



U.S. Citizenship  
and Immigration  
Services

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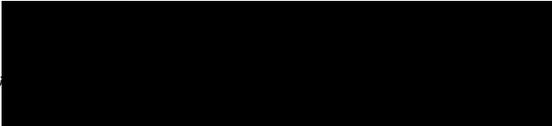


File: [Redacted] Office: TEXAS SERVICE CENTER

Date:

SEP 16 2004

IN RE: Petitioner:  
Beneficiary



Petition: Immigrant 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:

SELF-REPRESENTED

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.

*Mari Johnson*

Robert P. Wiemann, Director  
Administrative Appeals Office

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

The petitioner is a church. 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), in order to classify him as an Assistant Music Director.

The director denied the petition on July 7, 2003, finding that the petitioner failed to establish the beneficiary was employed during the two years preceding the filing of the petition in the same position as the position being offered by the petitioner. The director further found that in the petitioner's church, the proposed position of an Assistant Music Director does not constitute a religious occupation, as the position is not related to a traditional religious function. Additionally, the director determined the petitioner failed to establish its tax-exempt status under section 501(c)(3) of the Internal Revenue Code or provide such evidence to establish eligibility under said section of the code. Finally, the director determined the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage.

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 Revenue 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)(1) echoes the above statutory language, and states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file an I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two year period

immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States.” The regulation indicates that the “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.”

8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate 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. The petition was filed on February 8, 2002. Therefore, the petitioner must establish that the beneficiary was continuously working as an Assistant Music Director in the petitioner’s denomination throughout the two years immediately prior to that date.

The first issue is whether the beneficiary has the requisite two years experience as an Assistant Music Director. In his denial, the director noted the petitioner failed to submit evidence of the beneficiary’s prior work experience to include hours worked or proof of compensation.

With the original filing, the only evidence submitted by the petitioner to establish the proffered position and requisite work experience is the following statement:

[The beneficiary] has been a member of the Apostolic Pentecostal Church for the past four years in Canada; this is a non-profit organization. This is a sister church in Canada.

He would be coming to [the petitioning church] in Tampa, which is also a tax-exempt non-profit organization as our Assistant Music Director. He will be coming to Tampa solely to carry on in our church Music Ministry. He has lived in Canada for the past 10 years and has agreed to come to serve in [our music ministry] as an employee of the church. Since being at the church in Toronto he has served in their music department.

In a statement submitted by the petitioner in response to the director’s request for evidence, the petitioner indicated that “[a]s a Music Minister, [the beneficiary] will be paid \$1430.00 per month,” and submitted a copy of the beneficiary’s Canadian tax return. The petitioner, however, failed to provide any documentary evidence that the beneficiary had ever been employed in the capacity of an Assistant Music Director in Canada or the United States. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner further stated that since the beneficiary is a “recent graduate, his work history will be brief,” and that the beneficiary “has been a member of one of our sister churches in Canada for several years, working there as a volunteer musician.”

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.” H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

The statute states at section 101(a)(27)(C)(iii) of the Act 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. 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. 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.

On appeal, the petitioner claims that the beneficiary's job should be classified as a "religious instructor" rather than Assistant Music Director. While the petitioner is prohibited from making such a material change in the proffered position on appeal,<sup>1</sup> we find such a change, in this instance, to be inconsequential. Just as the petitioner has failed to submit any documentation to establish the beneficiary has the requisite experience and had been employed as an Assistant Music Director for at least the two years prior to filing the petition, the petitioner has also not submitted any evidence to show that the beneficiary had been performing any of the duties of the religious instructor position as stated on appeal.

Instead of providing evidence of the beneficiary's experience, on appeal, the petitioner requests that the two-year requirement "be waived in this very unique case." The petitioner states:

This position had been advertised for several years on our website and we were unable to fill it due to lack of applicants that were qualified. Apostolic Pentecostal musicians are very difficult to find.

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<sup>1</sup> A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Neither the statute nor the regulations provide for any waiver of the requirement that the beneficiary have been carrying on such vocation, professional work, or other work continuously for at least the two-year period prior to filing the petition. As we cannot accommodate the petitioner's request for a waiver and the record lacks any evidence demonstrating the beneficiary's experience related to the proffered position, we concur with the director's decision that the petitioner has not established the beneficiary worked continuously throughout the two-year period prior to filing the petition.

Further, although not discussed by the director in his decision, we note the record lacks sufficient evidence to demonstrate a connection between the petitioner and the beneficiary's prior employer in Canada. 8 C.F.R. § 204.5(m)(2) defines a "religious denomination" as a religious group or community of believers having some form of ecclesiastical government, a creed or statement of faith, some form of worship, a formal or informal code of doctrine and discipline, religious services and ceremonies, established places of religious worship, religious congregations, or comparable indicia of a bona fide religious denomination.

The religious work performed during the two-year period should be for, or under the auspices of the same religious denomination as the organization that is currently seeking his or her services. Work performed for a different religious denomination during that time period would not be qualifying. The petitioner has not established that there is an institutional relationship or common governing body between the organization currently seeking the beneficiary's services and the institution where the beneficiary claimed to have obtained prior work experience.

The regulatory definition of "religious denomination" is somewhat flexible. "Some form of ecclesiastical government" is one way to establish membership in a denomination, but this is neither exclusive nor mandatory. Still, the petitioner must establish a sufficient commonality between the different churches to justify a finding that they share a denomination.

The burden is on the petitioner to show that the different congregations belong to one denomination; we are under no obligation to assume a common denomination or prove that the congregations belong to different denominations. In this instance, even if we were to waive the two year requirement related to the beneficiary's work experience, the petitioner has provided no evidence to establish the connection between the petitioner and the petitioner's "sister church."

