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U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

CJ

FILE:

[REDACTED]
WAC 01 218 54981

Office: CALIFORNIA SERVICE CENTER

Date:

FEB 15 2005

IN RE:

Petitioner:

Beneficiary:

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:

[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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center initially approved the special immigrant religious worker petition. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and exercised his discretion to revoke the approval of the petition on November 21, 2003. The petitioner filed an appeal to this decision, and the petitioner's timely appeal is now before the Administrative Appeals Office (AAO) for review. The AAO will dismiss the appeal.

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), to employ the beneficiary as a "Choral Director." The director determined that the beneficiary's position as a Choral Director does not qualify as a religious occupation within the meaning of the regulations. The director further determined that the beneficiary had not been engaged in a full-time salaried position for the two years immediately preceding the date of filing of the petition.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General 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 Dec. 450 (BIA 1987).)

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 regulation at 8 C.F.R. § 204.5(m)(1) echoes the above statutory language, and 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) 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 April 30, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as a Choral Director for two years immediately prior to that date; the period covering April 30, 1999 to April 30, 2001. The Form I-94, Arrival and Departure Record, indicates that the beneficiary initially entered the United States on July 14, 1998, as a B-2 nonimmigrant. The record also contains a copy of the beneficiary's Form I-797A approval notice indicating the beneficiary's approval as an R-1 nonimmigrant from January 13, 1999 to December 20, 2001. Thus, the record reflects that the beneficiary was in the United States for the entire qualifying period.

As it relates to the beneficiary's work during the relevant two-year period, Reverend [REDACTED] of the petitioning church, states:

After [the beneficiary] came to the United States in July of 1998, she attended St. Gregory Nazianzen Korean Apostolate in Los Angeles, which is another Korean Catholic Church. St. Gregory Nazianzen Korean Apostolate submitted an R-1 petition for her, and she was granted R-1 visa status valid to December 20, 2001. After serving St. Gregory Nazianzen Korean Apostolate for some time, she started attending St. Agnes Catholic Church and also working for [REDACTED] as Choral Director.

In the director's notice of intent to revoke approval of the petition, the director indicated that to be eligible for approval as a special immigrant religious worker, the beneficiary's position as a Choral Director must be “a

paid, full-time" position. The director further noted that there was no evidence that the beneficiary received any remuneration from the petitioner or her previous employer during the requisite two-year period or evidence that the beneficiary worked full-time as a Choral Director during the requisite two-year period.

In response to the director's notice, the petitioner submitted a letter in which it acknowledges that the beneficiary "was not being paid," and that the beneficiary "continued to perform her services without remuneration." The petitioner argued, however, that the beneficiary's "unpaid service qualifies her for immigration as a religious worker."

The petitioner also submitted a letter from [REDACTED] of St. Gregory Nazianzen Catholic Korean Apostolate, which confirms the petitioner's statement that the beneficiary's work during the requisite two-year period was performed as a volunteer. [REDACTED]

This letter is to certify that [REDACTED] has worked as a choral director here at St. Gregory Catholic Church, AKA [REDACTED] between July 1998 and September 2000. She has received a small amount of stipend as a token of appreciation from time to time but she has worked mostly as a volunteer until she moved to St. Agnes Church in Los Angeles to work as a choral direct[or] in a full time position.

As it relates to the petitioner's work for the petitioner, the petitioner submitted a copy of the beneficiary's 2000 W-2 Wage and Tax Statement which demonstrates that the beneficiary received \$6,800 in wages from the petitioner. The petitioner also submitted copies of four checks issued to the beneficiary by the petitioner. The checks, dated June 17, 2001, July 20, 2001, August 20, 2001, and September 20, 2001, respectively, are each issued in the amount of \$1000 and indicate they were issued as "payroll." Given that the Form G-325A, Biographic Information sheet contained in the record, indicates the beneficiary was hired by the petitioner in March 1999, the four checks contained in the record are insufficient evidence to establish the beneficiary worked or was remunerated for her full-time position as a Choral Director from March 1999 to the date of filing on April 30, 2001. Further, that the beneficiary is only able to produce one Form W-2 for the amount of \$6800, is also not persuasive evidence the beneficiary was employed or compensated for full-time work during the requisite period.

