

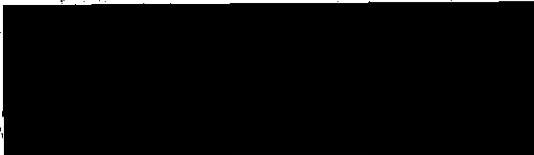


U.S. Department of Justice

Immigration and Naturalization Service

CA

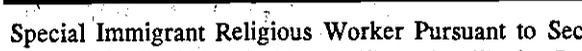
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



PUBLIC COPY

AUG 23 2001

File:  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)

IN BEHALF OF PETITIONER: 

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

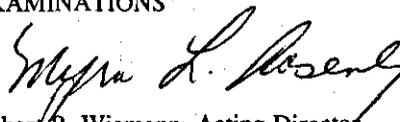
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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


for Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Nebraska Service Center, and 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 her as a "music director/associate minister" at a salary of \$1,800 per month, or \$21,600 per year.

The director denied the petition finding that the petitioner's claim that the beneficiary had served the church as a volunteer acting as choir/music director was insufficient to satisfy the requirement that the alien have been continuously carrying on a religious occupation for at least the two years preceding the filing of the petition.

On appeal, counsel for the petitioner submitted a written brief arguing that the regulations do not require that the past experience have been salaried employment, that the State department regulations recognize voluntary experience, and that the beneficiary is actually engaged in a religious vocation.

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 described as a church affiliated with the Full Gospel Missions, Inc. denomination, which in turn is affiliated with the Assemblies of God USA denomination, and that it receives the appropriate tax exempt recognition as a member church. The petitioner claims a congregation of 200 members with a single full-time employee, its minister. The beneficiary is a native and citizen of Korea who was last admitted to the United States on December 11, 1997, in B-2 classification, and later received a change of classification to F-2 as the dependent of her spouse. The petitioner claimed that the beneficiary received a Bachelor's degree in "sacred music" in 1976 in Korea and has been active in church work since such time.

In order to establish eligibility for classification as a special immigrant religious worker, the petitioner must satisfy several eligibility requirements.

The first issue is whether the petitioner has established 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 December 2, 1999. Therefore, the petitioner must establish that the beneficiary was continuously carrying on a religious occupation since at least December 2, 1997.

The petitioner asserted that the beneficiary had been employed as a choir director by an affiliated church in Korea since 1993 and that she had voluntarily served the petitioning church in the same capacity since she entered the United States in December 1997.

The director found that a claim of voluntary participation in church activities does not constitute carrying on a religious occupation for the purpose of special immigrant classification.

On appeal, counsel for the petitioner argued, in part, that the regulations do not require that the past experience be paid employment and that the beneficiary is engaged in a vocation due to her long service.

Counsel's argument and assertions are not persuasive. First, the regulations distinguish between religious vocations and religious

occupation. Vocations are characterized by the taking of life-long vows, such as nuns and monks. 8 C.F.R. 204.5(m)(2). The argument that a choir director is engaged in a religious vocation is not persuasive. There are no life-long vows associated with a choir director or any other indicia associated with religious vocations. Therefore, the petition will be addressed for classification as a lay person in a religious occupation.

Second, to establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a "religious occupation" and the regulation states only that it is an activity relating to a traditional religious function. 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.

Voluntary participation in the activities of one's religious institution is not considered to be engagement in a religious occupation. The plain meaning of the term "occupation" is an individual's primary endeavor and means of financial support. 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. For all these reasons, the Service holds that lay persons who perform volunteer activities for their church 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.

Finally, the argument that the State Departments regulations governing the same classification do not require paid experience is not compelling. Counsel did not provide a copy of the regulation he referred to or quote the relevant section in order to support his claim. However, similar to the Service's regulations, the State Department's ("DOS") regulations regarding religious workers are worded in a broad manner to accommodate both vocations and occupations. There is no evidence that the DOS regulations allow for the consideration of voluntary activities fulfilling the prior experience requirement for lay religious occupations. Regardless, the Service is bound by its own regulations in the administration of the Act and the DOS regulations are not controlling.

The next issue is whether the petitioner has established that the proposed position qualifies as a religious occupation for the purpose of 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.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a "religious occupation" and the regulation states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The list reveals 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 cantor, missionary, or religious instructor 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.

The duties of the proposed position were described as leading the choir at rehearsals and at the church's worship services and assisting the pastor counseling troubled individuals and leading Bible study.

After a review of the record, it is concluded that the petitioner

has not established that a music director is a qualifying religious occupation. First, the petitioner has not furnished any documentation from an official of the denomination verifying that the position of "music director" is a traditional permanent salaried religious occupation within the denomination or what the qualifications are for such a position.

Second, the record does not establish that the duties of a music/choir director qualify as a religious occupation. Music is a component of the worship services of many religious denominations. However, the performance of music for a religious organization is not considered a qualifying religious occupation for the purpose of special immigrant classification. A musical background, rather than a theological one, is the only prerequisite for the position. There is no inherent requirement that a person employed as a church pianist be a member of the employer's denomination or that he or she participate in the worship services, beyond providing the musical accompaniment. The duties of the position are not necessarily dependent on any religious background or prescribed theological education. Nor is the performance of the duty directly related to the creed of the denomination. Accordingly, it must be concluded that the petitioner has failed to establish that the position of choir director constitutes a qualifying religious occupation within the meaning of section 101(a)(27)(C) of the Act.

Third, the record does not credibly demonstrate that the small church with 200 members reasonably could or would employ an individual full-time as choir/music director. The petitioner did not disclose the number of worship services per week or the number of members of its choir. Based on the description of the duties of the position, it is simply not reasonable that the position could rise to the full-time level of 35 to 40 hours per week. There is no indication that the petitioner has ever employed a person in such a capacity in the past and no explanation of its decision to do so at this time. By its own statements, the petitioner has conceded that the position is traditionally a voluntary one from among its congregation. 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). It cannot be concluded that the petitioner has established that the small church will employ the alien beneficiary in a full-time permanent position as music director.

Finally, the secondary duties of the position described as assisting the minister in counseling and Bible study are insufficient to show that the position is a qualifying religious occupation. Here, the musical duties are clearly the principal duties of the proposed position. Any secondary duties assisting the pastor are insufficient to demonstrate that the position would qualify as a religious occupation. In addition, there is no

indication in the record that the beneficiary has any formal training or that she is qualified to "counsel troubled individuals" or that such a duty could be considered a primarily religious occupation rather than a secular one requiring specific degrees, training, and licensing.

A petitioner must also demonstrate its ability to pay the proffered wage.

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

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 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 annual reports, federal tax returns, or audited financial statements.

The petitioner in this case submitted its projected budget and copies of various bank account statements. These documents do not satisfy the regulatory requirement. The petitioner has not furnished the church's annual reports, federal tax returns, or audited financial statements. Therefore, the petitioner has not established the ability to pay the proffered wage.

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.