The next issue raised in the director's decision is whether the beneficiary's position constitutes a qualifying religious occupation for the purpose of special immigrant classification.

In this case, the petitioner describes the beneficiary's duties to include:

- Shall oversee and supervise all operations of the Music Ministry under the direction of the Pastor . . .
- Shall approve, through the Pastor, all musicians and singers to see if they comply with the Bible standard of holiness . . .
- Shall be responsible to continually look for and develop the musical talent in the church . . .
- Shall schedule a regular separate practice time for the choir, groups, and scheduled soloists . . .

We note that the petitioner's original letter, submitted concurrent with the filing of the petition, indicates the petitioner's intention to hire the beneficiary as an Assistant Music Director. On appeal, the petitioner reiterates its intent to hire the beneficiary as an Assistant Music Director and states that it has submitted "a

copy of the job description that would apply to the Assistant Music Director.”<sup>2</sup> Thus, we will consider whether the position of an Assistant Music Director within the petitioner’s church may be considered a religious occupation.

The regulation at 8 C.F.R. § 204.5(m)(2) offers the following pertinent definition:

*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, fundraisers, or persons solely involved in the solicitation of donations.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position it is offering qualifies as a religious occupation as defined in the regulation. 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 reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

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 regulations specify that religious occupations involve activities that related to traditional religious functions. The nature of the activity performed must embody the tenets of the particular religion and have religious significance. Their service must be directly related to the creed of the denomination.

In his decision, the director determined that the petitioner’s position of Assistant Music Director was not a traditional religious function within the petitioner’s church as the petitioner failed to submit evidence of the size of the choir, the number of services, performances and rehearsals per week or religious training required.

On appeal, the petitioner submits a picture of one of its choirs and states:

This choir generally runs between 60 and 70 people. The choir sings two times on Sunday; during special services during the week; special invitations from our District of National organizations; or special community requests. Rehearsals are usually held on Tuesdays and sometimes on Thursdays and last two to three hours.

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<sup>2</sup> Though the petitioner indicated on appeal that the beneficiary’s job is classified as a “religious instructor,” the job description submitted on appeal is for a “Music Ministry Director.” As noted previously in this decision, the petitioner may not substantially change the job offer after the initial filing.

The petitioner further states:

This position does qualify as a religious occupation across our entire Fellowship; a total of 40,000 churches worldwide with 4,000 churches in this country. He would be classified as a religious instructor. He has undergone much study and instruction in the field of Apostolic Pentecostal Faith. This position in most of our larger assemblies, such as ours here in Tampa, is traditionally a permanent, full-time salaried position. Very few people have the necessary skills to fill this position, which was demonstrated by the fact that this position remained unfilled though advertised on our web site for some five years.

Upon consideration of the available evidence, we are not persuaded that the petitioner's denomination regards Assistant Music Directors as a traditional religious function, with such Assistant Music Directors being routinely employed full-time at the denomination's churches.

First, we note that the petitioner currently employs a Music Director. The list of salaried employees and ministry listing submitted by the petitioner both indicate that William Adams is the Music Director. Moreover, the petitioner submits an organizational chart showing William Adams as the Music Director.

In the position description contained in the record, one of the duties listed indicates the Music Ministry Director "shall work with the Pastor to select an Assistant Music Director to work with [the Ministry Director] in all phases of the music ministry." This job description makes clear that the job of the Music Ministry Director is separate and distinct from the position being offered to the beneficiary as that of the Assistant Music Director.

Though the petitioner's organizational chart lists several positions under that of the Music Director, including Children's Choir, Youth Choir, and Sanctuary Choir, the chart does not contain the position of an Assistant Music Director. Given that the petitioner has been providing services and continues to operate as a church without the position of an Assistant Music Director is evidence that the beneficiary's position is not traditionally a permanent, full-time salaried occupation within the petitioner's denomination.

Moreover, the petitioner has failed to submit a description specifically tailored to that of an Assistant Music Director. The fact that the petitioner, on appeal, attempts to reclassify the beneficiary's position as "a religious instructor" is further proof that the beneficiary's originally offered position is not a traditional religious function of the petitioning church. Such facts do not demonstrate that the position is defined and recognized by the governing body of the petitioner's denomination.

The next issue is whether the petitioner has the ability to pay the beneficiary the proffered wage. In his decision, the director noted that unaudited financial statements do not satisfy the statutory and regulatory requirements.

On appeal, the petitioner submits three bank statements. The regulation at 8 C.F.R § 204.5(g)(2) states that evidence of the 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 *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 non-existence or other unavailability of required evidence creates a presumption of ineligibility. *See* 8 C.F.R. § 103 (b)(2)(i).

Further, the bank statements demonstrate that for the period covering April 30, 2003 through June 30, 2003, the petitioner had an average balance of approximately \$24,000. These documents do not establish the petitioner's financial position as of the February 2002 filing date, as required by the regulations.

The remaining issue is whether the petitioner submitted the appropriate evidence of its tax-exempt status. In his decision, the director noted that while the petitioner submitted evidence of 501(c)(3) certification for United Pentecostal Church International Inc., the petitioner failed to show that it is under the group exemption granted to United Pentecostal Church International Inc.

On appeal, the petitioner submits a letter from Jerry Jones, General Secretary of United Pentecostal Church International. In this letter, Mr. Jones verifies that the "petitioner is a subordinate of United Pentecostal Church International." We find such evidence sufficient to establish that the petitioner has the required tax-exempt status. We, therefore, withdraw the director's finding in this regard.

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.