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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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



C,

DATE: **JAN 05 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (Director, TSC), initially approved the employment-based immigrant visa petition. On further review, the Director, California Service Center (the director), determined that the petition had been approved in error. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke (NOIR) approval of the petition and her reasons for doing so and subsequently exercised her discretion to revoke approval of the petition on January 17, 2009. On December 8, 2009, the Administrative Appeals Office (AAO) remanded the matter for consideration under new regulations. The director again denied the petition and, following the AAO's instructions, certified the decision to the AAO for review. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

On November 26, 2008, the U.S. Citizenship and Immigration Services (USCIS) issued new regulations for special immigrant religious worker petitions. Supplementary information published with the new rule specified:

All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information. 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

As the instant petition was not pending on November 26, 2008, it is not subject to the evidentiary requirements of the new regulation. Accordingly, the petition must be adjudicated based on the regulations in effect at the time the petition was filed. Therefore, the AAO's remand for application of the new regulation was in error. As such, for purposes of this certification, the AAO will focus its review on the original decision of the director which was correctly based upon the regulations in effect at the time the petition was originally approved. Nonetheless, as the AAO conducts appellate review on a *de novo* basis, all of the evidence of record will be considered.

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 its music director. The director stated that public records indicate that the beneficiary was self-employed and that the petitioner had failed to fully respond to the NOIR by submitting the beneficiary's federal tax documentation.

On appeal, the petitioner states that the beneficiary has not been engaged in any supplementary employment and that he "honestly worked in our church as a music director since May 2003." The petitioner submits additional documentation in support of the appeal.

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department 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. *Id.*

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 September 30, 2012, 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 September 30, 2012, 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 issue presented on appeal is whether the petitioner has established that the beneficiary worked as its music director.

The regulation in effect at the time the petition was filed at 8 C.F.R. § 204.5(m)(1) provided that the alien must be coming to the United States at the request of the religious organization to work as a religious worker.

In its June 14, 2005 letter submitted in support of the petition, which was filed on July 12, 2005, the petitioner stated that the beneficiary "had served our church as a full-time Music Director with an R-1 visa from May 5, 2003 to this present day." The petitioner further stated:

[The beneficiary] has been authorized by our church to conduct services since February 1999 which duties he has been performing commendably since that date. Some of his duties include planning, organizing, and leading the church music program, praise team, worship team, and choir.

The petitioner provided a copy of the beneficiary's visa indicating that he was granted an F-1 nonimmigrant student visa on May 23, 2000 to attend school at the University of North Texas. The beneficiary's Form I-94, Departure Record, reflects that the beneficiary entered the United States pursuant to that visa on May 31, 2000. The petitioner submitted copies of Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, that it issued to the beneficiary in 2003 and 2004 on which it reported it paid the beneficiary wages of \$12,000 and \$18,000, respectively. The petitioner provided uncertified copies of the unsigned and undated IRS Form 1040, U.S. Individual Income Tax Return, for the beneficiary for the corresponding years, which reflect that he reported the income from the petitioner. The beneficiary also reported \$800 in "other income" from "general labor" on his 2006 IRS Form 1040. The petitioner also provided copies of three unprocessed checks for \$1,365.25 that it had made payable to the beneficiary on May 1, 2005, June 26, 2005, and July 3, 2005. The petitioner additionally submitted copies of photographs; although it did not identify the photographs, several depict choirs singing and one depicts a small band playing music.

In response to a July 28, 2005 request for evidence (RFE) from the Director, TSC, the petitioner submitted the following weekly schedule for the beneficiary:

Sunday	9 a.m. to 11 a.m. 11 a.m. to 6 p.m.	Choir Practice 2 Worship Services and Bible Study
Monday	Day of Rest	
Tuesday	9 a.m. to 12 a.m. [sic] 1 p.m. to 4 p.m.	Research and Practice Organize Music Score and Practice
Wednesday	9 a.m. to 12 a.m. [sic] 1 p.m. to 4 p.m.	Research and Practice Organize Music Score and Practice

	7 p.m. to 9 p.m.	Wednesday Service
Thursday	9 a.m. to 12 a.m. [sic]	Research and Practice
	1 p.m. to 4 p.m.	Arrange Music for Chamber Orchestra
Friday	9 a.m. to 12 a.m. [sic]	Research and Practice
	1 p.m. to 4 p.m.	Organize Music Score and Practice
Saturday	6 a.m. to 8 a.m.	Morning Devotion
	5 p.m. to 10 p.m.	Choir Practice

The petitioner further stated that the beneficiary would “continue to serve our church as a full-time Music Director, working 42 hours per week with the above schedule, and earning \$1,500 a month”

The Director, TSC approved the petition on October 4, 2005. On September 12, 2007, September 19, 2007, and November 30, 2007, immigration officers (IOs) visited the petitioner’s premises for the purpose of verifying the petitioner’s claims. The IOs reported that no one affiliated with the petitioning organization was available on any of the three visits. The reporting IO called the telephone number listed in the petition; however, the person who answered stated that she had reached a wrong number. The IO reported that she discovered that the petitioner had provided the wrong area code, but that calls to the correct number were unanswered and voice messages were not returned.

In her NOIR of May 22, 2008, the director notified the petitioner of the results of the IOs’ visits, and that public records indicate that the beneficiary had set up a photography business on May 26, 2005. The director instructed the petitioner to submit copies of the beneficiary’s federal tax returns, IRS Forms W-2, and IRS Form 1099-MISC, Miscellaneous Income, for 2005 through 2007.

