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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

[Redacted]

C1

DATE: JUL 26 2012 Office: CALIFORNIA SERVICE CENTER

[Redacted]

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:

[Redacted]

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. On further review, 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) the approval of the petition and her reasons for doing so. The Director subsequently exercised her discretion to revoke approval of the petition on December 8, 2004. The Administrative Appeals Office (AAO) dismissed a subsequent appeal on August 9, 2005. On December 3, 2008, the Ninth Circuit Court of Appeals vacated the AAO's decision and remanded the matter for further proceedings in accordance with the court's opinion. On December 30, 2008, the 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 AAO will affirm the director's revocation. The appeal will be dismissed.

On November 26, 2008, 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. 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. 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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 director. The director determined that the petitioner had not established that the proffered position qualifies as that of a religious occupation and that the beneficiary was continuously employed in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition. The AAO's decision affirming the director's decision was vacated by the Ninth Circuit and the record remanded for additional consideration of these issues.

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 first issue presented is whether the petitioner has established that the proffered position is a religious occupation within the meaning of the above cited regulation.

The proffered position is that of a choir director. In its October 3, 2001 letter submitted in support of the petition, the petitioner stated that the duties of the position included conducting the choir, selecting liturgical music, directing the group at rehearsals and performances, reviewing and revising musical compositions, and transcribing "music sheets." The petitioner provided the following schedule of the beneficiary's work:

Monday	Rest	
Tuesday (8 hours)	09:30 – 10:30 10:30 - 12:00 12:00 – 13:00 13:00 - 17:00 17:00 - 18:30	Prepare for daily's [sic] schedule Prayer Lunch Collect Library references & materials Select Choir Piece for the following week
Wednesday (7 hours)	13:30 - 15:30 15:30 - 18:30 18:30 - 19:00 19:00 - 20:00 20:00 - 20:30	Organize choir music pieces Prepare for the weekend Korean School Prepare for the Wednesday worship Wednesday Worship Choir Practice (1 st time)
Thursday (8 hours)	09:30 - 10:30 10:30 - 12:00 12:00 - 13:00 13:00 - 17:00 17:00 - 18:30	Prepare for daily's [sic] schedule Prayer Lunch Collect Library references & materials Select Choir Piece for the following week
Friday (8 hours)	09:30 - 10:30 10:30 - 12:00 12:00 - 13:00 13:00 - 17:00 17:00 - 18:30	Prepare for daily's [sic] schedule Prayer Lunch Collect Library references & materials Prepare Materials for the Korean School
Saturday (3 hours)	09:30 - 12:30	Korean School Teacher
Sunday	08:00 - 09:00	Choir Practice (2 nd time)

(6 hours)	09:00 - 10:30	Worship (1 st part)
	11:00 - 12:30	Worship (2 nd part)
	12:30 - 13:30	Lunch
	13:30 - 15:30	Practice choir

In response to a May 9, 2002 request for evidence (RFE), the petitioner stated that the beneficiary's duties were divided as follows:

- (1) 49% in religious performance, including Sunday service from 10:45 am to 1:30 pm, early morning service from 5:30 am to 7:00 am from Wednesday through Saturday, and weekly Wednesday evening service from 7:30 pm to 9:00 pm. The petitioner stated that the beneficiary also performed at special ceremonies such as Christmas, Thanksgiving, weddings, funerals, baptisms and other special events.
- (2) 31% in rehearsal, working on Tuesday from 3:00 pm to 7:00 pm and Saturday from 12:00 pm to 9:00 pm and may use "any free time available to do additional rehearsal and education." The petitioner further stated that the choir director also "attends regional musical events to share information and to gather information of the current religious musical piece.
- (3) 10% in conference with "various church members to give input and educational opinion surrounding religious musical piece." The petitioner stated that the beneficiary conferred with the pastor, elders, deacons, volunteer teacher, evangelist, choir members, and congregational representatives; and
- (4) 10% in coordination with the youth, volunteer teachers, and other churches, and gathering material for choir hymns and pastoral sermons. The petitioner stated that the choir director's schedule includes five hours for conference and coordination from 5:00 pm to 10:00 pm on Friday "and other days of the week when there is availability between schedules."

