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**U.S. Citizenship
and Immigration
Services**

C1

FILE:

Office: NEBRASKA SERVICE CENTER

Date: JUN 24 2005

IN RE:

Petitioner:

Beneficiary:

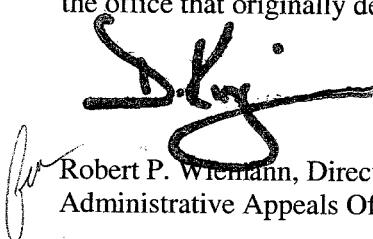
PETITION: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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. Wiermann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Acting Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a “supporting ministry of the Seventh-Day Adventist.” 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 and piano instructor. The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition, that the position qualifies as that of a religious worker, that the petitioner has extended a qualifying job offer to the beneficiary, or that it has the ability to pay the proffered wage.

On appeal, the petitioner submits a letter 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--
 - (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 presented on appeal is whether the petitioner established that the beneficiary had been continuously employed in a qualifying religious vocation or occupation for two full years 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 September 2, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a choir and piano instructor throughout the two-year period immediately preceding that date.

With the petition, the petitioner submitted a December 16, 2001 letter from [REDACTED] pastor of the Bangkok Chinese Seventh-day Adventist Church in Bangkok, Thailand. Pastor [REDACTED] stated that the beneficiary had been a member of the church since 1996, responsible for church music as a song leader, choir conductor, pianist and organist. He further stated that the beneficiary had been "especially active as a self-supporting missionary at [REDACTED] Texas and then in Japan" since 1994.

A December 14, 2001 letter from [REDACTED] whose position and identity are not provided, indicated that the beneficiary worked "directly and indirectly" as a "Christian Volunteer" for the writer and her husband periodically from 1994 to "the present day." This included "indirectly" working for the [REDACTED] from May 23, 2001 to "the present day" in Kent, Washington. According to Mrs. [REDACTED]

[The beneficiary's] duties included caring for the elderly, the sick, the depressed, and the families in need through counseling and encouragement. She shopped for groceries, prepared meals, did household chores and secretarial work and ran errands. She also attended worships, sang and played songs on the piano, and prayed. In addition, she initiated and supervised the 10-day cleansing programs to those who needed it and agreed to do so.

The petitioner also submitted a letter from the president of the [REDACTED] Institute in Japan, who stated that the beneficiary "served as a full time missionary from September 1, 2002 to July 13, 2003 serving as a bakery worker at Mount Akagi Institute . . . [She] was our regular church pianist and organist . . . She also taught piano, English, and guitar to the children on our campus."

In response to the director's request for evidence (RFE) dated April 28, 2004, the petitioner submitted a May 25, 2004 letter from Nita Chin, DDS, who stated:

This is to verify that [the beneficiary] was a full-time volunteer from May 23, 2001 to June 10, 2002. In return for room and board with me, she shared her Seventh-day Adventist faith by ministering to the depressed, discouraged, sick and/or elderly . . . During this period, she

spent at least 40 hours/week nurturing some on a one-to-one basis, others, group settings, some others, through email, snail mail and telephone.

Concurrently, she attended church weekly and was an active church member. She organized and put together about a dozen social gatherings . . . She was a great cook and an eager helper. She also reached out to the senior citizens at the Kent Senior Community Center by playing the piano and performing piano recitals on five different occasions.

A May 16, 2004 letter from [REDACTED] Japan, stated that the beneficiary lived at her home for a period of 10 weeks in 2002, performing duties of "child/house sitting, and piano/recorder teaching. On Tuesdays, she and my children went to help out a handicapped lady with her small but very busy mission field that she runs." [REDACTED] stated that the beneficiary "volunteered at my home that is turned into a mission field printing health-related and religious literature and selling bulk herbs by fax/phone/email/walk-in order." Another letter from the [REDACTED] Institute indicates that the beneficiary worked a total of 1,680 hours in the bakery, 11.5 hours as a church pianist/organist, and 52 hours as a piano instructor during the 10 and half months that she worked at that organization.

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. Rep. No. 101-723, at 75 (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 not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

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).

On appeal, the petitioner acknowledges that the beneficiary was not employed full-time as a music teacher during the qualifying two-year period. However, the petitioner states that the beneficiary had taught music and English for three years from 1991-1994. The petitioner requests "special consideration" for this teaching experience. There is no statutory or regulatory provision that waives this requirement.

