

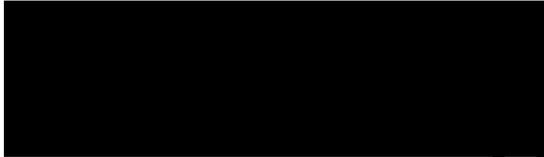


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U.S. Department of Justice

Immigration and Naturalization Service

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

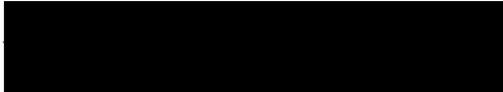


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File: [Redacted] Office: VERMONT SERVICE CENTER

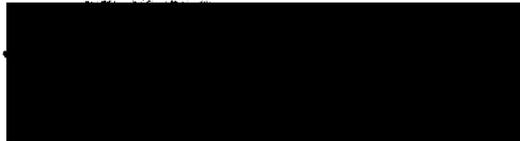
Date: JUL 3 2007

IN RE: Applicant:
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 APPLICANT:



Identifying data...
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, Vermont Service Center. An appeal was dismissed by the Associate Commissioner for Examinations. A motion to reopen that decision was dismissed by the Associate Commissioner as untimely filed. The matter is again before the Associate Commissioner on motion to reopen. The motion will be granted; the decision dismissing the appeal will be affirmed.

The petitioner is a church that 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 the church "music director/piano player."

The center director denied the petition determining that the description of the position of church piano player did not establish that it constituted a qualifying religious occupation for the purpose of special immigrant classification.

The Associate Commissioner, by and through the Director, Administrative Appeals Office ("AAO"), dismissed an appeal from that decision affirming the center director's decision. The AAO director further found that the petitioner failed to submit the necessary documentation to establish that it is a qualifying organization exempt from, or eligible for exemption from, taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations; failed to submit the required evidence of its ability to pay the proffered wage pursuant to 8 C.F.R. 204.5(g)(2); failed to show that the beneficiary had had the requisite continuous work experience in a religious occupation for the two years preceding the filing of the petition pursuant to 8 C.F.R. 204.5(m)(3)(ii)(A); and failed to show that the beneficiary is qualified to perform a religious occupation pursuant to 8 C.F.R. 204.5(m)(3)(ii)(D).

The appellate decision was issued January 21, 2000. Counsel for the petitioner filed a motion to "reopen and reconsider" on April 3, 2000. Pursuant to 8 C.F.R. 103.5(a)(1)(i), a motion must be filed within thirty days of the decision. The AAO director therefore dismissed the motion as untimely filed.

With the instant motion, counsel argued that the motion was timely filed, but not processed by the Service in a timely manner. Counsel submitted copies of Federal Express mail receipts and its cancelled checks in support of the petitioner's claim. On review of this evidence, the motion to reopen will be granted and the prior motion examined on its merits.

According to 8 C.F.R. 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. In order to prevail on a motion to

reopen, the petitioner must establish that the new facts and/or evidence presented are material and were unavailable at the time the prior decision was issued. Id.

According to 8 C.F.R. 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. To prevail on a motion for reconsideration, the petitioner must establish that the prior decision rests on an incorrect application of law, so that the decision "was incorrect based on the evidence of record at the time of the initial decision." Id.

The appellate decision of January 21, 2000, remains part of the instant record. In that decision, it was held that the proposed position of "music director/piano player" did not satisfy the definition of a qualifying religious occupation based on the Service's interpretation of its own regulation at 8 C.F.R. 204.5(m)(2). The decision noted that the regulation is worded in broad terms in order to accommodate the full range of religious traditions. The AAO held in its decision that the proposed position had not been shown to require any specific religious training and was essentially a secular support position. Such positions are specified as nonqualifying by the regulation. In analyzing the appeal, it was noted, in pertinent part, that specific theological training must be an element of a qualifying religious occupation and that it was not an inherent requirement that a person employed by a church in a musical capacity have any particular religious or theological background.

