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

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FILE: EAC 05 087 51192 Office: VERMONT SERVICE CENTER Date: JAN 10 2007

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, 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 member church of the Southern Baptist Convention. 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/minister of music. The director determined that the petitioner had not established that the position offered to the beneficiary qualifies as a religious occupation. In addition, the director determined that the petitioner had not established its ability to pay the beneficiary the proffered salary of \$24,500 per year.

On appeal, counsel asserts that the director failed to take the petitioner's evidence into account.

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 under consideration 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. 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.

Rev. [REDACTED] Jr., pastor of the petitioning church, states:

[The beneficiary is] a full time Minister of Music of [the petitioning church]. As Minister of Music, his duties include:

- Organizing and leading worship
- Organize and create a worship band
- Recruit and train musically gifted members to use their gifts of music
- Reorganize church choir and recruit new members
- Incorporate worship dance numbers during worship service
- Hold rehearsals for worship band and choir
- Teach musically inclined members to play various musical instruments
- Teach, prepare, and conduct skill enhancement training/seminars for band and choir members in the area of instrument playing, religious singing, and song leading
- Recruit and train members in the proper care, operation, and handling of musical instruments and equipments
- Secure, develop, and compose new songs for worship and improvise old ones
- Create music and preaching library
- Plan, organize, and provide music in events like Christmas cantata, Valentine’s concert, Easter presentation, church anniversary celebration, youth rallies, retreats, evangelistic seminars and conferences
- Coordinate with the pastor of the church in all activities related to music.

The petitioner submits a copy of the undated bylaws that accompany the church’s constitution. Article II, Section 1 of the bylaws states, in part: “The primary officers of this church shall be the pastor, deacons, clerk, treasurer, trustees, auditor and any other officers that may be deemed necessary to carry out a full Church program.” The remaining sections of Article II discuss the following positions:

Section 2: Pastor

Section 3: Board of Deacons

Section 4: Board of Trustees

Section 5: Church Council, chaired by Pastor and comprised of:

Chairman of the Board of Deacons

Chairman of the Board of Trustees

Church Clerk

Church Treasurer

Church Auditor

Chairmen of all Standing Committees including Music Committee

Section 6: Music Director

Section 7: Church Treasurer

Section 8: Church Clerk

Section 9: Assistant Church Clerk

Section 10: Moderator

Section 11: Auditor

Most of the above positions correspond to the list of “primary officers” in Section 1. The two principal exceptions are the music director and the moderator. Section 10 specifies that the moderator is not, in fact, a separate church officer: “The Pastor shall be the moderator of the Church council meetings and at special other meetings.” In other circumstances, “the Chairman of the Board of Deacons shall preside. And in their absence, the Clerk shall call the Church to order and moderator pro-tem shall be elected.”

Article II, Section 6 of the petitioner’s bylaws state: “The music director is a full time paid employee and shall be entitled to benefits accorded in the law.” The pastor’s terms of employment are spelled out in considerably greater detail, and all other church officers are to be elected annually, with no mention of compensation. The music director must adhere to the denomination’s “doctrines and practices,” and must be “[t]rained and experienced in worship leading, religious music, choir conducting, and instrument playing.” The bylaws list the following duties:

- a. Organize, create, and lead worship service.
- b. Organize, create, and keep worship band and choir.
- c. Recruit and train musically gifted members to use their gifts of music.
- d. Teach, prepare and conduct skill enhancement training/seminar for band and choir members.
- e. Plan and organize musical events during Christmas, Valentine, Easter, church anniversary, youth rallies, retreats, evangelistic seminars and conferences.

The section of the bylaws dealing with the music director begins with this phrase: “The Music Director shall be chosen and called by the Church to perform a traditional religious function.” This is the only time the phrase “traditional religious function” appears in the bylaws. This language appears to derive directly from the regulatory definition of “religious occupation” at 8 C.F.R. § 204.5(m)(2). Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at 5 (S.D.N.Y.).

Article V, Section 1.F of the bylaws concerns the “Music Committee,” to consist of the Chairperson, Vice-Chairperson, Secretary, Pianist and Choir Conductor. The section does not define the interaction between the committee and the music director; indeed, this section does not mention the music director at all. The title of music director does not appear anywhere in the bylaws outside of Article II, Section 6.

Given the above information, it seems likely that the petitioner inserted or significantly modified Article II, Section 6 of its bylaws in furtherance of the present petition. Other than the bylaws, the petitioner's initial submission contains no evidence to show that the petitioning church has routinely employed a paid, full-time music director. We note that Article II, Section 7.B.1 of the bylaws requires the church treasurer to "[r]ecord all receipts and disbursements to the official records of the Church." All payments over \$200.00 are to be paid by check. Thus, if the petitioner has adhered to its own bylaws, there ought to be detailed pay records regarding the beneficiary's past work for the church, although such records are not part of the record of proceeding.

Regarding the beneficiary's prior experience and preparation for the position, Rev. [REDACTED] writing as Assistant Administrator of Asia Pacific Campus Challenge, states:

Prior to my current responsibility, I served as National Secretary and Regional Director for Philippine Agape Campus Missions Inc. [from] 1985 until 1996. . . .

