

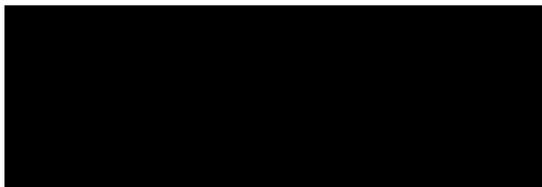
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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
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FILE:



WAC 99 077 51710

Office: CALIFORNIA SERVICE CENTER

Date: **MAY 02 2006**

IN RE:

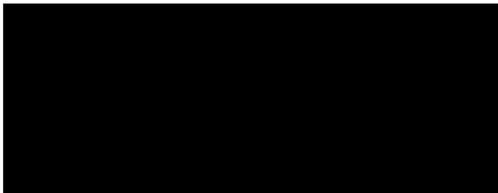
Petitioner:

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:



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.

A handwritten signature in cursive script that reads "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Presbyterian 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 music director and choir pianist. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience in the occupation immediately preceding the filing date of the petition. In addition, the director determined that the position offered to the beneficiary did not qualify as a religious occupation.

On appeal, counsel indicates that a brief will be forthcoming within 30 days. To date, six months after the filing of the appeal, the record contains no further substantive submission from the petitioner. Contact with counsel has confirmed that no brief was submitted. We therefore consider the record to be complete as it now stands.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security 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 un rebutted, 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 450 (BIA 1987)).

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*. 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. *Id.* at 582.

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 we shall consider is whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The regulation at 8 C.F.R. § 204.5(m)(2) defines "religious occupation" as 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, fund raisers, or persons solely involved in the solicitation of donations.

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 regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

Citizenship and Immigration Services 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.

[REDACTED], senior pastor of the petitioning church, describes the duties of the position offered to the beneficiary:

Assist the pastor in selecting and performing music for worship services and other church events. Educate church members, especially choir, in music. Plan and coordinate music

ministry. Organize, train and guide singing groups of choir. Play the piano for worship services and for church choir. Conduct periodic practice of church choir. Select, arrange and play music for worship service.

indicates the job pays \$1,750 per month, which is \$21,000 per year. Subsequent Form W-2 Wage and Tax Statements show that the petitioner has, in fact, paid the beneficiary that amount since hiring the beneficiary in mid-1999.

The director approved the petition on March 8, 2000, but subsequently, on June 14, 2005, the director issued a notice of intent to revoke (NOIR), based in part on the petitioner's failure to establish that the beneficiary's position as a music director and choir pianist qualifies as a bona fide religious occupation, rather than a secular duty that could be undertaken by anyone with musical skills. The director stated:

Fields related to music . . . are essentially secular rather than traditional religious functions. . . . Although music is a component of a worship service of many religious denominations, there is no inherent requirement that a person involved as a **Music Director/Choir Pianist/Organist** of a religious service [must] be a member of the petitioner's denomination. . . . The duties of the occupation do not have religious significance and embody the tenets of that particular religious denomination.

(Emphasis in original.) In response to the NOIR, counsel argues that "the regulation[s] intend to encompass any activity which relates to a traditional religious function to be deemed [a] religious occupation. . . . Music is not only essential but indispensable to the ritual of every religion" (emphasis in original). Counsel argues that a choir director is comparable to a "cantor," the latter being specifically included in the definition of a religious occupation.

The director rejected counsel's argument and repeated the assertion: "There is no inherent requirement that a person employed as a Music Director/Choir Pianist/Organist be a member of the employer's denomination." On appeal, counsel contends that the director's decision "rests upon an arbitrary assessment of the term 'traditional religious function.'" Counsel observes that if a choir director can be characterized as nothing more than a musician, then a preacher can be deemed to be nothing more than a "speaker." Counsel asserts "it is not what is being done but rather the function, purpose, goal of the doing that determines character."