In response, the petitioner, through its senior pastor [REDACTED] stated in a June 11, 2008 letter that staff was allowed to work from home but was also expected to work the “necessary hours” and “to be physically present at all posted plenary church sessions.” The petitioner submitted a “time sheet” showing the beneficiary’s hours, which included “research and practice” from 9 a.m. to 12 p.m. on Tuesday through Friday; “organize music score and practice for two hours on Tuesday, Thursday, and Friday; worship service on Wednesday beginning at 6 p.m., morning devotion on Saturday from 6 a.m. to 8 a.m.; choir, youth orchestra, and worship band practice beginning at 5 p.m. on Saturday. The petitioner indicated that the beneficiary’s Sunday schedule consisted of choir practice for two hours, band practice for two hours, and worship service for four hours. The petitioner submitted copies of the IRS Forms W-2 that it issued to the beneficiary in 2005, 2006 and 2007, and provided uncertified and unsigned copies of the beneficiary’s corresponding IRS Forms 1040.

In an undated letter, the beneficiary offered explanations for his business, why the IO was not able to reach anyone at the church, and his work hours. The beneficiary admitted that he

registered a business but that he never worked in it. He further stated that although the area code for the petitioner changed in 1996, the petitioner failed to change its letterhead to reflect the new number. Nine years later in 2005, when the petition was filed, the petitioner's letterhead still reflected the wrong area code. The beneficiary also alleged that "the church's main voicemail has not been functioning properly for many months." He stated that because of limited space, the church does not have "official church office hours unless it is necessary." He stated that he has "all the necessary equipments [sic] at home that help me to prepare to do my job. Moreover, the nature of my job does not need for me to be present at the church at all times." He further stated:

As the director of Music for [the petitioner], I oversee all aspects of music program [redacted] Sunday Worship Band, and Youth Group Band). I personally direct the choir and the youth orchestra, but there are those who are more talented than I in "band" music that leads the program under my direction. As a music director it is my duty to ensure music is utilized to prepare, emphasize, and reinforce [redacted] sermon or theme of his sermon series It is not easy to find the song, nor is it easy to lead a choir that is strictly voluntary. Hence, I perform research and practice on my own throughout the week. During the week, I practice the songs, parts, and re-arrange according to the need of our choir's ability. The plenary practice for the choir is on Saturdays (as needed) and on Sundays. Therefore, I need to focus on the [redacted] direction of his ministry. Hence, the pastor and I are in constant communication so that I can align music program to his ministry direction. Therefore, my time outside of the church office is very valuable, if not essential, to ensure that I fulfill my role as the Director of Music for [the petitioner].

In a separate letter, the beneficiary stated that he helped a friend in his photography business for which he received \$800 which he reported on his 2006 tax return as "other income."

On January 17, 2009, the director denied the petition, finding that the petitioner had failed to provide certified quarterly tax reports, certified tax returns, and certified IRS Forms W-2, as requested in the NOIR.

On appeal, the petitioner submits a statement from the Social Security Administration, indicating that the petitioner reported wages for the beneficiary from 2003 to 2007, copies of the beneficiary's wage and income transcripts from the IRS for 2004 through 2007, and his tax return transcripts for 2005 through 2007.

In a January 21, 2010 letter submitted in response to the director's Notice of Intent to Deny (NOID) issued after the AAO's remand, [redacted] stated:

[The beneficiary] has been serving as a full-time Music Director since May 5, 2003. His duties include planning and directing activities of personnel in the music department and conducting the choir as well as instruments/praise and worship team. He also selects vocal, instrumental, and recorded music suitable to

the types of religious programs, issues assignments and reviews work of staff in such areas as arranging and vocal coaching. Also, he auditions and selects vocal and instrumental talent for services on Sundays.

The petitioner submitted copies of a May 5, 2003 Form I-797 approving the beneficiary for a change of status to R1 nonimmigrant religious worker for the period May 5, 2003 to January 16, 2006 and a November 17, 2006 Form I-797 approving the beneficiary's extension of stay in an R-1 status from January 17, 2006 to January 17, 2008. The petitioner also resubmitted the beneficiary's time sheet and provided copies of the beneficiary's wage and tax transcript and tax return transcript for 2008.

The director again denied the petition and certified her decision to the AAO, finding that the record contains unexplained inconsistencies about the beneficiary's duties and that a congregation of 120 members did not support the need for a full time music director. The director references the petitioner's letters stating that the beneficiary has held the proffered position since 1999 while others stated that he has held the position since 2003, and June 14, 2008 letter in which he stated that the beneficiary's duties are "not limited to regular worship services. He is responsible for music for church retreats and joint worship services with other Korean American churches in the Dallas area."

The AAO does not find any significant inconsistencies in the petitioner's letters. Although the petitioner stated that the beneficiary had served in the position since 1999, the letters generally indicate that the beneficiary volunteered his services beginning in 1999 and was employed by the petitioner in 2003. The petitioner's statement that the beneficiary is responsible for music during retreats and joint worship services does not indicate that he also works for other churches, as alleged by the director. Furthermore, there is nothing to support the director's conclusion that a congregation of 120 does not justify the services of a full-time music director.

The director's decision is withdrawn. The petitioner has submitted sufficient documentation to establish that he works for the petitioning organization. Nonetheless, the petition cannot be approved as the record now stands.

The regulation at 8 C.F.R. § 204.5(m)(12) provides:

Inspections, evaluations, verifications, and compliance reviews. The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval

inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

This matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.