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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: APR 23 2007

EAC 05 187 53612

IN RE:

Petitioner:

[REDACTED]

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.

Maura Deadrick

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a church belonging to the Presbyterian Church (USA) religious denomination. 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 ministry leader, church choir director and organist. The director determined that the petitioner had not established that the position offered to the beneficiary qualifies as a religious occupation, or that the petitioner had extended a valid job offer to the beneficiary.

On appeal, the petitioner submits a brief from counsel and additional documents.

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).

A principal issue in this decision 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.

Citizenship and Immigration Services 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.

Additionally, 8 C.F.R. § 204.5(m)(4) requires the petitioner to set forth the terms of the job offer, including how the alien will be paid or remunerated. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or solicitation of funds for support.

the petitioner's Clerk of the Session, describes the beneficiary's position:

As Leader of our Music Ministries, Choral Director, and Organist, [the beneficiary] will conduct both student and adult choirs and will direct choirs at rehearsal and performances. She will select appropriate music (tailored to the religious needs and desires of the music ministry program as well as the abilities of the choir). She will instruct choir members in the reading of music and will focus on tonal and harmonic balance, music theory, dynamics, rhythm and tempo. She will utilize her knowledge of music and conducting techniques to establish the choir and music ministry and help to develop the programs. In addition, she will be available to provide musical accompaniment if necessary, and to perform to illustrate certain points of musical theory as well as certain musical techniques. Her musical interpretation will enhance and assist our expression of our faith. . . .

The individual serving in this position must be fully educated and trained in advanced musical theory as well as liturgy and music interpretation. She must also be familiar with the doctrinal themes of the church and able to interpret and produce music that illustrates these themes.

Copies of church worship service programs and newspaper articles identify the beneficiary as the petitioner's choir director, but do not establish the extent of her duties.

The petitioner's initial submission included a copy of the beneficiary's résumé, in which the beneficiary stated that she worked in "all aspects of land conveyancing" from 1959 to 1998 and then: "In December 1998 I retired from the Legal Office and traveled to America to stay with a friend and after setting up a business, I obtained a work permit. As a result I sought work as a Church Musician and in March 2000 acquired a post at [the petitioning church] as Choir Director. . . . When the Organist has been away I've filled in for her on average about once a month." The beneficiary did not identify or describe the "business" mentioned above, although she stated that she has "helped a friend with her Pet Sitting Business."

On August 25, 2005, the director issued a request for evidence (RFE), instructing the petitioner to "[s]ubmit a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis." The director also requested evidence to show that the beneficiary's work relates to "traditional religious functions above those performed routinely by members."

In response, the petitioner submitted a letter from Rev. Dr. [REDACTED] a Unitarian Universalist minister, who stated: "As in any Presbyterian Church the position of Choral Director receives special education and has responsibility for the liturgy of the Church and is in a position with traditional religious functions above those performed routinely by other members of the Church."

[REDACTED] and [REDACTED], Pastor of the petitioning church, stated in a joint letter: "Although the Book of Order does not specify [the beneficiary's] position as a religious occupation, we at [the petitioning church] see it as one." The two church officials assert that the beneficiary is, in her own way, as important as a minister in terms of "their functions within the worship service."

Regarding the beneficiary's work schedule, [REDACTED] stated:

On a weekly basis, it is required that she spends:

- Two hours training Choir and directing at worship services.
- Two hours taking choir rehearsals and teaching music, part singing and blending of voices.
- Preparing for major church festivals according to the liturgical year (Christmas, Holy Week, Easter, etc.)
- Two hours for filling in as volunteer organist – approximately one Sunday per month.
- Three hours arranging music scores to suit voices available and writing descants and other parts.
- Five hours preparation and practice on organ and piano.
- Three hours exploring and studying new music for Choral repertoire.
- Two hours creating music library.

The above schedule involves 17 hours in a typical week, with unspecified additional time spent when "major church festivals" approach. The beneficiary's occasional time spent "filling in as volunteer organist" at Sunday services does not appear to add hours to the beneficiary's schedule, because she already directs the choir at worship services, whether or not she is playing the organ at the same time. The petitioner indicated that "the Minister wants to create a junior choir," but there is no indication of how this proposed change would affect the beneficiary's future schedule.

A list submitted by the petitioner identifies 38 active members of the petitioning church along with a few dozen "inactive members" and "visitors and friends."

The petitioner's RFE response also included unaudited "Statement[s] of Income & Expense" showing itemized expenses and revenues for calendar years 2003 and 2004 and the first nine months of 2005. Line items on this document under the heading "Staff" include "Minister Salary," "Cleaning Wages" and "Nursery Wages." An additional line item, "Other Salaries," is blank for each year. The "Staff" category also includes numerous items that are not labeled as "wages" or "salaries," such as "Minister Travel" and "Workers Compensation." Another such item is "Music Director," a line item reflecting expenses of \$2,344.46 in 2003, \$2,711.28, and \$1,215.68 for January-September 2005. It is not clear whether these amounts represent

compensation paid to the music director, or simply expenses incurred by the music director for materials such as sheet music. (The statement also shows a \$347.00 expense for "Music" in 2003.) The director concluded that the "Music Director" expenses represent the beneficiary's salary, but we find that the available evidence is not sufficient to support that conclusion.

