



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

[REDACTED]

D13

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 22 2010**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1)

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision. Because the record, as it now stands, does not support approval of the petition, the AAO will remand the petition for further action and consideration.

The petitioner is a church belonging to the Presbyterian Church (USA). It seeks to classify the beneficiary as a nonimmigrant religious worker pursuant to section 101(a)(15)(R)(1) of the Act, to perform services as a director of musical services. The director determined that the petitioner had not established that the position qualifies as a religious occupation.

On appeal, the petitioner submits arguments from counsel, new letters, and other exhibits.

Section 101(a)(15)(R) of the Act pertains to an alien who:

- (i) for the 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; and
- (ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii).

Section 101(a)(27)(C)(ii) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii), pertains to a nonimmigrant who seeks to enter the United States:

- (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,
- (II) . . . 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) . . . 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.

U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 214.2(r)(1) state that, to be approved for temporary admission to the United States, or extension and maintenance of status, for the purpose of conducting the activities of a religious worker for a period not to exceed five years, an alien must:

- (i) Be a member of a religious denomination having a bona fide non-profit religious organization in the United States for at least two years immediately preceding the time of application for admission;

- (ii) Be coming to the United States to work at least in a part time position (average of at least 20 hours per week);
- (iii) Be coming solely as a minister or to perform a religious vocation or occupation as defined in paragraph (r)(3) of this section (in either a professional or nonprofessional capacity);
- (iv) Be coming to or remaining in the United States at the request of the petitioner to work for the petitioner; and
- (v) Not work in the United States in any other capacity, except as provided in paragraph (r)(2) of this section.

The petitioner filed the Form I-129 petition June 23, 2008. The petitioner submitted a job description, containing the following information:

SUMMARY:

The Director of Musical Services is responsible for providing overall musical services as the lead worship and musical director of the Classical Service (the earlier, traditional worship service); the pianist for the Contemporary Service; the director for the Choir; the coordinator and teacher of [REDACTED] and the church's musician for any other occasions under the Senior Pastor's discretion. . . .

RESPONSIBILITIES

A. General Responsibilities:

1. Oversee and give prayerful attention to assisting, promoting, and encouraging the spiritual life and Christian training of the worship team members, choir members, and other church musicians under the care of one's ministry.
2. Coordinate and/or direct all activities related to music and worship in the early Classical Service.
3. Be available for worship and prayer leadership, when requested.
4. Provide pastoral care via home visits, telecare, and email communication with members under the care of one's musical ministry.
5. Provide oversight and upkeep of the church's sound equipment, musical instruments, podium furnishings, and other decorations.
6. Direct and conduct regular meetings with creativity, imagination and energy.
7. Be responsible for the follow-up of all members under the care of the musical ministries. Maintain an organized, updated register of all persons interested in worship and music.

8. Regularly contact and develop positive relationships with the parents, youth, and other adults.
 9. Organize or involve people in special events for study and challenge (cantatas, retreats, teaching seminars, talent search groups, choir tours, visiting other nearby churches, etc.)
 10. Organize or involve people in special occasions for celebration enjoyment (banquets, parties, recreations, special worship services, etc.)
 11. Recruit and train a core of people, who truly enjoy music.
 12. Plan and direct a strong, diversified musical ministry.
 13. Initiate musical and worship projects for raising funds.
 14. Project and submit for approval a portion of the Worship/Music budget.
 15. Project a vision for future goals and growth.
- B. Specific Responsibilities:
1. Rehearse and play professionally and punctually the piano for both Sunday worship services at 9:00am and 11:30am.
 2. Sing or play Musical Specials (or find someone who will sing or play, when this is necessary) for the first worship service.
 3. Be the musical director and lead liturgist for all the hymns and canticles in the Classical Service. Be a musical member (pianist) of the Worship Team for the Contemporary Service.
 4. Work on a monthly basis with the Senior Pastor and the Director of Pastoral and Administrative Office in the selection and coordination of the hymns and songs.
 5. Play on special occasions, whenever needed, as assigned by the Senior Pastor.
 6. Maintain a record of all the hymns and songs for future usage (and to avoid constant repetition), take initiative, and be fully prepared for each rehearsal with regards to the two worship teams and the choir members.
 7. Identify, recruit, cultivate, and train a core of youth and adults as potential musicians through the School of Music at the church's facilities. Make sure the church's instruments are protected. Coordinate payments and promote the school in the community.
 8. May play or sing with other groups on special occasions (weddings, funerals, etc.) as long as the Senior Pastor is informed.
 9. Maintain a respectful, friendly, responsible, and Christ-like spirit with one's interpersonal relationships, inside and outside of the church.

