

(b)(6)

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

Date: **MAY 28 2013** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

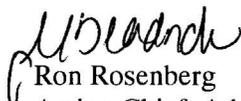
ON BEHALF OF PETITIONER:

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.

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 in accordance with the instructions on 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,


Ron Rosenberg
Acting 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 appeal will be dismissed.

The petitioner is a church. It seeks to classify the beneficiary as a nonimmigrant religious worker under section 101(a)(15)(R) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R), to perform services as a musical director. The director determined that the petitioner had not established that the position qualifies as that of a religious occupation.

The director also determined that the petitioner had failed to maintain a lawful immigration status and therefore was not eligible for the immigration benefits requested in this petition. The regulation at 8 C.F.R. § 214.1(e) states that a nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Under 8 C.F.R. § 214.1(c)(4), extension of status is available only to aliens who maintain their previously accorded status.

The issue of the beneficiary's maintenance of status is significant only insofar as it relates to the application to extend status. An application for extension is concurrent with, but separate from, the nonimmigrant petition. There is no appeal from the denial of an application for extension of stay filed on Form I-129. 8 C.F.R. § 214.1(c)(5). Because the beneficiary's maintenance of status is an issue related to extension eligibility, rather than eligibility for classification as an R-1 nonimmigrant, the AAO lacks authority to decide this question, and the issue will not be addressed in this decision.

On appeal, counsel asserts that the "position of Choir Director is a religious occupation, both as a general category under the I&N Act" and under case law "as well as in the context of the Petitioning church's prayer services which feature a very large organized choir that performs elaborate hymns and sacred music by renowned historical and contemporary Western and Korean composers" Counsel submits a brief and additional documentation in support of the appeal.

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

The issue presented is whether the petitioner has established that the proffered position qualifies as that of a religious occupation.

The regulation at 8 C.F.R. § 214.2(r)(3) provides:

Religious occupation means an occupation that meets all of the following requirements:

- (A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination;
- (B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination;
- (C) The duties do not include positions which are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible; and
- (D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

In its October 11, 2012 letter submitted in support of the petition, the petitioner outlined the duties of the proffered position as:

- Serving as Musical Director for all church services as well as direct the church choir and holding rehearsals.
- Performing at all unscheduled services such as weddings and funerals;
- Coordinating and staffing all other liturgies and competent musicians (cantors & instrumentalists);

- Developing both short and long term music program for the Parish and will participate in planning the liturgies with the Parish Liturgy Committee;
- Conducting Church musical groups;
- Auditioning and selecting members of Church musical groups;
- Selecting religious music to suit performance requirements and accommodating talent and ability of groups;
- Directing Church choir at rehearsals and performance to achieve desired effects, such as tonal and harmonic balance, dynamics, rhythm, tempo, and shading, utilizing knowledge of conducting techniques and music theory;
- Scheduling tours and performances and arranging for transportation and lodging;
- Transcribing religious musical compositions and melodic lines to adapting them to or create particular style for choir; and
- Conducting Church choir with instrumental accompaniment.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that it currently employed 26 employees in the United States. On the Form I-129 Supplement R, the petitioner stated in Section 1 at question 1 that it employed only one individual at the location where the beneficiary would work and, at question 2, identified that individual as another choir director. With the petition, the petitioner submitted an undated and unsigned copy of its bylaws that identified the officers of the church but did not name any other positions within the church organization. The petitioner also submitted an October 10, 2012 in which its pastor certified that the beneficiary had worked at the petitioning organization as its music director.

In an October 19, 2012 request for evidence (RFE), the director instructed the petitioner to submit additional documentation “to establish the need for the beneficiary’s services,” to include:

- Specific duties which the beneficiary will be undertaking AND those of other staff at the same location;
- Provide a description of your religious services and ministries, including location and times;

- Whether the petitioner has always had the services of a minister or staff to perform the duties that the beneficiary will be undertaking? If not, explain what circumstances created a need for the beneficiary's services[.]

The director also instructed the petitioner to submit additional documentation to establish that the position is a religious occupation within the meaning of the regulation, including a "detailed explanation as to the requirements of the position" and documentation to establish the religious denomination requirements for the position. In order to establish that the duties of the position relate to a traditional religious function, the director instructed the petitioner to submit evidence such as the petitioner's constitution or bylaws and "a letter from a superior or principal of the religious denomination or organization in the United States explaining how the position offered qualifies as a traditional religious function."

In response, the petitioner provided an "additional job description" for the proffered position that provides a more detailed enumeration of the duties previously outlined. In a letter dated January 6, 2013, the petitioner's senior pastor stated that the "number-one responsibility of the director is to select the worship music for services." He stated that the position is full time and involves "directing a volunteer choir of approximately 260 plus people, leading the congregational music, and encouraging and coordinating the participation of the Body of Believers in solos, ensembles, etc with either instrumental or vocal talents on a regular basis in the worship services." The pastor stated that the beneficiary's work schedule would include services on Sunday morning and evening, daily morning services, "and [at] other times as required," evening services on Wednesday and Friday, and "other [at] times as required."