The statute and the regulation require that the alien seeking admission to the United States as a religious worker must have worked in the religious occupation or vocation for which he or she seeks entry for at least two full years immediately preceding the filing of the visa preference petition. The statute and regulation provide for no waiver of this two-year experience requirement.

The evidence does not establish that the beneficiary was continuously engaged in a qualifying religious vocation or occupation for two full years prior to the filing of the visa petition. The petitioner, of course, has the option of filing a Form ETA 750, Application for Alien Employment Certification, with the United States Department of Labor and petitioning for the beneficiary as a skilled or professional worker pursuant to section 203(b)(3) of Act, 8 U.S.C. § 1153(b)(3).

The second issue is whether the petitioner established that 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. 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.

The petitioner, in its August 29, 2003 letter accompanying the petition, stated that the “importance of music in the SDA plan of education dates back to Bible times and the Schools of the Prophets,” and that the music must be the “right” kind of music, which does not serve to “deteriorate[] the moral power and [thus to] smooth[] the way for the making of wrong decisions.” The petitioner also states that all students attending the school must complete one unit of choir for each year of attendance at the school, and that the petitioner “seeks to teach the making of proper choices relative to Christian music.”

The petitioner states that all of its teachers must be members of the Seventh-day Adventist faith, and on appeal, states:

As a volunteer worker at [the petitioning organization,] every worker is expected to understand and be able to instruct the students on the basic religious beliefs of the Seventh-day Adventist Church. Any teacher who works at [the petitioning organization] needs to be prepared to present and follow the teachings and objectives of the Adventist system of education. In the sense of this special preparation, a person working in the musical ministry of our church and school is just as important to our educational system as is a Seventh-day Adventist Chaplain or Pastor.

Nonetheless, the petitioner submitted no evidence that the proffered position is defined and recognized by the Seventh-day Adventist Church, or that the position is traditionally a permanent, full-time, salaried occupation within the denomination. The work schedule submitted with the petition indicates that the beneficiary would be expected to work only a half hour with the choir, while spending approximately two hours in "preparation for choir." The remainder of the duties involves teaching English as a second language and supervision and instruction of "home making." The petitioner indicated that the position would involve three hours of "private music instruction" on Sunday afternoon. The evidence submitted with the petition indicated the proffered position is primarily secular or administrative in nature, and that duties involving music are only tangential to the other job duties.

In its June 8, 2004 response to the RFE, the petitioner stated that in the proffered position, the beneficiary would spend 65% of her time in choir duties, 25% of her time in teaching English, and 10% of her time giving private piano lessons. The petitioner outlined the workweek as follows:

On Sunday afternoon from 2:00-6:00 PM, [she] will teach private piano . . . On Monday morning, from 8:00-10:00 AM, she will teach English as a Second Language; from 10:00 AM-12:00 PM, she will prepare and teach choir; then in the afternoon from 2:00-4:00 PM, she will be occupied with more choir preparation . . . On Saturday, she will be engaged in choir presentations at churches arranged, which often covers the entire day.

This schedule expands upon the duties originally reported as constituting the required duties of the position. On appeal, the petitioner stated that it added the English instruction after the job was offered to the beneficiary. However, we note that the English instruction was part of the original job schedule and that the petitioner offered no explanation as to the additional duties involving music that were added to the schedule. 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, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Based on the description of the duties, as initially presented, the evidence does not establish that the position is a religious occupation within the meaning of the statute and regulation.

The third issue on appeal is whether the petitioner established that it had extended a qualifying job offer to the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(4) states, in pertinent part, that:

Job offer. The letter from the authorized official of the religious organization in the United States must state how the alien will be solely carrying on the vocation of a minister, or how the alien will be paid or remunerated if the alien will work in a professional capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support.

The petitioner stated that the beneficiary will be expected to work at least 40 hours per week in the proffered position and that her compensation would consist of housing, utilities, and a small monthly stipend for, among

other things, food, household expenses, travel, and discretionary expenses, totaling \$707.80. In response to the RFE, the petitioner stated that the new financial package for the beneficiary and her husband would be approximately \$1,376 per month plus housing and utilities. The director concluded that the remuneration indicated the position did not offer full-time employment.