We note that the statements show net losses of \$1,290.14 in 2003 and \$23,106.95 in 2004 and net income of \$5,246.37 in the first three quarters of 2005, for an aggregate net loss of \$19,150.72 for the entire period.

The director denied the petition on February 10, 2006, stating that the petitioner had failed to establish that the beneficiary occupies "a permanent, full-time, salaried occupation within the denomination." Citing the congregation's small size, the beneficiary's schedule, and the minimal "Music Director" figures on the "Statement[s] of Income & Expense," the director determined that the petitioner had not established the existence of a valid job offer. The director further found that the petitioner had "not submitted any evidence which explains how the beneficiary supports herself."

On appeal, the petitioner submits evidence regarding music ministry from various sources. Much of this evidence relates to other religious denominations, and as such is not directly relevant to the petitioner's denomination, specifically the Presbyterian Church (USA). The petitioner also submits copies of job announcements, again from various denominations. Most of the churches that announced full-time positions claim well over a thousand members. Only one of these churches belongs to the Presbyterian Church (USA) – a "Congregation of just under 500." This last announcement demonstrates that the petitioner's denomination is known to employ full-time music director, but it does not answer the director's legitimate concern about whether the petitioner's much smaller congregation has the need or means to employ a full-time music director.

The petitioner submits a new letter from [REDACTED], evidently [REDACTED]'s successor as the petitioner's Clerk of the Session, indicating that the beneficiary "works at least 35-40 hours per week." An amended schedule adds duties to the schedule submitted previously. For instance, the petitioner now asserts that the beneficiary spends two hours each week "Develop[ing] plans for expansion of the music ministry," and another two hours "Explor[ing] and study[ing] new music for choral repertoire to accommodate the growing diversity of worshippers." [REDACTED] does not claim that the petitioning church has ever paid the beneficiary or ever will pay her, but does refer to the beneficiary as "an employee of Pets Plants and People." This is the petitioner's only reference to the beneficiary's past or future financial support.

[REDACTED] and Treasurer of the petitioning church, states: "it is my opinion that [the petitioner] is solvent, able to meet all of its financial obligations without incurring debt and has the ability to pay" the beneficiary. Under 8 C.F.R. § 204.5(g)(2), a prospective employer can establish its ability to pay the beneficiary with a statement from a financial officer, but only when the prospective employer employs 100 or more workers. Here, the petitioning church does not even have 100 members, let alone 100 employees. We note that, while Ms. [REDACTED] asserts that the petitioner is able to pay the beneficiary, she does not specify the amount of the beneficiary's purported salary, nor does the petitioner submit any evidence that the beneficiary has ever received such a salary.

Counsel, on appeal, claims that the beneficiary "is appropriately compensated for her efforts and is able to support herself. She does not have any full or part-time work outside of her employment with [the petitioning church] in the religious professional capacity. However, in addition to her salary, she does live off of personal savings and receives a pension from her many years of employment." The record contains no documentary evidence to support these assertions. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 2, 4 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Even if we were to assume, for the sake of argument, that the beneficiary did work full-time, and that all of the petitioner's "Music Director" expenses went toward compensating the beneficiary directly, there is still a problem with regard to counsel's vague assertion that the beneficiary "is appropriately compensated for her efforts." Counsel fails to explain what is "appropriate" about paying a full-time, year-round employee less than \$3,000 per year, in what appears to be gross violation of minimum-wage laws. This observation should not, in any way, be construed as a stipulation on our part that the beneficiary did, in fact, work full-time, or that the church actually paid the beneficiary a wage or salary for that work.

We find that the position of music director is a religious occupation within the Presbyterian Church (USA) denomination, but we affirm the director's finding that the petitioner has not established the existence of a valid job offer for the beneficiary. The petitioner has not demonstrated that the beneficiary will not be solely dependent on outside employment. The vague and uncorroborated claim that the petitioner "has the ability to pay" an unspecified salary to the beneficiary cannot suffice in this regard. We find the petitioner's failure to set forth any concrete terms of employment, even after the director cited the absence of such terms as a basis for denial, to be a serious deficiency in the petition. Also raising questions are the petitioner's drastic revision of the beneficiary's work schedule, and the total absence of documentary evidence to support critical claims.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

Due to the factors listed above, we find additional deficiencies in the petition beyond those enumerated by the director. Specifically, the petitioner has not established that the beneficiary meets the requirement of two years of continuous religious work set forth at 8 C.F.R. §§ 204.5(m)(1) and (3)(ii)(A), or that the petitioner has established its ability to compensate the beneficiary as required by 8 C.F.R. § 204.5(g)(2).

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.