The regulation in effect at the time the petition was filed provided at 8 C.F.R. § 204.5(m)(1) that the alien must be coming to the United States at the request of the religious organization to work as a religious worker. Therefore, to establish eligibility for special immigrant classification, the petitioner was required to establish that the specific position that it is offering to the beneficiary qualified as a religious occupation as defined in these proceedings. The statute in effect at the time the petition was filed did not define what constituted a "religious occupation" and the regulation, 8 C.F.R. § 204.5(m)(2), stated only that it is an activity relating to a traditional religious function. The regulation did not define the term "traditional religious function" and instead provided a brief list of examples. The list revealed that not all employees of a religious organization were considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation identified positions such as cantor, missionary, and religious instructor as examples of qualifying religious occupations. Persons in such positions would

reasonably be expected to perform services directly related to the creed and practice of the religion. The regulation reflected that nonqualifying positions were those whose duties are primarily administrative or secular in nature. These lists of qualifying and nonqualifying occupations derived from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

USCIS therefore interpreted the term “traditional religious function” to require a demonstration that the duties of the position were directly related to the religious creed of the denomination, that the position was defined and recognized by the governing body of the denomination, and that the position was traditionally a permanent, full-time, salaried occupation within the denomination. In accordance with its interpretation of the regulation, the AAO dismissed the petitioner’s appeal on August 9, 2005, finding that the petitioner had made inconsistent statements regarding the content of the duties of the position and had not established that all of the duties identified in the work schedule related to the position of choir director. The AAO found therefore that the petitioner had failed to establish that the proffered position qualifies as that of a religious occupation as that term was defined in the regulation.

The Ninth Circuit Court of Appeals, in *Love Korean Church v. Chertoff*, 549 F. 3d 749, (9th Cir. 2008), vacated the AAO’s decision, holding that the AAO’s interpretation that “all” of the duties of the proffered position must be religious in nature “is inconsistent with the definition of ‘religious occupation’ set forth in the regulation” The court agreed with the Third Circuit’s decision in *Soltane v. DOJ*, 381 F.3d 143 (3rd Cir. 2004) to the extent that the decision “reject[|s an interpretation of 8 C.F.R. § 204.5(m)(2) that would require *each discrete* duty of a qualifying religious occupation to be primarily nonsecular and directly related to core religious activity.” [Emphasis by the court.] The court however “decline[d] to adopt [its] own characterization of the quantum of religious activity that a proposed position must include to qualify under 8 C.F.R. § 204.5(m)(2).” The court left it to USCIS to decide “whether an occupation that has merely ‘*some* religious significance’ suffices under the statute, *Soltane*, 381 F.3d at 150, or whether some greater level is required: for example, that the occupation must be *substantially* or even *primarily* comprised of religious duties.” [Emphasis by the court.]

In its response to the director’s May 9, 2002 RFE, the petitioner provided a “verification of weekly duties of choir director” which was inconsistent with the duties and hours that it outlined in its initial submission. The petitioner’s RFE response indicated that the duties of the position were 100% of a religious nature. These duties, as outlined in the RFE response, consisted of performances, rehearsals, conferences with church members regarding selection of musical pieces, and coordinating with various individuals and groups on music and liturgy. None of the hours for these duties detailed by the petitioner in its RFE response correspond with the times alleged in its initial correspondence. Additionally, the petitioner added duties such as conferencing and coordinating but omitted activities such as preparing and teaching at the Korean school and collecting library references and materials, duties that consumed a significant number of hours when those duties were originally detailed by the petitioner.

Regarding these inconsistencies, the court stated:

The Church carried the burden of proof throughout the proceedings to revoke the previously granted visa petition. 8 U.S.C. § 1361; *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir.1984). Moreover, we defer to the BIA's reasonable interpretation of § 1361, which makes "it ... incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I. & N. Dec. 582, 591-92 (BIA 1988). Under appropriate circumstances, "[d]oubt cast on any aspect of the petitioner's proof may ... lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Id.* at 591 (emphasis added).

The AAO's decision in this case did not rest, however, on an adverse credibility finding based on the inconsistent records that caused it to reject the Church's other evidence. It is true that the AAO noted unresolved discrepancies between the duties of the Church's choir director as listed in its weekly work schedule and the summary of those duties contained in the diagram. The AAO apparently (and properly) resolved these discrepancies against the Church, which had the burden of proof. The AAO did not state, however, that the discrepancies tainted the credibility of the other evidence, and it reached the merits of the Church's visa petition in light of that other evidence. Because our review of an agency decision is limited to the reasoning articulated by the agency, *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943), we may not now reject the entirety of the evidence submitted by the Church when the agency did not do so. We therefore reach the merits of the Church's petition and review the legal and factual sufficiency of the agency's reasoning, mindful that any inconsistency must be resolved against the petitioner. *See Matter of Ho*, 19 I. & N. Dec. at 591.