We withdraw this statement by the director. The compensation for the position, in this case, is not necessarily indicative of part-time employment.

Nevertheless, as the petitioner has not established that the position qualifies as that of a religious worker, it has not established that it has extended a qualifying job offer to the beneficiary. Additionally, in its August 29, 2003 letter, the petitioner stated that the position "may be considered a full-time, 3-year position."

Based on the temporary nature of the proffered position, the petitioner's offer of employment to the beneficiary does not meet the requirements for this preference based immigrant visa petition.

The record does not establish that the petitioner has extended a qualifying job offer to the beneficiary.

The fourth issued on appeal is whether the petitioner established that it has the ability to pay 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 submitted a copy of its Form 990, Return of Organization Exempt from Income Tax, for the years 2001 and 2002. The petitioner submitted no evidence of its financial ability to pay the proffered wage in 2003, the year the petition was filed.

The director determined that, as the petitioner relies upon student tuition and fees, sales of produce from its farm and greenhouse and contributions from its supporting constituency for its income, the petitioner's ability to remunerate the beneficiary is dependent upon a "myriad of factors" and, as such, he could not conclude that the beneficiary would not be reliant upon supplemental income for support. This is clearly an unsustainable determination, and will be withdrawn. The fact that the petitioner has several sources of income, each impacted by outside factors, is true of almost all businesses, and does not indicate potential financial instability.

Nonetheless, the petitioner is required to establish its continuing ability to pay the proffered wage as of the date the petition was filed. The petitioner submitted no evidence of its financial status in 2003.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage as of the date the petition was filed.

Beyond the decision of the director, the petitioner has not established that it is a bona fide nonprofit religious organization.

The regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

(3) *Initial evidence.* Unless otherwise specified, each petition for a religious worker must be accompanied by:

(i) Evidence that the organization qualifies as a nonprofit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with § 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 § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organization.

The petitioner submitted a copy of a March 13, 1996 letter from the Internal Revenue Service (IRS) indicating that the petitioner had been granted tax-exempt status under section 501(c)(3) of the Internal Revenue Code (IRC) as an organization described in sections 509(a) and 170(b)(1)(A)(ii) of the IRC. This documentation reflects that the petitioner received its tax-exempt status as an educational institution. The petitioner did not submit evidence that it was covered under the group tax-exemption granted by the IRS to the Seventh-day Adventist Church.

An organization that qualifies for tax exemption as an educational institution 170(b)(1)(A)(ii) of the IRC can be either religious or non-religious. The burden of proof is on the petitioner to establish that its classification under section 170(b)(1)(A)(ii) derives primarily from its religious character, rather than from its status as a publicly supported educational institution.

Because the IRS determination letter that classifies an entity under section 170(b)(1)(A)(ii) of the IRC cannot, by itself, establish that the entity is a religious organization, that determination letter cannot satisfy 8 C.F.R. § 204.5(m)(3)(i)(A). The other option, at that point, is to comply with 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting the documentation that the IRS would require to determine that the entity is a religious organization.

The organization can establish this by submitting documentation that establishes the religious nature and purpose of the organization, such as brochures or other literature describing the religious purpose and nature of the activities of the organization. The necessary documentation is described in a memorandum from [REDACTED] Associate Director of Operation for CIS, *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003):

- (1) A properly completed IRS Form 1023,
- (2) A properly completed Schedule A supplement, if applicable,

- (3) A copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization, and
- (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

The above list is consistent with the regulatory requirement at 8 C.F.R. § 204.5(m)(3)(i)(B), cited above. The memorandum specifically states that the above materials are, collectively, the “minimum” documentation that can establish “the religious nature and purpose of the organization.” Thus, for example, a petitioner cannot meet this burden by submitting only its articles of incorporation. Also, obviously, it is not enough merely for the petitioner to *submit* the documents listed above. The *content* of those documents must establish the religious purpose of the organization.

The petitioner submitted a copy of its articles of incorporation. On appeal, it also submitted copies of its program for a church service, a flyer advertising the school, and an excerpt from its staff handbook. The petitioner did not submit a completed IRS Form 1023 as required by the regulation.

The evidence submitted therefore is insufficient to meet the requirements of the regulation and does not establish that the petitioner is a bona fide nonprofit religious organization. This deficiency constitutes an additional ground for which 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.