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

[redacted]

Public Copy

File: WAC-99-232-52860 Office: CALIFORNIA SERVICE CENTER Date: JUL 30 2001

IN RE: Petitioner: [redacted]
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: [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

Myra L. Rosener

for Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner 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 an "accompanist" at a salary of $1,000 per month.

The director denied the petition determining that the petitioner failed to establish that the duties of the proposed position of accompanist, which consist of playing piano/organ at Sunday worship services and at choir practices, constitute 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 the position is a traditional religious function and qualifies for special immigrant classification. Counsel further argued that the center director failed to issue a request for additional evidence as required if it was determined that there was evidence of ineligibility.

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 Christian church recognized by the Internal Revenue Service with the appropriate tax exempt status. The petitioner did not furnish an estimate of the size of its congregation or the number of persons it employs, but indicated 1998 revenues of approximately $1.4 million. The beneficiary is described as a native and citizen of Korea who last entered the United States in an unspecified manner and date. The record shows that the beneficiary was granted R-1 nonimmigrant classification as a temporary religious worker to be employed by the petitioner, such status valid from July 7, 1999 to July 6, 2002.

At issue in the director's decision is whether the petitioner has established that the proposed position constitutes a religious occupation for the purposes of this visa petition proceeding.

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 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 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.

On appeal, counsel argued, in pertinent part, that:

> Contrary to the Director's holding, music is an essential part of the practice of Christianity. The musical accompanist/liturgical worker is clearly engaged in an occupation related to a traditional religious function. In light of the above [the definition of "musician," which includes pianists and organists for religious institutions, in the *Occupational Outlook Handbook*, published by the Department of Labor], [redacted] duties fit squarely with the definitions set for a religious worker in the Christian Faith and the petition should be granted.

The petitioner's argument is not persuasive. First, the fact that professional musicians may be employed by religious institutions tends to support the director's finding that the position of accompanist, or musician, is a secular occupation not a religious occupation.

Second, the fact that music is traditionally a component of the religious worship services in many denominations is acknowledged. However, it has not been shown that the duties of the position satisfy the intent of the statute. Here, musical ability is the principal qualification, not any formal theological training. While music accompanies portions of the worship service, the performance of that function is not clearly religious in nature. As noted by the director, the position is considered secular in nature. For example, there is no inherent requirement that an individual hired as an accompanist be a member of the petitioner's church or participate in its worship practices.

Third, as noted by the director, the petitioner has not asserted or demonstrated that the position requires any formal theological education or that the beneficiary has any formal theological education.

Fourth, the record does not credibly demonstrate that the church could reasonably employ an accompanist as a full-time position. The petitioner did not disclose the number of worship services per week or the number of members of its choir. The stated duties of the position are to perform at worship churches and at choir practices. There is no evidence that these duties could possibly reach the full-time level of at least 35 hours per week. It is noteworthy that there is no evidence that the petitioner has ever employed a person in this capacity in its past.

Finally, it is noted that the fact that the Service approved a nonimmigrant petition for the same position is not dispositive and has no bearing on the denial of the instant petition. 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). In this case, if R-1 classification was granted for a part-time accompanist, it was granted in error.

Beyond the discussion in the director's decision, the petitioner has failed to demonstrate eligibility on other grounds.

The petitioner is an independent church and will be treated as a denomination for the purposes of this proceeding. See 8 C.F.R. 204.5(m)(2). The beneficiary had not been a member of the church/denomination for the two years prior to the filing of the petition and therefore cannot satisfy the two-year membership requirement of 8 C.F.R. 204.5(m)(3)(ii)(A). The beneficiary also had not been employed by the petitioner for at least two years

prior to filing and therefore cannot satisfy the two-year work experience requirement of 8 C.F.R. 204.5(m)(3)(ii)(A), even if the position was considered qualifying. The petitioner also failed to submit the documentation required to establish the ability to pay the proffered wage pursuant to 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 appeal is dismissed.