On January 21, 2009, the director instructed the petitioner to "explain how the duties of the position relate to a traditional religious function" and to "[s]ubmit documentary evidence that the governing body recognizes the position of Music Minister as directly related to the religious creed of the denomination."

In response, the petitioner submitted a copy of the "Two-Month Review of the Work of the Director of Musical Services," dated March 13, 2008. The document stated: "For the first time in the church's history, a Director of Musical Services has been hired as part of the formal staff. . . . In the past, the

church relied upon a few (mostly inexperienced) volunteers and at other times gave love offerings per worship service.”

The director denied the petition on December 29, 2009, stating: “the petitioner gives no explanation as to whether anyone held the salaried position of musical director in either its particular church or in the denomination at large prior to the beneficiary’s attainment of the petition.” The director concluded: “the petitioner has not established that the position of ‘Musical Director’ is a qualified religious occupation in its denomination.”

On appeal, counsel asserts that the concerns raised in the denial notice do not match what the director had previously requested, and that “more evidence[] would have been filed” “if [those concerns had been] raised in the Request for Evidence.” We agree with counsel that there are important differences between what the director requested, and the deficiencies upon which the director later based the decision. One important factor is that the director, in the January 2009 request for evidence, asked for information from “the governing body,” without specifying what such a body governed. The director evidently sought evidence from the governing body of the denomination, but the director did not say so in the request for evidence. Given the ambiguous nature of the request, it was not unreasonable for the petitioner to conclude that the director was referring to the governing body of the petitioning church rather than to some larger, unnamed organization.

In a letter submitted on appeal, [redacted] executive [redacted] states: “In this presbytery, 48 of our 75 churches have such a [music director] position. In our churches, the Music Director must have special skills in worship leadership in the Reformed worship as well as having skills in directing music.” The petitioner submits copies of new letters from pastors of other Presbyterian churches, indicating that their churches employ music directors or ministers of music. Some churches employ such workers full time, others part time, indicating that the need for such services varies from congregation to congregation. The petitioner had previously indicated that the growth of its own congregation had led to the decision to switch from relying on volunteers to creating a paid position.

The record shows that the position does not simply involve playing music during a church service. Rather, the director of music plays an active and integral role in the planning and presentation of worship services, and works closely with the pastoral staff. From the evidence presented, we find that the position offered to the beneficiary relates to a traditional religious function, and that the petitioner’s denomination recognizes the position as a religious occupation. We will withdraw the director’s finding in this regard. Because that finding was the sole basis for denial, we will also withdraw the decision.

Nevertheless, the petition cannot be approved as it now stands. The AAO may raise new issues not discussed by the director. *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 regulation at 8 C.F.R. § 214.2(r)(8) requires the petitioner to submit a detailed attestation with the petition, to provide information about the petitioner, the beneficiary and the job offer. Because the petitioner filed the petition before this requirement went into effect, the petitioner filed the petition without the attestation. The director must allow the petitioner an opportunity to submit this required document.

Also, the regulation at 8 C.F.R. § 214.2(11) requires the petitioner to submit evidence regarding the beneficiary's intended compensation. The petitioner has submitted some documentation in this regard, but an issue of concern remains. The petitioner indicated that the beneficiary would earn \$9,735 per year. The petitioner also specified that the beneficiary would work 30 hours per week. This means that the petitioner would pay the beneficiary approximately \$6.24 per hour. In 2008, when the petitioner filed the petition, Florida's minimum wage was \$6.79 per hour.¹ Therefore, it is not clear that the petitioner's compensation offer was consistent with state law. As of this writing, the federal minimum wage is \$7.25 per hour.

Rev. [REDACTED] senior pastor of the petitioning church, stated that the beneficiary's base salary would be \$9,735 per year, but that the beneficiary "may earn more income from the church by providing private music classes to the community and congregation as the founding director of the church's School of Music." "[P]roviding private music classes to the community" appears to be an ancillary, secular function.

Given the low level of the beneficiary's intended base compensation, it appears that the petitioner not only permits, but expects, the beneficiary to supplement his income through private instruction above and beyond his church functions. It is not clear that such work readily falls within the intended scope of the R-1 religious worker classification. The petitioner must provide further information about the nature of the beneficiary's intended work at the music school, including his expected work hours and how much income the beneficiary is likely to earn through that work.

For the reasons discussed above, the director's decision cannot stand and we hereby withdraw that decision. At the same time, however, the record as it now stands does not permit approval of the petition. Therefore, the AAO will remand this matter to the director. 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 Administrative Appeals Office for review.

¹ Source: <http://www.dol.gov/whd/state/stateMinWageHis.htm> (printout added to record September 21, 2010).