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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 02 249 51338

Office: VERMONT SERVICE CENTER

Date: AUG 24 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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont 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) to perform services as a choir conductor and music director.

The director denied the petition on June 24, 2003 after determining that the petitioner failed to establish that the beneficiary had been continuously performing essentially the same duties as the duties of the proffered position for the two-year period immediately preceding the filing of the petition. The director further determined that the petitioner failed to establish that the beneficiary's proffered position is a qualifying religious occupation and that the petitioner failed to establish its ability to pay the beneficiary the proffered wage.

The petitioner, through counsel, files a timely appeal. On appeal, counsel indicates that a brief and/or evidence would be submitted within 30 days. To date, no further documentation has been submitted. Accordingly, the record is considered to be complete as it now stands.

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 July 24, 2002. Therefore, the petitioner must establish that the beneficiary was continuously performing essentially the same duties as the duties required of the proffered position for the two-year period immediately prior to the filing of the petition; July 24, 2000 to July 24, 2002. The Form I-94, Arrival and Departure Record, indicates that the beneficiary entered the United States on May 14, 1996 as an R-1 nonimmigrant with permission to remain in the United States until May 13, 1999. The record further reflects that the beneficiary was granted an extension of her stay as an R-1 nonimmigrant from April 29, 2001 until April 28, 2003. Thus, it appears that all of the beneficiary’s qualifying experience occurred while she was in the United States.

In a letter dated January 30, 2002, which was submitted with the original petition, Rev. [REDACTED] senior pastor of the petitioning church, describes the beneficiary’s past duties and the petitioner’s intent to continue the beneficiary’s employment in the position of choir conductor and music director. Rev. [REDACTED] states that the beneficiary “has been faithfully serving the Princeton Korean Community Church as a full-time Choir Conductor and Music Director since May 1996.” Rev. [REDACTED] describes the duties performed by the beneficiary:

[The beneficiary] is serving for the Church in the areas of selection and training of the choirs, consultation with pastor to plan and implement a musical accompaniment of church services, performance of the musical instruments, and development of music programs for youth and member groups.

In response to the director’s request for evidence the petitioner submitted a document entitled “Church Position Requirement,” which lists specific positions, their requirements and associated duties. As it relates to the position of “Music Director/Choir Conductor/Cantor,” the document states that a person holding this position is responsible “for directing the Choir and Praise teams . . . [s]electing musical programs for religious services . . . [and] holding auditions and teaching vocal and instrumental hymn or gospel songs to the congregation.” We note that the last page of the document contains the following notation: “D:\NJ First Methodist Church/Response letter.” It appears that this notation is actually the name under which the particular document was saved and that the petitioner attempted to use the job requirements and duties from another church of a different denomination in order to prepare its response to the director’s request. The petitioner has not submitted any documentation from its denomination, the Korean Presbyterian church, to establish the actual duties and requirements associated with the position of choir conductor and music director.

The petitioner also submitted a letter dated February 12, 2003, from [REDACTED], pastor in charge of the petitioning church, who indicates that the beneficiary has been "serving our church as both an assistant pastor and an office employee from 9 am to 5 pm; Tuesday through Saturday." Pastor [REDACTED] further states:

Specifically, [the beneficiary] has been leading our choir as a conductor for Sunday services; taking charge of our praise school for our church's praise service on Thursdays. She leads Bible study groups on Wednesdays and Saturdays as an assistant pastor. With all her other contributions she also leads our prayer meetings on Friday nights. She has been visiting two families a week and giving pastoral counseling for our church members.

In a third letter, also dated February 12, 2003, [REDACTED] treasurer of the petitioning church, reiterates Pastor [REDACTED] assertion that the beneficiary serves the petitioner in the position of assistant pastor. Mr. [REDACTED] states:

Our church is being served by two full time pastors and one part time pastor. As full time salaried pastors, [REDACTED] is serving as our pastor in charge and [the beneficiary] is serving as our assistant pastor.