On motion, counsel argued that "There is no rational basis to find that a 'cantor' qualifies under 8 C.F.R. 204.5(m)(2), but a 'music director/piano player' does not." Counsel also submitted a letter from the pastor of the church dated February 16, 2000, in which it was stated that the church requires a bachelor's degree and two years of experience for the position. The pastor stressed that the church requires that the music director/piano player be baptized and a member of the denomination.

Counsel's arguments are 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.

The requirements of the proposed position of "music director/piano player," in contrast, are described as requiring a bachelor's degree. It was stated that the beneficiary holds a bachelor's degree in music from a university in Korea. The Service considers a bachelor's degree in music to be a secular requirement, not a theological one. While a "music director/piano player" may lead the congregation in the musical portion of worship services, it is not persuasive that the position rises to the same theological level as a cantor as contemplated in the regulation. The fact that the petitioning church has as a requirement for employment membership in its congregation and a bachelor's degree is not analogous to the qualifications of a cantor or other qualifying religious occupation.

Accordingly, the petitioner has failed to establish that the previous decision was incorrect based on the evidence of record at the time of the initial decision and the motion will be dismissed.

Counsel did not address the additional issues raised in the decision of January 21, 2000.

A petitioner must establish that it is a qualifying organization for the purposes of this proceeding by establishing that it is exempt from, or eligible for exemption from, taxation in accordance with section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

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

(i) Evidence that the organization qualifies as a nonprofit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations; or

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under section 501(c)(3).

The petitioner is the Together Presbyterian Church of North Bergen, New Jersey. To address this requirement, the petitioner submitted a letter from the Internal Revenue Service ("IRS") dated oct 16, 1995, formally granting the Together Presbyterian Church of Flushing, New York, the appropriate tax exempt recognition. The pastor explained in a letter that the "church" has 200 members and that the North Bergen congregation is affiliated with the Flushing congregation.

On review, the pastor's statement regarding the affiliation of the two entities is not sufficient to satisfy the burden of proof. The petitioner submitted no documentation showing a formal affiliation between the two congregations and no evidence that the IRS recognition of the Flushing church as tax exempt under section 501(c)(3) extends to any subsidiaries or affiliates. Therefore, the petitioner failed to establish that this requirement has been satisfied.

The next 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 January 14, 1998. Therefore, the petitioner must establish that the beneficiary was continuously carrying on a religious occupation since at least January 14, 1996.

The beneficiary last entered the United States on December 26, 1995, and remained beyond her period of authorized stay. The petitioner testified that the beneficiary has performed as a church "music director/piano player" both in the United States and in her native Korea. It must be concluded that the petitioner has failed to establish that this requirement has been satisfied.

First, as noted above, the petitioner failed to establish that the position of "music director/piano player" constitutes a religious occupation. Therefore, experience in the position is not experience in a religious occupation.

Second, the petitioner asserted that the beneficiary had voluntarily served as piano player for the church until she was hired in April 1996. The Service does not recognize voluntary participation in church activities as carrying on a religious occupation for the purpose of 8 C.F.R. 204.5(m)(1). As the beneficiary was not employed in the position since at least January 1996, she could not have the requisite experience.

The final issue is the petitioner's 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 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.

The petitioner stated that the proffered wage in this matter is \$24,267 per year. The petitioner submitted copies of its internal financial statements to demonstrate its financial ability to pay the proposed salary. These documents do not satisfy the documentary requirement. The petitioner must submit evidence of its ability to pay the wage in the form of annual reports, federal tax returns, or audited financial statements. The petitioner has not satisfied this burden.

It is noted that the petitioner submitted W-2 forms reflecting that it has employed the beneficiary in 1997 and 1999. This evidence is considered, but is insufficient to satisfy the documentary requirement at 8 C.F.R. 204.5(g)(2).

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 decision dated January 21, 2000 is affirmed; the petition is denied.