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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 258 53692 Office: CALIFORNIA SERVICE CENTER Date: **APR 05 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and 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), in order to classify him as a Pianist.

The director denied the petition on February 7, 2004 after determining that the petitioner failed to establish that the beneficiary's proffered position is related to a traditional religious function and, therefore, could not be considered as a religious occupation.

The petitioner, through counsel, files a timely appeal.

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 issue in contention is whether the petitioner seeks to employ the beneficiary in a qualifying 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 at 8 C.F.R. § 204.5(m)(2) 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 occupation. 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.

On appeal, counsel argues the "duties of a Pianist are clearly closely associated with the duties of those occupations listed in [the regulation]," and that "music has traditionally played a major role in Christian religious services and the Pianist is essential to this role." We are not persuaded by counsel's argument. We find that merely being "closely associated" with the occupations listed in the regulation, is not sufficient. Instead, as noted above, in order to establish that the beneficiary's position as a Pianist is a traditional religious function, the petitioner must establish that the beneficiary's duties are directly related to the petitioner's religious creed, that the position is defined and recognized by the petitioner's denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

In a letter accompanying the initial filing, Reverend [REDACTED] Pastor of the petitioning church, states:

It is our desire to employ [the beneficiary] as a Pianist.

Western Presbyterian Church was established in 1998 and has been serving the Korean-American community since then. We currently have a congregation in excess of 80.

[The beneficiary's] duties as Pianist will include providing accompanying music for our choir at Sunday religious Services, as well as Wednesday Night Services. Further, [the beneficiary] will play the piano at all Religious Holiday Services, including Christmas, Easter, etc. Further, [the beneficiary] will be responsible for assisting in organizing the choir group rehearsals and in the preparation and choosing of the appropriate religious hymns and songs to be used in various Religious Ceremonies.

Though the petitioner claims the beneficiary will perform his duties during the Sunday religious services, the Wednesday night services, and religious holiday services, the "Facility Use Schedule" contained in the record indicates that the petitioning church is granted use of First Presbyterian Church of Gardena space only during Sundays from 11:30 am to 2:30 pm, Tuesday through Thursday from 5 am to 6 am, and Fridays from 5 am to 6 am and 6 pm – 10 pm. Given that the "Facility Use Schedule" does not make any reference to Wednesday night services or to religious holiday services, it is unclear where exactly the beneficiary will be "providing accompanying music" for the petitioner's church services. 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. 582, 591-92 (BIA 1988).

Further, it appears that at most, the beneficiary would only be serving as a Pianist for the petitioner for a total of 11 hours per week. Given this information we find the petitioner has offered nothing to show that the religious denomination considers the beneficiary's duties to be a traditional religious function, routinely assigned to a full-time paid employee, rather than tasks usually assigned to a part-time worker or a volunteer from the congregation.

On appeal, counsel argues that the prior approval of the beneficiary's R-1 petition demonstrates that CIS has affirmed that the beneficiary's work constitutes a traditional religious function. This argument is not persuasive. The instant petition and the beneficiary's current nonimmigrant status are unrelated. Given that a petitioner must meet the eligibility requirements for each petition filed, the fact that a previous nonimmigrant petition may have been approved, does not indicate a de facto approval for any further petition filed in the future. We note that if the previous petition was approved in error, that error does not create a presumptive entitlement to perpetuation of that error.

Beyond the decision of the district director is the issue of whether the beneficiary has during the two years immediately prior to the filing of the petition has the required experience in the same position being offered by the petitioner.

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 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 September 15, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a Pianist in the petitioner's denomination throughout the two years immediately prior to that date. The record reflects that the beneficiary entered the United States on June 9, 2003 as an R-1 nonimmigrant. As the beneficiary was outside of the United States for the majority of the two-year period, his experience in the United States cannot suffice to meet the experience and denominational membership requirements.

In a copy of a letter dated April 13, 2002, Senior Pastor, Joo Won Kim, of the Daejeon Jungbu Church, "certifies that the [beneficiary] . . . is employed as a church choir pionist [sic] and is paid 200,000 won (APP. \$167) monthly." Pastor Kim does not, however, indicate the hours worked by the beneficiary, much less that he worked for the Daejeon Jungbu Church on a full-time basis. Further, the letter is not supported by contemporaneous, documentary evidence to support Pastor Kim's claim that the beneficiary was remunerated for his services. Moreover, we note that though the letter is dated April 13, 2002, Pastor Kim indicates the beneficiary's period of

employment as “1993 [April], 2003 PRESENT.” This inconsistency serves to undermine the credibility of Pastor Kim and the claims made in his letter.

A second letter from Pastor Kim, dated November 5, 2003, indicates that the beneficiary’s receipt of 200,000 won per month is “a reward” or in “appreciation” of the beneficiary’s services. The fact that such payment was received as “a reward” rather than a salary does not support a finding that the beneficiary was employed on a full-time basis.

Further, we do not find the record establishes that the beneficiary’s work for the petitioner has been full-time. First, the petitioner’s statements that the beneficiary’s duties “will include,” that the beneficiary “will play,” and “will be responsible,” implies that these terms cover future employment, rather than terms already in effect. Second, we question the authenticity of the paychecks submitted in support of the petition to show the beneficiary was remunerated for his work for the petitioner. The record contains copies of three of the beneficiary’s paychecks showing the beneficiary received a salary of \$1500 for August 2003, September 2003, and October 2003, numbered 1585, 1623, and 1634, respectively. We find it curious that the “YTD,” (year-to-date) column for each of the paychecks remains constant for each consecutive paycheck. Without an explanation for these discrepancies, it appears that the paychecks were simply manufactured by the petitioner to fill in as evidence where it was lacking in the record.

As noted previously, the record also contains inconsistencies between petitioner’s claims of the beneficiary’s workdays and hours and the hours noted in the “Facility Use Schedule.” Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Accordingly, we find the record does not establish the petitioner has employed the beneficiary on a full-time basis for the periods claimed, much less that the beneficiary was continuously working as a Pianist throughout the entire two-year period immediately prior to filing of the petition.

The remaining issue, beyond the decision of the district director, is whether the petitioner has established its ability to pay the beneficiary the proffered wage.

In an attempt to demonstrate it has the financial resources to pay the beneficiary’s salary, the petitioner submits financial statements, dated December 31, 2001 and December 31, 2002, respectively.

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.*

[Emphasis added].

The cover letters that accompany the petitioner's financial statements indicate that the statements are "limited to presenting . . . information that is the representation of management," and that the accountant has "not audited or reviewed the accompanying financial statements" As the petitioner's accountant clearly indicates that the statements were "not audited or reviewed," they do meet the requirements of 8 C.F.R. § 204.5(g)(2) which requires either copies of annual reports, federal tax returns, *audited financial statements*. Though the petitioner is free to submit other kinds of documentation, such submissions must only be *in addition to*, rather than *in place of*, the type of documentation required by 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. 8 C.F.R. § 103.2(b)(2)(i).

Moreover, as the financial statements are from December 2001 and December 2002, such evidence is insufficient to demonstrate that the petitioner had the ability to pay the beneficiary from the time of filing in September 2003, continuing to the time the beneficiary obtains lawful permanent residence.

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.