On appeal, counsel for the petitioner argues that the evidence "supports a finding that the beneficiary continued to perform the duties of [her] religious occupation at least for 2 years immediately preceding the filing of the petition." Counsel fails to refer to any specific document and submits no further evidence on appeal.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." See H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years

immediately preceding the time of application. The term "continuously" was interpreted to mean that one did take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Com. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Com 1963).

The term "continuously" also is discussed in a 1980 decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

In line with these past decisions and the intent of Congress, it is clear therefore, that to be continuously carrying on the religious work means to do so on a full-time basis. That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is not paid, the assumption is that he/she is engaged in other, secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who, in accordance with their vocation, live in a clearly unsalaried environment; the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and salaried. To hold otherwise would be contrary to the intent of Congress.

As the record does not demonstrate the beneficiary received remuneration for her services, the petitioner is unable to show that the beneficiary had the requisite two years experience as a Choral Director immediately preceding the filing date of the petition.

Counsel further argues that Citizenship and Immigration Services (CIS) "should also be barred from changing its determination so long after approving the petition based on equity and other grounds." We are not persuaded by counsel's argument. 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. *Matter of Ho*, 19 I&N Dec. at 590 (BIA 1988). The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Matter of Ho*, 19 I&N Dec. at 590.

The next issue is whether the beneficiary's position constitutes a qualifying religious occupation for the purpose of special immigrant classification.

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 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 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.

The petitioner describes the beneficiary's duties and remuneration as Choral Director:

She will conduct choirs and vocal music groups, audition and select members of choirs and groups, and select music to suit performance requirements and accommodate talent and ability of groups. She will also direct groups at rehearsals and performance to achieve desired effects, such as tonal and harmonic balance, dynamics, rhythms, tempos, and shading, utilizing knowledge of vocal music techniques and music theory. She will work with soloists and individual or several members of choir to observe them sing, detect mistakes in voice production and lead them to improve their singing skills by correcting their bad habits. In addition, she will transcribe musical compositions and melodic lines to adapt them to or create particular style for each group and performance as well as conduct groups with instrumental accompaniment. She will also compose and modify music for special occasions.

We are firmly convinced that she has been and will continue to manage its music programs well to foster development of choir members' singing ability and present well-refined performances at regular services and special occasions by bringing out the best religious musical effect possible. Our church will pay her \$1,600 a month in remuneration for her work.

In this instance, the petitioner 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 delegated to a part-time worker or a volunteer from the congregation. The record contains scant evidence of any remuneration received by the beneficiary from the petitioner. The fact that the petitioner was able to provide services and operate as a church without the beneficiary serving in a full-time, paid capacity, does not support the petitioner's assertion that the beneficiary's position is considered a traditional religious function by the petitioner's denomination.

Beyond the decision of the district director is the issue of whether the petitioner is considered a qualifying tax-exempt religious organization. The regulation at 8 C.F.R. § 204.5(m)(2) defines a "bona fide nonprofit religious organization in the United States" as an organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations, or one that has never sought such exemption but establishes to the satisfaction of CIS that it would be eligible if it had applied for tax-exempt status.

The regulation at 8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization qualifies as a non-profit organization in the form of either:

- (A) Documentation showing that it is exempt from taxation in accordance with section

501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases, evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or

- (B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

In support of the petition, the petitioner submits a letter from the Internal Revenue Service (IRS) dated August 12, 1981. The letter indicates that the Korean Catholic Association of Los Angeles, located at [REDACTED] [REDACTED] is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. The record contains a copy of the Korean Catholic Association's 1999 Form 990 which reflects its employer identification number as [REDACTED]

The Form I-360 indicates that the petitioner is the Korean Catholic Center, doing business as St. Agnes Catholic Church, and lists the petitioner's IRS tax number as [REDACTED]. This number is consistent with the number reflected on the beneficiary's 2000 W-2 Wage and Tax Statement.

In this case, the petitioner has not submitted any documentation to show the relationship between the Korean Catholic Center, d/b/a as St. Agnes Catholic Church, and the Korean Catholic Association. In fact, as evidenced by the two separate employer identification numbers, the organizations appear to be two completely separate entities. Without evidence that the petitioner is covered under the tax exemption granted to the Korean Catholic Association as part of a group exemption, the petitioner has not shown that it has the required tax-exempt status. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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.