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Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 16 2004

IN RE: Petitioner: [redacted]
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)

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The director granted a subsequent motion to reopen, and reaffirmed his original decision. A second motion to reconsider was denied by the director. 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 cantor. The director determined that the petitioner had not established that the position qualified as that of a religious worker.

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--
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> > (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).
>
> (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 petitioner submitted an earlier petition on behalf of the beneficiary in which it stated the beneficiary would be employed as an associate pastor of music. The job and its responsibilities in that petition, which was denied by the director of the Vermont Service Center, are the same as the job and responsibilities in the current petition. The

petitioner acknowledges that it employs the beneficiary as a director and teacher of music, but that the position is really that of a cantor, as defined by the Dictionary of Occupational Titles. The petitioner states that the beneficiary "writes Christian music for worship, conducts the musical aspects of worship, trains the choir to sing in worship and enter competitions, [] conducts a singing group, plays keyboard, teaches classes in music theory, conducts classes in voice training and teaches practical music."

In the motion to reopen, counsel argued that the beneficiary's job meets the definition of cantor as defined by the Encarta World English Dictionary, which defined cantor as "lead singer in choir: somebody who leads the singing in a church choir or congregation." In his decision granting the motion to reopen, the director conceded that the proffered job responsibilities met the dictionary definition of cantor, but that this was not sufficient for immigration purposes.

On appeal, counsel asserts that the beneficiary was granted an R-1 visa under the same facts, and that the regulations defining religious workers are the same under both 8 C.F.R. § 214.2(r)(2) and 8 C.F.R. § 204.5(m)(2). Counsel also includes a copy of an article entitled "The Cantor" by Philip Snare, which discusses the role of the cantor within his church and Christianity in general.

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.

According to the Dictionary of Occupational Titles (DOT), a cantor:

> Chants and reads portions of ritual during religious services, and directs congregants in musical activities. Arranges musical portion of religious services in consultation with leader of congregation. Chants or recites religious texts during worship services or other observances and trains and leads congregants in musical responses. May create variations of traditional music or compose music for services. May train and direct choir or teach vocal music to youth or other groups of congregants.

Although counsel argues that the duties as outlined for the proffered position fall within the dictionary definitions and the job as defined by the DOT, we find the argument unpersuasive. We note first that the petitioner has described the job in several different ways: as an associate pastor/minister of music, as a director and teacher of

religious music, and now as a cantor/musician. The petitioner acknowledges that, within the internal workings of the church, the position is that of an associate pastor/minister, and only by looking at the definition of "cantor" was it able to ascertain that the beneficiary actually performed in the role of cantor.

Counsel bases his argument that the proffered job is that of a cantor because the term is defined in the dictionary as "a lead singer in a choir." The document by also indicates that the role of "cantor" is as the lead singer of a religious choir."[1] It is noted, however, the record reflects that the proffered position is more that of a choir director than a "lead singer" in the petitioner's choir. Although the beneficiary appears to perform several of the functions listed under the job title "cantor" in the DOT, there is no evidence that he "chants" or recites religious text during the course of the religious service or that he trains the congregation in the proper responses to those chants or recitations. rticle supports the position that the cantor is less a choir leader and more of a soloist who chants liturgical music or religious passages with the appropriate responses from the congregation or choir.

This is more than just a matter of semantics, as alleged by counsel. The petitioner cannot pick and choose among job functions as listed by the DOT and classify a position such that it falls within those religious occupations specifically named in the regulation. The evidence establishes that the beneficiary is music director for the petitioner. Therefore, the petitioner must establish that the position is a traditional religious function within its denomination.

he petitioner's pastor, stated in the church's original petition that it has "long been recognized in religious circles that the musical expression of a people in praise and song is vital to their worship." He stated that the beneficiary has been working in the capacity of music minister since 1997, and is required to "address the ethnic aspect of our church life as it relates to songs of praise and worship." The petitioner describes itself as a non-denominational church that was established in 1969. The petitioner provides no evidence that the position of associate pastor or minister of music (or cantor) existed in the church or was recognized as a traditional function of the church prior to the beneficiary assuming the role in 1997. The petitioner further provided no evidence that any governing body of the petitioner defines and recognizes the position as a full time salaried position within the denomination. Although the petitioner discusses the important role of music in religion, it provides no evidence of the history of the music director position at issue as a traditional religious function within its own denomination.

The director determined that the petitioner had established its ability to pay the proffered salary. We withdraw this determination by the director. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part, that:

> 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 wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent

[1] Counsel provides no evidence of the full identity of Mr. Snare or his scholarly credentials. Mr. Snare's article does not document the source of the facts on which he bases his conclusions. Thus the article has little evidentiary value.

> residence. Evidence of this ability shall be either in the form of annual reports, federal tax returns, or audited financial statements.

The petitioner submitted copies of Forms W-2c, Corrected Wage and Tax Statement, for the years 1999 and 2000. Each of the corrected wage statements reflect an increase of over $9,600 in reported wages for the beneficiary.[2] There is no evidence that these corrected tax statements were filed with the Internal Revenue Service (IRS). The petitioner also submitted copies of the beneficiary's Form 1040, U.S. Individual Income Tax Return, for 1999 and 2000. The 1999 return is dated January 18, 2002. The record contains no evidence that either Form 1040 was filed with the IRS, and neither reflects that it is a corrected tax return.

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 submitted copies of unaudited financial statements for the years ending 1998 and 1999. Although these statements were "reviewed" by a certified public accountant (CPA), the information used by the CPA was based primarily on representations of management. The CPA could therefore express no opinion as to whether they present fairly the financial position of the petitioner for the relevant years. No further supporting documentation is included in the record to reflect the assertions made by the petitioner in the unaudited financial statements. No evidence of the petitioner's financial status for the year 2000 was submitted.

Beyond the decision of the director, the evidence does not establish that the beneficiary has been engaged continuously in a qualifying religious occupation for two full years immediately preceding the filing of the petition. The evidence submitted indicates that the petitioner initially reported paying the beneficiary $10,920 in 1999 and 2000. Although the petitioner states it issued corrected tax returns that reflect an increase in wages of more than $9,600 for each year, as indicated above there is no evidence that these returns were filed with the IRS. The record contains no contemporaneous evidence of wages paid to the beneficiary for continuous employment during the qualifying years. The evidence does not establish that the beneficiary was continuously engaged in a full time religious occupation for the two years immediately preceding the filing of the petition. For this additional reason, the petition cannot 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.

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[2] We note that the previous petition also contains corrected wage and tax statements for the years 1997 and 1998, reflecting increases in salary from $0 to $20,850 in 1997, and from $5,776 to $20,565 in 1998.