Counsel is correct in the general assertion that working with music is not, by itself, automatically a disqualifying factor. We acknowledge that there are some positions in which working with music involves more than mere technical mastery of music theory and the playing of an instrument. At the same time, however, we are not prepared to find that every church position involving music must always qualify. Such decisions must be made on a case-by-case basis, relying on the evidence in a given record of proceeding.

In this instance, the Forms W-2 described earlier in this decision lend support to the assertion that the beneficiary's work is a full-time job, rather than a few hours volunteering to play the piano at Sunday services. At the same time, the Forms W-2 also speak to the director's un rebutted finding that the beneficiary's position does not appear to require membership in the petitioner's denomination.

In 2001, the beneficiary reported income from two different sources. The petitioner, as usual, paid the beneficiary \$21,000 that year. Another Form W-2, however, shows that Berendo Street Baptist Church paid the beneficiary \$1,122.00. Thus, the beneficiary herself has submitted evidence showing that she worked for two different churches of *two different denominations* in 2001. This is, to say the least, compatible with the director's finding that the beneficiary's job has more to do with musical skills than with the tenets of any one particular religious denomination.

The beneficiary's documented work with two unaffiliated churches raises legitimate and serious questions about the nature of her work. These questions would, under different circumstances, warrant a remand of the matter in order that the director may further investigate the issue. (The petitioner could, for example, have attempted to provide evidence that Presbyterian churches require Presbyterian choir directors, but Baptist churches do not require Baptist choir directors). In this proceeding, however, the question is moot because another issue raised by the director is, by itself, sufficient grounds for revocation of approval and dismissal of the appeal.

The regulation at 8 C.F.R. § 204.5(m)(1) 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 experience in the religious vocation, professional religious work, or other religious work. The petition was filed on January 13, 1999. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a music director and choir pianist throughout the two years immediately prior to that date.

In a letter accompanying the initial filing of the petition, [REDACTED] describes the position offered to the beneficiary, but does not claim that the petitioner had employed the beneficiary prior to the filing date. In other words, [REDACTED] describes an offer of prospective employment rather than an existing position that the beneficiary already held at the time of filing.

A letter from [REDACTED] pastor of Joo Shin Presbyterian Church, Seoul, Korea, states that the beneficiary "has been serving as choir pianist of this church since January 1996 to date." The date of the letter is April 15, 1998, ten days before the beneficiary arrived in the United States.

After the director approved the petition on March 8, 2000, the beneficiary applied for adjustment of status on April 28, 2000 by filing Form I-485 and accompanying materials including Form G-325A, Biographic Information. That form instructed the beneficiary to list her employment over the past five years (*i.e.*, April 1995 to April 2000). The beneficiary listed three periods of employment, all as a music director:

|                              |                              |
|------------------------------|------------------------------|
| Jiguchon Presbyterian Church | January 1995 – December 1995 |
| Jushin Presbyterian Church   | January 1996 – April 1998    |
| The petitioning church       | June 1999 – present time     |

With the adjustment application, the beneficiary submitted a letter from Rev. Young Suk Kang, indicating that the beneficiary “has been working as a Music Director/Choir Pianist/Organist for our church since August 1999.” Thus, while the petitioner and the beneficiary disagree somewhat as to exactly when the beneficiary began working for the petitioner, both the petitioner and the beneficiary are in agreement that the beneficiary did not work for the petitioner during the January 1997-January 1999 qualifying period.

In the NOIR, the director informed the petitioner that the available evidence does not establish the beneficiary’s continuous employment from January 1997 to January 1999. Specifically, the director noted that the letter from Joo Shin Presbyterian Church indicates only that the beneficiary had been “serving” that church, and the petitioner had not shown that the beneficiary’s work for that church took the form of paid, full-time employment rather than unpaid, part-time volunteer work. Also, the director noted that the petitioner had submitted no evidence that the beneficiary was employed anywhere between her April 1998 arrival into the United States and the January 1999 filing of the petition.