The record contains a fourth letter from the petitioner, dated April 14, 2003. The letter, written by Rev. [REDACTED] indicates that due to the "fast growing rate of Korean immigrants and their spiritual needs, our congregation is in urgent need of a full-time Cantor (Religious Music Director). Contrary to his previous letter, in which he indicated that the beneficiary served "as both an assistant pastor and an office employee," in this letter Rev. Jeong now indicates that the beneficiary "has been working for our church as religious music director since her arrival in the United States" Pastor Jeong goes on to describe the beneficiary's previous duties:

- According to the religious tradition and principles of the Presbyterian church, planning, preparing and teaching music programs and other religious programs for parish members (10 hours per week);
- Planning, preparing, and teaching musical study groups at the parish for different age groups (10 hours per week);
- Planning, preparing, and performing musical accompaniment at the church Sunday services (10 hours per week);
- Planning, organizing, and teaching at special musical programs for parish members such as religious retreats, evangelism conferences, community outreach programs, revival meetings, summer/winter vacation school, etc. (5 hours per week);
- Planning, preparing, and teaching music to the homebound and the invalid members at the hospital (5 hours).

In this letter, Rev. [REDACTED] also provides a breakdown of the beneficiary's work hours and responsibilities for each day of the week. However, contrary to Rev. [REDACTED] description of the beneficiary's duties as requiring 40 hours per week, the breakdown provided by Rev. [REDACTED] in this letter indicates that the beneficiary's duties actually required only 34 hours per week. Further, the duties listed by Rev. [REDACTED] in this breakdown include duties not previously listed by Rev. [REDACTED] such as "providing counseling to church members," "assist[ing] in bible lessons to church members," and "conduct[ing] hospital and home visitation for spiritual and bible study."

In denying the petition, the director noted the discrepancies related to the descriptions of the beneficiary's past experience as well as the proffered position and found that such discrepancies did not lead to a finding that the beneficiary was continuously employed in essentially the same position as the proffered position for the two-year period immediately preceding the filing of the petition. The director further determined that the petitioner failed to demonstrate that the proffered position was a qualifying occupation. Finally, the director determined that the petitioner failed to establish that the petitioner had the ability to pay the beneficiary the proffered wage and that the beneficiary would not be solely dependent on supplemental employment of solicitation of funds for support.

On appeal, counsel claims that the petitioner "supplied a great deal of evidence that the alien worked a 40 hour schedule and that she was not solely dependent on supplemental employment." Counsel does not elaborate on either of these statements or point to specific evidence to support the claim that the petitioner "supplied a great deal of evidence." The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Upon review of the evidence in the record, we first find that there is sufficient evidence in the record to establish the petitioner's ability to pay and that the beneficiary will not be solely dependent on supplemental employment. The regulation at 8 C.F.R. § 204.5(m)(4) states:

Job offer. The letter from the authorized official of the religious organization in the United States must also state how the alien will be solely carrying on the vocation of minister (including any terms of payment for services or other remuneration), or how the alien will be paid or remunerated if the alien will work in a professional religious capacity or in other religious work.

In this instance the petitioner has provided evidence that it paid the beneficiary \$24,344 in 2000, \$24,240 in 2001, and \$24,240 in 2002. The fact that the petitioner consistently paid the beneficiary during the requisite period is sufficient evidence of the petitioner's ability to pay and establishes that the beneficiary will not be solely dependent on income from other sources. However, although we withdraw this particular finding of the director, given the discrepancies in the record regarding the beneficiary's previous experience, including the actual position and duties performed, we do not find there is sufficient evidence to establish the beneficiary's work was full time or continuous or that the position is a qualifying religious occupation.

As previously discussed, the record contains contradictory evidence regarding the beneficiary's prior experience. Initially, the petitioner indicated that the beneficiary's prior experience was that of a choir conductor and music director and that her duties included the selection and training of the choirs, consultation with pastor to plan and implement a musical accompaniment of church services, performance of the musical instruments, and development of music programs for youth and member groups. In subsequent evidence, the petitioner indicated that the beneficiary had been serving as an assistant pastor and an office employee performing duties such as leading bible study, visiting families, and giving pastor counseling.

