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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 MASS, 3/F
Washington, D.C. 20536

[redacted]

JUN 27 2003

File: WAC 00 250 55905 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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 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.

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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, California Service Center. An appeal was dismissed by the Administrative Appeals Office (AAO) on appeal. The matter is again before the AAO on motion to reconsider. The motion to reconsider will be granted; the denial of the visa petition will be affirmed.

The petitioner is a church. The petitioner 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 church music accompanist and assistant music director.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary had been performing full-time work as church accompanist and assistant music director for the two-year period immediately preceding the filing of the petition.

On appeal, counsel for the petitioner asserted that the beneficiary had the two-years requisite qualifying experience in the proffered position.

The AAO dismissed the appeal, finding that the petitioner had failed to overcome the grounds for denial. The decision further noted that the petitioner failed to submit evidence that it was covered under the group tax exemption of the Southern Baptist Convention of Arizona. The AAO further determined that the petitioner had failed to establish that the proposed position qualifies as a religious occupation for the purpose of special immigrant classification. The AAO also determined that the petitioner failed to establish that it had the ability to pay the proffered wage.

Counsel for the petitioner now files a motion to reconsider that decision arguing that the petitioner is a member church of the Southern Baptist Convention of Arizona and that the proposed position qualifies as a religious occupation. Counsel further asserts that the Bureau erred in determining that volunteer work cannot constitute qualifying work experience and that the beneficiary has the requisite two-year experience.

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, 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 beneficiary is a native and citizen of Korea. The beneficiary entered the United States on February 10, 1999 as a nonimmigrant visitor for pleasure (B-2). According to the petitioner, the beneficiary subsequently changed her status to that of a nonimmigrant student (F-1).

On motion, the petitioner established that it is covered by the group tax exemption accorded to the Southern Baptist Convention of Arizona.

The next issue to be addressed in this proceeding is whether the petitioner established that the proposed position constitutes a qualifying religious occupation or vocation for the purpose of special immigrant classification.

8 C.F.R. § 204.5(m)(2) states, in pertinent part, that:

Religious vocation means a calling to religious life evidenced by the demonstration of commitment practiced in the religious denomination, such as the taking of vows. Examples of individuals with a religious vocation include, but are not limited to, nuns, monks, and religious brothers and sisters.

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 or vocation as defined in the regulations.

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.

On motion, counsel for the petitioner submits a letter written by its senior pastor stating:

> Worship and praise are very important aspect of our ministry. [sic]
>
> * * *
>
> Traditionally, music in both forms of instrumental and vocal, have been integral part of the religious worship services and most of the Christian churches incorporate "Hymns" in their traditional services. In addition to that, however, contemporary Christian music and gospel songs during the worship, along with the more traditional style of hymns. These songs are intended to prepare the hearts of the believers before the sermon is given and to express praise to our God during the worship. The accompanist and music director play an essential role in adding traditional function by leading the choir and church members during the worship and providing the necessary music for that purpose.

After a review of the record, it is concluded that the petitioner has not established that the position of "church accompanist and assistant music director " constitutes a qualifying religious occupation. The petitioner submitted no documentation that the position is a traditional full-time paid occupation in its denomination. The petitioner failed to establish that the offered position requires specific religious training or theological education. The duties of the position were described as directing the playing of the piano at worship services and working with the church choir. The petitioner failed to establish that the performance of these duties is directly related to the creed and practice of the petitioner's religion.

On appeal, the AAO determined that the petitioner failed to establish that it had the ability to pay the proffered wage. On motion, counsel for the petitioner submits copies of bank statements.

In pertinent part, 8 C.F.R. 204.5(g)(2) states:

> *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 failed to overcome this basis for denial of the petition because it failed to provide evidence of its ability to pay in the forms delineated in the regulation.

The final issue to be addressed in this proceeding is whether the beneficiary had been continuously carrying on a religious occupation for the two years preceding the filing of the petition.

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 director determined that the beneficiary's voluntary work experience did not satisfy the two-year qualifying experience requirement. The AAO concurred.

On motion, counsel cites St. John the Baptist Ukrainian Church v. Novak, the unpublished decision of a federal district court in New York. Counsel asserts that the Bureau conceded that an alien's "voluntary employment" would satisfy the requirement that he or she has performed the work for the two year period prior to the filing of the petition. Counsel's assertion is not supported by the record as counsel has not provided a copy of the court's decision. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. Id. at 719. In addition, as the

published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

In review, the petitioner has failed to overcome the director's objection to approving the petition.

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

ORDER: The appeal is dismissed; the denial of the visa petition is affirmed.