539 F.3d at 754. Footnote omitted.

In an April 26, 2010 "certificate of employment," submitted following the AAO's remand, the petitioner's senior pastor, [REDACTED], stated that the duties of the proffered position are to:

- 1) Direct and prepare for religious music performance
- 2) Research music and direct rehearsals for worship services
- 3) Attend church conferences and/or meetings
- 4) Coordinate church's praise activities

In a June 3, 2010 "declaration," [REDACTED] stated that the beneficiary "has not served as a Korean School Teacher" with the petitioner. Yet the petitioner also resubmitted the original schedule which includes the duties of a Korean school teacher, and stated that it was the beneficiary's schedule at the time the petition was filed.

Rather than submitting competent objective evidence clarifying the duties of the proffered position, the petitioner has provided further inconsistent statements. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The AAO therefore rejects [REDACTED] statement that the beneficiary “has not served as a Korean School Teacher” as false and misleading. The beneficiary has allegedly held the choir director’s position, first in an unpaid and then in a paid capacity, since 1998. At the time the petition was filed in 2001, his duties would have been set. If teaching school was not part of the duties of choir director, the petitioner would not have included them in the beneficiary’s schedule submitted in support of the petition. Additionally, if the duties were included to inflate the number of hours the beneficiary worked, then the petitioner provided false and misleading statements when it filed the petition in 2001.

In response to the director’s Notice of Intent to Deny (NOID) the petition issued following the AAO’s remand, the petitioner submitted another hourly schedule of the beneficiary’s weekly duties, noting that it was the “proposed/actual work schedule” and a “detailed job description” that corresponds to the outline of duties that it provided in response to the director’s May 2002 RFE. The changes in the duties of the position as outlined by the petitioner appear to be a patent attempt to ensure that the position meets the requirements of the regulation. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971).

As counsel stated in his June 21, 2010 brief, the work schedule at issue is the one submitted at the time the petition was filed. That schedule revealed that, as choir director, the beneficiary’s duties included preparing for the day’s schedule, collecting library references and materials, preparing to teach and teaching at the Korean school, and prayer. The record contains no evidence as to what these duties entailed. In fact, after its initial submission, the petitioner omitted these duties from all subsequent iterations of the job duties. These omissions raise further questions regarding the legitimacy of the position as a religious occupation as that term was defined by the regulation.

As discussed above, the controlling regulation in effect at the time the petition was filed provided a list of positions that did not qualify as religious occupations. This list, which included janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations, reflected those positions that were primarily secular in nature. The corollary to that is that a qualifying religious occupation is one that is primarily religious in nature. USCIS adopted this standard in the regulations published on November 26, 2008.¹¹

¹¹ See the current definition of “religious occupation” at 8 C.F.R. § 204.5(m)(5).

Application of this standard to the position and duties of music director as described by the petitioner in its initial submission reveals that the duties that can be clearly identified as religious in nature are those involving the choir, music selection and worship, which total 13 hours. The list of duties includes 4.5 hours per week dedicated to “prayer.” The Ninth Circuit concluded that the time that the beneficiary was engaged in prayer must be included in the calculation of religious duty “[i]f prayer is a duty under the Church’s choir director position.” 549 F.3d at 759. The petitioner has provided no evidence that prayer is a duty of the position or simply a personal activity for which it provides time during the day. Nonetheless, even if the time dedicated to prayer is a duty that is actually required by the proffered position, then the position still requires only 17.5 hours of what can be reasonably described as religious activity. The record does not establish the nature of the activities involved with preparing for the day’s schedule nor did the petitioner provide any details about the beneficiary’s work to collect library references and materials or his work as a Korean school teacher.