[D]uring those times [the beneficiary] served as Student leader for three (3) years and Staff for one (1) year while finishing his degree at Notre Dame of Dadiangas College. This letter is to certify that he . . . completed all levels of trainings in **Leadership, Worship Leading and Missions**. Thus, he qualified to serve as among the Staff of the said ministry.

On July 22, 2005, the director issued a request for evidence (RFE), instructing the petitioner to provide further documentation regarding the nature of the position offered to the beneficiary, as well as the beneficiary's religious training.

In response, the petitioner has submitted a booklet that commemorates the 15<sup>th</sup> anniversary of the founding of the petitioning church. The booklet is dated October 11, 2003, which was before the beneficiary began working for the petitioner. Under "Music (Ministry of Worship)," the booklet identifies a chairperson and a second individual with no stated title. Elsewhere, the booklet names a third person as "pianist." There is no mention of a music director as such. Thus, the booklet does not demonstrate that the church employed a music director as of October 2003.

The petitioner submits a new letter from Rev. [REDACTED] now identified as Senior Pastor of International [REDACTED] Inc., "an urban ministry of the Philippines General Council of the Assemblies of God." Rev. [REDACTED] expands on his earlier letter, describing in greater detail the beneficiary's student leader training at Notre Dame of Dadiangas College. He states, for instance, that the beneficiary took courses such as "*Understanding Worship, Ascending Worship, Worship Leading and Development of Worship Teams*."

[REDACTED] founder of the Manila Vocal Ensemble, states that the beneficiary belonged to that group for about nine months in the late 1980s, during which time the beneficiary received lessons in "vocal production," "choral singing" and "choral conducting." Mr. [REDACTED] states that the beneficiary "ministered as a musician" "at the City Assembly of God Church in General Santos City," but "was not able to join our European Concert Tour in 1989 due to the work offered to him by [REDACTED] Company." This

indicates that, in 1989 at least, the beneficiary was active as a church musician but nevertheless relied on secular employment, to the extent that his secular work took precedence over touring with the choir.

The petitioner submits a copy of the beneficiary's diploma in Theological Studies, awarded by the Emmanuel School of Ministry on September 18, 2005. Because the beneficiary did not receive this diploma until well after the petitioner hired him (and, for that matter, seven months after the petitioner filed the petition), it is clear that this diploma is not a basic requirement for the position.

The director denied the petition on January 3, 2006, in part based on the finding that the beneficiary's "past and proposed duties do not require specific religious training and therefore do not qualify as a religious occupation." On appeal, counsel argues:

The petitioner sets some minimum requirements for its music director – one who has a conviction in Christ coupled with the experience and background directly related to the creed and practice of religion. The various certifications clearly inferred how beneficiary perfected the art of worship leading and music directing gained through almost twenty years of experience.

After careful and prolonged consideration of this issue, the AAO finds that the "training" issue has received a disproportionate amount of weight in adjudications of special immigrant religious worker petitions. Obviously, when a given position clearly requires specific training, 8 C.F.R. § 204.5(m)(3)(ii)(D) requires the petitioner to show that the alien possesses that training; but the issue of training should not be a primary factor when considering the question of whether that position relates to a traditional religious function. Of greater importance is evidence showing that churches or other entities within a given denomination routinely employ paid, full-time workers in comparable positions, and that those positions do not embody fundamentally secular tasks, indistinguishable from positions with secular employers.

We find that the position of music director can be deemed a religious occupation within the Southern Baptist denomination, but we must consider the circumstances of each particular job offer. Here, the record offers no reliable indication that the petitioning church ever employed a music director or minister of music prior to the beneficiary's arrival, and the description of the position in the church's bylaws appears to have been tailored to the regulatory requirements. Therefore, we cannot find that the petitioner has submitted sufficient evidence to demonstrate the existence of a *bona fide* job offer for a paid, full-time music director position.

The director's other cited ground for denial concerns the petitioner's ability to pay the beneficiary's salary of \$24,500 per year. 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's initial submission includes a copy of the petitioner's 2005 budget, including a \$24,500 allocation for the music director. The budget also includes a \$47,000 "pastoral package."

In the July 2005 RFE, the director requested additional evidence of the petitioner's ability to pay the beneficiary's full proffered wage, such as "a current financial statement that either has been reviewed or audited by a Certified Public Accountant." In response, the petitioner submits a document which counsel calls an "audited financial report." The report, however, is not audited. Rather, according to the accountant who compiled it, it is a "review," which "is substantially less in scope than an audit." The report indicates that, for the year ending December 31, 2004, the petitioner paid only \$17,738 in total salaries. All told, all salaries, employee benefits, housing benefits and payroll taxes for both "Ministry" and "Management and General" add up to \$45,422, which is less than the \$47,000 "pastoral package" shown in the 2005 budget. The statement shows cash assets of \$13,498, offset by a \$18,621 liability. The line item "net assets" is a negative number, (\$5,123).

