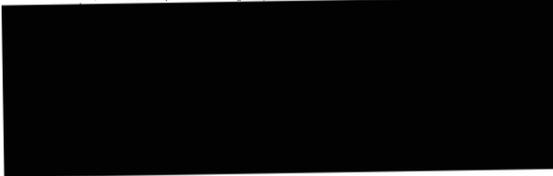




CA

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



Public Copy

File: WAC-98-073-50490 Office: CALIFORNIA SERVICE CENTER

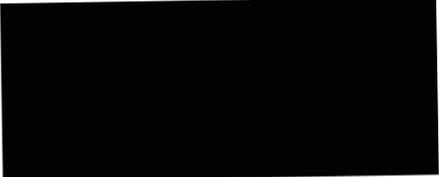
Date: AUG 14 2001

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 APPLICANT:



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. Rosenberg
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 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 "choral director" at a salary of \$1,700 per month.

The director denied the petition determining that the petitioner failed to establish that the proposed position constituted a qualifying religious occupation for the purpose of special immigrant classification.

On appeal, counsel for the petitioner first argued that he filed a motion to reconsider with the center director that was improperly forwarded to the Administrative Appeals Office ("AAO") to be treated as an appeal. Counsel also argued that the center director failed to consider all the evidence submitted in her decision. Counsel stated that the decision, "...is not only clear error, it raises serious violation of due process concern and smacks of malicious administrative misconduct." A written brief was submitted.

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 a church affiliated with the Presbyterian Church USA denomination and is recognized by the Internal Revenue Service with the appropriate tax exempt status. The petitioner claims a congregation of 770 members. The beneficiary is described as a native and citizen of Korea who was last admitted to the United States on June 9, 1993, in an undisclosed classification, and was later granted a change of classification to F-1. Her current immigration status is unknown.

At issue in the director's decision is whether the position of choral director constitutes a religious occupation for the purposes 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 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.

In the job offer letter dated January 9, 1998, the duties of the position were described as conducting the church choir and orchestra, auditioning members of the choir, and selecting the music to perform. It was stated that this will be a full-time permanent position. It was further stated that the beneficiary has been performing these duties without compensation since January 1994.

Counsel argued that music has been part of Korean religious traditions throughout its history and prior to the introduction of Christianity. Counsel further stated that the church requires a college degree for the position and argued, in part, that the

duties of the position include religious instruction, liturgical work, and the "quintessential basic elements of the practice of religion." Counsel also stated that the Service had previously approved a petition for a choral director with the petitioner and argued that it could not now reverse that decision. Counsel concluded that the proposed position meets the intent of the statute.

First, counsel's claim of error in the forwarding of the motion to the AAO is without merit. The petitioner filed a Form I-290B Notice of Appeal, with a brief titled "Motion to Reconsider." 8 C.F.R. 103.5(a)(1) provides that the director may reopen a proceeding for proper cause shown. Where favorable action is not warranted, the motion should be forwarded to the AAO for adjudication as an appeal. Therefore, the director acted properly in forwarding the appeal.

Second, counsel's claim that the director abused her discretion in the decision is not supported by the record. In the written decision, the director summarized the petitioner's claim, but counsel has not established any omission of material facts that would alter the decision or shown any "malicious misconduct."

Next, the merits of the petition must be examined. As noted above, the regulations do not provide a specific definition of a qualifying lay religious occupation. The regulation was broadly worded as a "traditional religious function" as a means to accommodate the range of religious occupations in various religious traditions. The Service interprets its own regulation as stated above.

In this case, there is no claim that the beneficiary has any formal theological training. Nor is there any evidence that the denomination recognizes and governs the position of choral director as a specific permanent religious occupation requiring specific religious training. Counsel argued on appeal that the position involves religious instruction and liturgical work, but submitted no evidence from the petitioner to substantiate this claim. The assertions of counsel do not constitute evidence. Matter of Obaiqbena, 19 I&N Dec. 533 (BIA 1988); Matter of Laureano, 19 I&N Dec. 1 (BIA 1983); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980).

Music is a component of the worship services of many religious denominations, including those of Korea. However, it has not been shown that the duties of the position of choir director satisfy the intent of the statute. 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 choir director 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 choral director constitutes a qualifying religious occupation within the meaning of section 101(a)(27)(C) of the Act.

Furthermore, the petitioner submitted no evidence to support its assertion that the position would be full-time and permanent. The petitioner provided no indication of the number of its worship services at which the choir performs. The petitioner failed to provide a comprehensive description of the duties of its choir director that could reasonably constitute a full-time position. There is no indication in this case that the petitioner has ever employed a choir director, that it is a traditional permanent paid occupation in the denomination, or that it would reasonably amount to a full-time position.

Finally, the fact that the Service may have approved a petition for the same or a similar position is not dispositive. Any such approval would have been made in error. 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).

The petition is deficient on additional grounds. A petitioner must establish that the beneficiary has at least two years of experience in the religious occupation. 8 C.F.R. 204.5(m)(1). The claim that the beneficiary was a volunteer with her church does not constitute the requisite continuous experience in a religious occupation for the purposes of this proceeding. A petitioner must also submit its federal tax returns, audited financial statements, or annual reports to establish its ability to pay the proffered wage. 8 C.F.R. 204.5(g)(2). The petitioner has not satisfied this documentary requirement. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

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.