Further discrepancies were noted in the petitioner's claim that the beneficiary worked on a full-time basis. In one letter the petitioner claims that the beneficiary works from 6:00 am – 7:00 am on Tuesday, 6:00 am – 7 am and 5:00 pm to 10:00 pm on Wednesday, 6:00 am – 7:00 am and 5:00 pm – 10:00 pm on Thursday, 6:00 am – 7:00 am and 5:00 pm – 10:00 pm on Friday, 6:00 am to 7:00 am and 5:00 pm – 10:00 pm on Saturday,

and 6:00 am - 7:00 am and 8:00 am to 4:00 pm on Sunday, while another letter indicates that the beneficiary's daily duties are from 9:00 am to 5:00 pm, Tuesday through Saturday. 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).

Counsel's assertion on appeal the petitioner did not change the "job positions but merely added duties of assistant pastor" further demonstrates the beneficiary's ineligibility. The regulations at 8 C.F.R. § 204.5(m)(1) and (3)(ii)(A) require that the beneficiary must have carried on *the* vocation or occupation, rather than a vocation or occupation, indicating that the work performed during the qualifying period should be substantially similar to the intended future religious work. The underlying statute, at section 101(a)(27)(C)(iii), requires that the alien "has been carrying on such . . . work" throughout the qualifying period. Given the requirement that the work performed during the qualifying period should be substantially similar to the intended future religious work, if the proffered position is that of a "cantor" or "religious music director," the beneficiary cannot be considered to have been carrying on "such work" if employed as an "assistant pastor" or "office employee" during most of the qualifying period.

More important, however, is the fact that the petitioner may not make a material change to the petition subsequent to the filing of the petition, as the petitioner did in this instance by assigning additional duties. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *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).

For all of these reasons, the record does not support a finding that the beneficiary had the requisite two years continuous experience immediately preceding the filing date of the petition.

The remaining 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.

In his decision, the director determined that the beneficiary's position did not qualify as a religious occupation, based in part on the determination that the beneficiary's position does not require any "religious training or qualifications." We note that although the beneficiary must be qualified for his occupation, the regulation requires no specific religious training or theological education. Accordingly, we withdraw the director's finding in this regard.

On appeal, counsel claims that that position of “cantor is the same position as religious Music Director,” the job described in the petitioner’s original letter. Although the regulation at 8 C.F.R. § 204.5(m)(2) includes “cantor” among the examples of a qualifying religious occupation, job title alone does not determine eligibility as the mere fact that the beneficiary is given a title that is found in the regulation as a qualifying occupation is not sufficient to secure benefits. Instead, we must consider the actual duties of the position and whether the particular occupation is recognized by the petitioner’s denomination. To hold otherwise would permit religious organizations to sidestep immigration law simply by giving qualifying job titles to all their employees.

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 regulations indicate that employment by a church or religious organization is not synonymous with employment in a religious occupation and that non-qualifying positions are those whose duties are primarily administrative or secular in nature.

Thus, we interpret 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 regulations specify that religious occupations involve activities that relate to traditional religious functions. The nature of the activity performed must embody the tenets of the particular religion and have religious significance. Their service must be directly related to the creed of the denomination.

Traditional religious functions vary from denomination to denomination. The matter now at hand concerns the Korean Presbyterian Church. In this instance, the petitioner has failed to submit any documentation from the governing body of the petitioner’s denomination that a music director, choir director, or cantor holds a religious occupation in the petitioner’s denomination. As previously noted, the document submitted to describe the duties and requirements of the proffered position appears to belong to the First Methodist Church in New Jersey, not the instant petitioner who is affiliated with the Presbyterian Church.

Moreover, the petitioner has failed to demonstrate that the proffered position is one whose duties relate to traditional religious functions. In this instance, the petitioner has not shown that the beneficiary’s core duties are intrinsically religious in nature; there are many secular settings in which individuals teach, prepare and play music. Preparing and playing songs with religious lyrics does not change the fundamental nature of that activity.

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.