In a January 10, 2013 letter, prior counsel stated:¹

[The beneficiary] was employed as a Conductor of Choirs at the [redacted] in South [sic] from 1999 to 2005.

Additionally, he was employed as a Choir Director at our Church in the United States with a lawfully issued employment authorization card and since he has been in H-4 status, he has assisted us a volunteer Musical Director and a member of the Church choir. . . .

The Church follows the same tradition and believes in the same tenets as the Beneficiary's Church in South Korea. [The beneficiary] is, therefore, fully qualified to perform the duties of Music Director as follows. In his temporary assignment, [the beneficiary's] responsibilities fall within the definition of traditional religious function

The petitioner also submitted a copy of a different set of bylaws.

¹ Different counsel represents the petitioner on appeal. Previous counsel is referred to as "prior counsel" in this decision.

The director denied the petition, finding *inter alia* that the petitioner had failed “to establish that the position of Music Director is recognized by the organization and denomination as a traditional function of the church” and that the petitioner did not address the issue of “the existence of the position within the organization prior to the beneficiary” assuming the duties.

On appeal, counsel, in a joint brief with the petitioner’s administrative pastor, states that the position of music director as a religious occupation is supported by the Act and by the regulation in the “category of ‘Cantor,’” and that the duties of the position in the Occupational Outlook Handbook include “May train and direct Choir or teach vocal music to youth or other groups or congregants.” Counsel further states:

The petition’s approvability is further supported by the holdings in *Love Korean Church v. Chertoff*, 549 F3d 749, 756-9 (9th C., 2008, *Matter of Rhee*, A22332670 (BIA, 10/16/78) *Soltante* [sic] v. DOJ, and 381 F3d 143, 149-50 (3rd C. 2004); and, most significantly, by the factual context that the Petitioning church’s prayer services featuring, and largely consisting of, religious music led by an organized choir with instruments and often an orchestra, as well as a Congregation musically and textually prepared by Musical Directors.

Although referencing specific pages in the *Love Korean Church* and *Soltane* decisions, counsel does not point to any specific point or issue in these decisions to support the petitioner’s claims. All of the decisions cited by counsel are based on regulations that were superseded by new regulations on November 28, 2008, prior to the filing of the instant petition. Neither the Act nor the current regulations identify specific occupations as categorically “religious occupations.” While the court in *Love Korean Church* and the Bureau of Immigration Appeals (BIA) in *Matter of Rhee* suggest that a musical director is a religious occupation, and USCIS does not deny that music plays a significant role in most religious organizations, current regulations set forth certain criteria that a petitioner must meet in order to establish that a position is a religious occupation within the meaning of the regulation. Additionally, while the court in *Soltane* stated that a petitioner must show only that the proffered position has “some religious significance,” the Ninth Circuit did not make a similar finding in *Love Korean Church* and left it to USCIS to determine “the quantum of religious activity that a proposed position must include to qualify” as a religious occupation under the prior regulations. 549 F.3d at 757.

The petitioner’s argument appears to be that the size of the choir and the complexity of the material that it presents are sufficient to establish that the position of musical director is a religious occupation. Under current regulations, the petitioner must provide evidence that the duties of the proffered position “primarily” relate to a traditional religious function and that the duties clearly involve inculcating or carrying out the religious creed and beliefs of the denomination. The petitioner must also provide documentation to establish that the position is recognized as a religious occupation within the denomination.

In her RFE, the director specifically directed the petitioner to submit evidence that the proffered position is recognized as a religious occupation within the petitioner’s denomination. The

director advised the petitioner that it may establish this criterion such as by providing either its constitution or bylaws or by submitting a letter from an authorized official of its denomination.

In response, the petitioner submitted a document that it identified as its bylaws. However, the document is different from the document originally submitted and identified as the petitioner's bylaws. The new document did not contain a date or signature and did not indicate that it was an amended version or an addendum to the original bylaws, which the petitioner resubmitted with its response to the RFE. The new bylaws list the different positions within the church including a choir leader and music director. The record is not clear that the new bylaws were drafted prior to the director's RFE rather than in direct response to the director's concerns. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not 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 Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). 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).

Although the director also found that the petitioner failed to address the questions of when the position came into existence in the petitioning organization and who held the position prior to the beneficiary, the answers to these questions are not a relevant factor in the determination of whether the proffered position is recognized within the petitioner's denomination.

The petitioner has failed to establish that the proffered position is recognized as a religious occupation within its denomination. Thus, it has failed to establish that the position qualifies as a religious occupation as that term is defined by the regulation.

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 appeal is dismissed.