The record reflects that more than half of the beneficiary’s time will be spent on activities that the petitioner failed to establish have any religious significance. The time spent on duties such as “collecting library references and materials” and “preparing for the beneficiary’s daily schedule” are not merely a minor portion of the beneficiary’s duties but rather encompass a significant percentage of the beneficiary’s work. The evidence does not demonstrate that the beneficiary’s duties are primarily focused on religious activities. The AAO finds that the limited time spent by the beneficiary on duties that are predominately religious in nature is not sufficient to establish that the duties relate to a traditional religious function.² Although the beneficiary’s duties do involve some clearly religious activities, such activities do not encompass the majority of his time.

The remaining issue is whether the petitioner has established that the beneficiary worked in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the petition.

The regulation in effect at the time the petition was filed at 8 C.F.R. § 204.5(m)(1) provided, in pertinent part, that “[a]n alien, or any person in behalf of the alien, may file a Form 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.” The regulation indicated 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.” Analyzing case law and legislative history, the AAO interpreted the regulation to require that the qualifying two years of religious work must have been full-time and generally salaried.

² This interpretation is generally consistent with the current regulations governing immigrant religious workers which require that the duties must primarily relate to a traditional religious function and must clearly involve inculcating or carrying out the religious creed and beliefs of the denomination. *See* 8 C.F.R. § 204.5(m)(5).

The petition was filed on November 21, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as a choir director throughout the two-year period immediately preceding that date. In dismissing the appeal, the AAO determined that the work schedule submitted by the petitioner indicated that the beneficiary served, at most, 13 hours per week in music related activities and therefore the evidence did not establish that the beneficiary had worked full-time as a choir director.

Regarding the AAO's finding, the Ninth Circuit stated:

[The AAO] concluded that not enough of the full-time, salaried work performed by [the beneficiary] was actually related to music. This approach is contrary to the statute in two respects. First, although the Church did label the proposed position as "choir director," music is not necessarily the only activity of religious significance in the proposed position. To the extent that other duties identified in the proposed position and unrelated to music carried religious significance, the salaried time spent by [the beneficiary] engaging in those activities during the relevant two-year period must be credited towards the required full-time and salaried experience. For example, by focusing exclusively on music, the AAO apparently excluded from its calculus several hours dedicated every week to "prayer"—presumably as religious an activity as one can imagine. If prayer is a duty under the Church's choir director position and [the beneficiary] engaged in prayer as part of his salaried employment during the relevant two-year period, that time was clearly spent in "such work" as that for which the Church seeks the "special immigrant" classification. 8 U.S.C. § 1101(a)(27)(C)(iii). Accordingly, it must be credited in assessing the full-time nature of [the beneficiary's] experience.

Moreover, the statute requires two years of experience in "*such work*" as that of the proposed "religious occupation." 8 U.S.C. § 1101(a)(27)(C)(iii) (emphasis added). As we have already explained, however, § 204.5(m)(2), which defines the key phrase "religious occupation," does not require that *every* duty of a qualifying position be religious in nature or related to religious activities. It follows, then, that the two-year experience requirement may similarly be satisfied even if not every work-related duty in which the beneficiary engaged during the relevant two-year period was religious in character. If, for example, the agency on remand should adopt the Third Circuit's standard requiring only "*some* religious significance," *Soltane*, 381 F.3d at 150, and should conclude that the Church's choir director position does have "some religious significance," *id.*, then [the beneficiary] would appear to satisfy the experience requirement announced in § 1101(a)(27)(C)(iii).

549 F.3d at 759. (Footnote omitted.)

As discussed above, the petitioner has provided conflicting statements regarding the duties of the proffered position. Although it initially stated that the beneficiary engaged in 1½ hours of prayer three times a week, the petitioner provided no evidence that such prayer was a duty imposed by the proffered position rather than a personal preference for which the petitioner provided the beneficiary time to perform. Additionally, as previously discussed, the petitioner provided no documentation to reflect how the activities of collecting library references and materials, teaching at the Korean school, or preparing for the day's schedule were of a religious nature and therefore had some religious significance. In subsequent submissions, the petitioner failed to include "prayer" or either of the other questioned activities as a requirement of the position. The omissions reinforce the AAO's initial determination that these duties were not a requirement for the position of choir director. Accordingly, as the petitioner has failed to establish that the duties performed by the beneficiary during the requisite two-year period were primarily religious in nature, it failed to establish that the beneficiary worked continuously in a qualifying religious occupation for the two years immediately preceding the filing of the petition.

The petition will be denied 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The director's decision to revoke the petition is affirmed. The appeal is dismissed.