In response to the NOIR, the petitioner has submitted a new letter from [REDACTED], who states:

[The beneficiary] served as a choir pianist/music director at Joo Shin Presbyterian Church since January 1990. She first served as an unpaid volunteer staff helping in the music ministry until January of 1996 when Joo Shin Presbyterian Church was able to offer her a full-time paid position in its music ministry. In April 25, 1998 to May 31, 1998, she was given a paid vacation; she and her family went to visit her extended family in the United States. At the end of May 1998, she requested an extension of her leave. She was given an extension and retained as a paid staff because of her service to the church during its initial transition and growth. From June 1998 until her resignation on January 31, 1999, she continued to provide assistance for the church and was a constant encourager on our staff.

Woo Chul Lee does not specify how the beneficiary “continued to provide assistance for the church.” in Seoul while she was thousands of miles away in Los Angeles.

In the revocation notice, the director observed that, on Form G-325A, the beneficiary indicated that her employment with Joo Shin Presbyterian Church ended in April 1998. The director noted the absence of financial documentation showing that the beneficiary continued to draw a salary from Joo Shin Presbyterian Church throughout her nine-month “vacation.”

On appeal, counsel deems the director’s finding to be “arbitrary,” but offers no further argument on that point. As noted above, counsel originally indicated that “[a] more formal and detailed assessment will be provided in a brief to follow,” but such a brief was never submitted, and we are therefore left only with counsel’s general assertion that the director erred.

In the notice of revocation, the director quoted 8 C.F.R. § 204.5(m)(1), which states that the beneficiary “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” (emphasis added). This language is in keeping with the statutory language at section 101(a)(27)(C)(iii) of the Act,

which requires that the alien “has been *carrying on* such vocation, professional work, or other work continuously for at least the 2-year [qualifying] period” (emphasis added). It is not sufficient for the beneficiary to be on the books as a nominal employee; she must have been “performing the . . . work” and “carrying on . . . [the] work” continuously. We also note, here, *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980), in which the Board of Immigration Appeals ruled that an individual’s unpaid, part-time church work was not “continuous” for immigration purposes. If the part-time work performed by the alien in *Varughese* did not qualify as “continuous,” then it is not reasonable to conclude that this beneficiary’s experience was “continuous” despite not working at all for nine months.

If the employing church, including its choir, piano, and congregation, were all in Seoul, Korea, then there is no reasonable way to conclude that the beneficiary was somehow “performing the . . . work” of a choir pianist for that church while she was in Los Angeles. A few weeks of vacation time is not a disqualifying interruption in the continuity of one’s work, but here we are not dealing with a short vacation, but rather a major absence taking up most of a year.

We must find that the petitioner’s prolonged absence from Korea amounts to an interruption of her qualifying employment. If we were to find otherwise, then there would be nothing, in principle, to stop an alien from securing nominal employment at an overseas church, taking a two-year “vacation” in the United States without formally resigning from the overseas position, and then claiming qualifying continuous experience without having actually worked a single day.<sup>1</sup> The beneficiary was not “performing” or “carrying on” any qualifying religious work between April 1998 and January 1999, and her alleged delay in resigning from her position in Korea cannot and does not erase this major, disqualifying interruption in her work.

Given the significant gap in the beneficiary’s work during the two-year qualifying period, it is clear that the petition should never have been approved in the first place; that it was approved in error; and that the director was entirely justified in revoking the approval based on the discovery of that error. 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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<sup>1</sup> We note that the Board of Immigration Appeals has cautioned that “Congressional policy in the field of immigration could be readily circumvented by accommodating religious organizations” that provide meaningless “certificates of ordination” purely for immigration purposes. *Matter of Rhee*, 16 I&N Dec. 607, 610 (BIA 1978). By the same logic, an “accommodating religious organization” could list an individual as an “employee” long after that individual has permanently abandoned his or her position at that organization, in order to create the superficial appearance of “continuous” religious work.