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U.S. Citizenship
and Immigration
Services

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ei

FILE: [Redacted]
WAC 97 108 52192

Office: CALIFORNIA SERVICE CENTER

Date: JUL 07 2005

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:



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

2 Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. Following a standard adjustment interview with the beneficiary and subsequent review of the evidence, the director determined that the beneficiary was not eligible for the visa preference classification. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the preference visa petition and his reasons therefore, and subsequently exercised his discretion to revoke the approval of the petition on August 10, 1999. The director noted in his decision that the petitioner had submitted no evidence in response to the NOIR. On appeal, counsel submitted evidence that the petitioner had submitted a timely response to the NOIR. The petition is now before the Administrative Appeals Office (AAO) 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), to perform services as a choir accompanist. The director determined that the petitioner has not established that the beneficiary possessed the required two years membership in the denomination, that the position qualified as that of a religious worker, or that the petitioner had the ability to pay the proffered wage.

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department of Homeland Security “may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.”

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for “good and sufficient cause” where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director’s realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.*

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 first issue on appeal is whether the petitioner established that the beneficiary possessed the required two years membership in the denomination prior to the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that “[a]n alien, or any person in behalf of the alien, may file a Form 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 years 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.”

The regulation at 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.

The petition was filed on March 10, 1997.¹ Therefore, the petitioner must establish that the beneficiary was a member of the prospective U.S. employer’s denomination throughout the two-year period immediately preceding that date.

With the petition, the petitioner submitted a copy of a “certificate of experience” dated February 15, 1997, in which the pastor of the Hwagokdong Church in Korea stated that the beneficiary “has been working at our church

¹ In his decision, the director stated that the petition was filed on May 23, 1997. However, the date stamped on the petition indicates that it was received on March 10, 1997.

as Choir Accompanist from January 1985 to present.”² The record reflects that during the adjustment interview on October 26, 1999, the beneficiary stated that her church in Korea was of the Methodist denomination while the petitioning organization is Presbyterian. The beneficiary stated that she worked as a choir accompanist with her church in Korea until 1997. The record reflects that the beneficiary entered the United States on January 27, 1997 pursuant to a B-2 nonimmigrant visitor for pleasure visa.

In his letter accompanying the petitioner’s response to the NOIR, counsel stated that the Methodist and Presbyterian churches share a common bond that “is widely known.” According to counsel, the two denominations “share a common creed or statement of faith, the some [sic] of worship and religious services and ceremonies.” Counsel submitted no documentary evidence to support his statements. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, while both the Methodist and Presbyterian are of the protestant religious branch of Christianity, there is no evidence that they are the same denomination.³

The evidence does not establish that the beneficiary possessed the required two years membership in the petitioner’s denomination.

The second issue on appeal is whether the position qualifies as that of a religious worker.

According to the regulation at 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 as a religious worker.

The petitioner stated that the duties of the proffered position would entail playing a musical instrument as a soloist or as a member of a musical group such as a choir or small church band. The petitioner did not indicate any other requirements for the position.

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

² We note that the translation submitted by the petitioner does not comply with the provisions of 8 C.F.R. § 103.2(b)(3), which require that documents submitted in a foreign language “shall be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.”

³ See, e.g., the websites for the Presbyterian Church USA (www.pcusa.org) and the United Methodist Church (www.umc.org). For a chart comparison of the beliefs and practices of the two religious groups, see also, www.religiousfacts.com, which also states that Protestantism is “less a denomination than a general branch of Christianity encompassing numerous denominations and a wide theological spectrum.”

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.

In response to the NOIR, counsel stated, "Nothing is more of a traditional religious function than that of a choir accompanist. " Nonetheless, the petitioner submitted no evidence that the proffered position is directly related to the religious creed of its denomination, that the position is defined and recognized by the governing body of the petitioner's denomination, or that the position is traditionally a permanent, full-time, salaried occupation within its denomination.

The evidence is insufficient to establish that the proffered position qualifies as a religious worker within the meaning of the statute and regulation.

The third issue on appeal is whether the petitioner established that it has the ability to pay the beneficiary the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) 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 \$1,200 per month. The record contains a copy of the petitioner's financial statements for the year 1997, accompanied by an accountant's compilation report. As the compilation is based primarily on the representations of management, the accountant expressed no opinion as to whether they fairly present the financial position of the petitioning organization. In light of this, limited reliance can be placed on the validity of the facts presented in the financial statements that have been submitted. No further supporting documentation is included in the record to reflect the assertions made by the accountant in the financial documentation, or contained within the unaudited financial statements.

The record also contains copies of the petitioner's monthly bank statements for the periods July through September 1998 and March through May 1999, and a copy of a Form 1099-MISC, Miscellaneous Income, issued to the beneficiary by the petitioner in 1998 and reflecting nonemployee compensation of \$14,400. The record also includes copies of two checks issued to the beneficiary in September and October 1998 in the amount of \$1,200.

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 primary evidence.

The evidence is insufficient to establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage as of the date the petition was filed.

Beyond the decision of the director, the petitioner has not established that the beneficiary was continuously employed in a qualifying religious occupation or vocation for two full years prior to the filing of the visa petition.

The petition was filed on March 10, 1997. Therefore, the petitioner must establish that the beneficiary was continuously employed as a choir accompanist for two full years preceding that date.

The document from the Hwagokdong Church in Korea indicates that the beneficiary worked as a choir accompanist with the church from 1985 until at least February 1997. The beneficiary also stated that the Hwagokdong Church employed her until February 1997. The petitioner, however, submitted no documentary evidence to corroborate the beneficiary's employment with the Hwagokdong Church. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The evidence does not establish that the beneficiary was continuously employed as a choir accompanist for two full years preceding the filing of the visa petition. For this additional reason, the petition may not be approved.

Also, beyond the director's decision, it is unclear whether the petitioner is a bona fide nonprofit religious organization. The Form I-360, filed on March 10, 1997, indicates that the petitioner is located at [REDACTED]. However, an undated "Letter of Intention," filed with the petition, and a 1998 Form I-099-MISC show that the church is located at 3307 West Avenue J in Lancaster, CA. Bank statements for February 1999 through May 28, 1999 show the petitioner is located at 2629 Avenue K West in Lancaster, CA. However, on appeal, counsel for the petitioner submits a G-28, Notice of Entry of Appearance as Attorney or Representative, showing the petitioner is still claiming to be at [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Based on this conflicting information, it is unclear where the petitioner is located, or if it exists at all. For this additional reason, the petition may not be approved.

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.