the petitioner must establish that the beneficiary had been continuously carrying on a religious occupation since at least

March 24, 1996.

The petitioner claimed that the beneficiary had been a volunteer music director with an affiliated church in Romania and had been a volunteer with it since his admission in October 1997.

In the appellate decision, it was held, in pertinent part, that voluntary services donated to one's church did not constitute carrying on a religious occupation within the meaning of the Act.

On motion, counsel again argued that the Service's interpretation was too narrow and would exclude unpaid nuns and monks etc. The argument is not persuasive.

The pertinent regulations were drafted in recognition of the special circumstances of some religious workers, specifically those engaged in a religious vocation, in that they may not be salaried in the conventional sense and may not follow a conventional work schedule. The regulations distinguish religious vocations from lay religious occupations. 8 C.F.R. 204.5(m)(2) defines a religious vocation, in part, as a calling to religious life evidenced by the taking of vows. While such persons are not employed *per se* in the conventional sense of salaried employment, they are fully financially supported and maintained by their religious institution and are answerable to that institution. The regulation defines lay religious occupations, in contrast, in general terms as an activity related to a "traditional religious function." *Id.* Such lay persons are employed in the conventional sense of salaried employment. The regulations recognize this distinction by requiring that in order to qualify for special immigrant classification in a religious occupation, the job offer for a lay employee of a religious organization must show that he or she will be employed in the conventional sense of salaried employment and will not be dependent on supplemental employment. See 8 C.F.R. 204.5(m)(4).

Because the statute requires two years of continuous experience in the same position for which special immigrant classification is sought, the Service interprets its own regulations to require that, in cases of lay persons seeking to engage in a religious occupation, the prior experience must have been full-time salaried employment in order to qualify as well.

Furthermore, in evaluating a claim of prior work experience, the Service must distinguish between common participation in the religious life of a denomination and engaging continuously in a religious occupation. It is traditional in many religious organizations for members to volunteer a great deal of their time serving on committees, visiting the sick, serving in the choir, teaching children's religion classes, and assisting the ordained ministry without being considered to be carrying on a religious

occupation. It is not reasonable to assume that the petitioning religious organization, or any employer, could place the same responsibilities, the same control of time, and the same delegation of duties on an unpaid volunteer as it could on a salaried employee. Nor is there any means for the Service to verify a claim of past "volunteer work" similar to verifying a claim of past employment. For all these reasons, the Service holds that lay persons who perform volunteer activities, especially while also engaged in a secular occupation, are not engaged in a religious occupation and that the voluntary activities do not constitute qualifying work experience for the purpose of an employment-based special immigrant visa petition.

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

ORDER: The motion is dismissed.