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U.S. Department of Homeland Security
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Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

[Redacted]

[Handwritten signature]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 20 2004

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)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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

[Signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a temple. It seeks to classify 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), to perform services as a music coordinator. The director determined that the petitioner had not established that the position qualified as that of a religious worker or that it had extended a valid job offer.

On appeal, counsel submits a brief and additional documentation.

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, 2008, 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, 2008, 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 regulation at 8 C.F.R. § 204.5(m)(3)(ii)(D) requires a petitioner for a special immigrant religious worker to show that the alien is qualified in the religious occupation. According to 8 C.F.R. § 204.5(m)(1), the alien must be coming to the United States at the request of the religious organization to work in a religious occupation.

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 would reasonably be expected to perform services 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. The lists of qualifying and nonqualifying occupations derive from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

Citizenship and Immigration Services (CIS) 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 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 petitioner states that the duties of the proffered position would consist of playing music for all services, teaching religious music to members of the congregation before Sunday service, performing as vocalist during services and practicing with the chorus on a weekly basis. The petitioner also states that the beneficiary would be expected to work as assistant to the minister but does not specify what those duties would entail. The petitioner states that the position would require "25+" hours per week and that the salary would be \$1,750 but does not specify the frequency of payment.

The director determined that the petitioner had not established that the proffered position qualified as a religious occupation within the meaning of this statutory provision.

On appeal, counsel asserts that music has been a part of Korean Buddhism for centuries. In support of this argument, counsel submits a page showing the results of an Internet search on "music rituals in Korean Buddhism." Counsel also submits an article from the Internet that briefly discusses music and dance in Buddhist religious rituals. Additional documents from the Internet include a paper by [REDACTED] president of the International Buddhist Cultural Center in Korea, which discusses, in part, music in the Buddhist religion, a "report" by [REDACTED] on a class he taught on "Buddhism and Music," and several documents discussing the role of music in religion.

While the AAO does not dispute the role of music in the petitioning church, the evidence of record is insufficient to establish that the role of "music coordinator" is a traditional religious function within the denomination for purposes of this visa preference classification petition. The petitioner submits no evidence that the position is defined and recognized by the governing body of the petitioner's denomination or that the position is a traditional permanent, full-time, salaried position within the denomination. As noted by the director, the petitioner presented no evidence that the position existed in the petitioning organization prior to the beneficiary assuming the position.

Further, the record does not establish that the needs of the petitioner will provide permanent, full-time work for the beneficiary. The petitioner states that the beneficiary would work at least 25 hours per week. However, the detailed list of the duties of the proffered position does not provide evidence of full time employment. Part-time work is not a qualifying job offer for the purpose of this employment-based visa petition.

On appeal, counsel asserts that the job would initially require the beneficiary to work "25 hours plus" per week, and that the "plus could be immediately up to 40 hours per week." However, counsel provides no evidence to substantiate this assertion. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel further argues that the compensation offered evidences an intent to employ the beneficiary full time. Nonetheless, the record contains no evidence to establish that the position has been or will be a full time occupation. It does not appear from the record that the size of the congregation justifies a full time music coordinator.

¹ No further identifying information is provided for Mr. Hata.

Counsel also asserts that the petitioner is a growing congregation and that the position taken by CIS is biased against smaller organizations. Regardless of its size, however, the petitioning organization must meet the requirements of the statute and regulation.

The record does not establish that the position is a traditional religious occupation within the petitioner's denomination or that the petitioner has extended a full time job offer to the beneficiary.

Beyond the decision of the director, the petitioner has not established that the beneficiary had been engaged continuously in the religious occupation for two full years immediately preceding the filing of the petition. For this additional reason, the appeal must be dismissed.

The petition was filed on July 11, 2002. Therefore, the petitioner must establish that the beneficiary was continuously working as a music coordinator throughout the two-year period immediately preceding that date.

The petitioner stated that the beneficiary worked at the Myeonmok Parish Temple of Won Buddhism from July 11, 2000 to July 11, 2002. It states that the beneficiary worked as a pianist and acted as volunteer assistant to the minister, and was paid the equivalent of 1,000 US dollars per month.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." See H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Comm. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 1963).

The term "continuously" also is discussed in a 1980 decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

In line with these past decisions and the intent of Congress, it is clear, therefore that to be continuously carrying on the religious work means to do so on a full-time basis. That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is

not paid, the assumption is that he/she is engaged in other, secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who in accordance with their vocation live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and salaried. To hold otherwise would be contrary to the intent of Congress.

The petitioner submitted no evidence to substantiate the beneficiary's employment during the qualifying two-year period. Furthermore, the duties identified by the petitioner do not establish that the beneficiary was continuously engaged in the same religious occupation during the two years immediately preceding the filing of the visa petition as the occupation for which the beneficiary now seeks entry.

Another issue pertains to the regulation at 8 C.F.R. § 204.5(g)(2), which states in pertinent part:

Ability of prospective employer to pay wage. 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 indicates that it will pay the beneficiary a salary of \$1,750 per month. As evidence of its ability to pay this salary, the petitioner submitted a copy of its unaudited financial statements for the periods ending December 31, 2000 and December 31, 2001. It also submitted a letter dated December 10, 2002 from its bank indicating that it had two checking accounts with a total balance of \$17,271 and a certificate of deposit with a balance of \$10,037.

The above-cited regulation states that evidence of ability to pay "shall be" in the form of tax returns, audited financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only in addition to, rather than in place of, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of evidence.

The petitioner has not established that it has the ability to pay the proffered salary. This deficiency constitutes an additional ground for dismissal of the appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.