It is not clear how many salaried workers the petitioner employs, but this figure is less than the beneficiary's salary alone, and the figure provided, being listed under the heading "Ministry," also presumably includes the pastor's compensation. (There is no other line item designated for the pastor's salary, nor any line item of comparable size that could be interpreted as covering that salary.) Thus, the financial statement does not establish that the petitioner employed and compensated the beneficiary in 2004.

The director also requested copies of the beneficiary's tax documents, including tax returns and Forms W-2. The director additionally requested copies of quarterly withholding statements and/or other documentation of salaries paid to other church workers. The petitioner did not submit these documents or explain its failure to do so. We note that, despite the requirement in the bylaws that the church must pay all significant expenses by check and maintain detailed financial records, the record contains no contemporaneous evidence to show that the petitioner has ever paid the beneficiary or, indeed, anyone else.

In denying the petition, the director noted the petitioner's failure to submit several requested documents, including quarterly withholding statements and the beneficiary's tax documents. The director noted the \$17,738 salary line item under "Ministry." The director concluded that the petitioner had failed to establish its ability to pay the beneficiary's proffered wage of \$24,500 per year.

On appeal, counsel states: "The petitioner submitted its audited financial statements, 2005 budget, deed of ownership of the church building and parsonage and bank statements to prove that the petitioner has enough resources to pay beneficiary the proffered salary." Counsel's statement is only partly true, and it only partly responsive to the grounds raised by the director. The financial statement submitted by the petitioner was clearly marked as not being the result of an audit, and we can find no bank statements in the record. Although the director, in the denial notice, specifically cited the petitioner's failure to provide tax documents, even on appeal the petitioner neither supplies these documents nor explains their absence.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Here, the petitioner has not submitted any of the types of evidence that required by 8 C.F.R. § 204.5(g)(2). We acknowledge the director's erroneous assertion that a "reviewed" financial statement would be acceptable evidence, but even then, the reviewed statement in the record does not specifically show full payment of the beneficiary's proffered salary, and there were no existing net assets to make up the shortfall. There is, therefore, no reason to conclude that the petitioner is, or has been, able to pay the beneficiary's proffered wage. We affirm the director's finding in this regard.

Beyond the decision of the director, review of the record reveals an additional impediment to a finding of eligibility. The regulation at 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to show that the beneficiary belonged to the petitioner's religious denomination, and performed qualifying religious work, continuously for at least the two-year period immediately preceding the filing of the petition. These requirements also appear at 8 C.F.R. § 204.5(m)(1). The petition was filed on February 2, 2005. Therefore, the petitioner must establish that the beneficiary joined the petitioner's Southern Baptist religious denomination and began working as a music director no later than early February 2003.

It is not clear exactly when the beneficiary joined the petitioning church. The "Minutes of Special Meeting," dated April 25, 2004, indicate that, on that day, the beneficiary was "unanimously recommended by the Board of Deacons to assume the leadership of the music ministry with the title as Music Director." The petitioner has submitted a copy of a letter dated January 5, 2004, from Rev. [REDACTED], Senior Pastor of Emmanuel Christian Fellowship church in Philadelphia, Pennsylvania. In that letter, Rev. [REDACTED] refers to the beneficiary's work in Philadelphia in the present tense. Thus, the beneficiary did not join the petitioning church until some time between early January and late April of 2004. (The beneficiary's September 2005 diploma from Emmanuel School of Ministry identifies Rev. [REDACTED] as the Dean of that institution.)

Without knowing exactly when the beneficiary ceased working for Emmanuel Christian Fellowship church, we cannot find that the beneficiary has worked continuously as a music director during the 2003-2005 qualifying period. The petitioner could overcome this issue by establishing exactly when the beneficiary ceased to work for Emmanuel Christian Fellowship Church and began working for the petitioning church, and that the beneficiary was not unemployed for a significant period of time in between holding those two positions. The denominational membership issue is more difficult to overcome.

There is no evidence that Emmanuel Christian Fellowship is a member church of the Southern Baptist Convention to which the present petitioner belongs. Instead, according to an earlier letter from its senior pastor, "Emmanuel Christian Fellowship church . . . shares a common program, theology, practice, doctrine and liturgy with the Assembly of God churches in the Philippines where [the beneficiary] was a member [in] good standing for about 20 years." The petitioner has also submitted copies of documents from the Philippines, confirming the beneficiary's activity with the Assemblies of God denomination there. The letter contains four mentions of the Assemblies of God, but no reference to the Southern Baptist Convention or even, more generally, the Baptist family of denominations. The Assemblies of God denomination is separate and distinct from the Southern Baptist denomination. Thus, there is no evidence that the beneficiary belonged to the Southern Baptist denomination before joining the petitioning church in early 2004, and considerable

evidence that the beneficiary belonged to the Assemblies of God denomination when the two-year qualifying period began in February 2003.

The director, in denying the present petition, mentioned both Emmanuel Christian Fellowship and the Assemblies of God denomination, but did not acknowledge the consequences of this information with respect to the beneficiary's eligibility. We find that the petitioner has not shown that the beneficiary was a member of the Southern Baptist denomination throughout the two-year period from February 2003 through February 2005. This finding, by itself, is sufficient to merit denial of the petition and dismissal of the appeal.

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).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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.