U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

File: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 1 2001

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: 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)

IN BEHALF OF APPLICANT: [redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

[redacted]

DISCUSSION: The immigrant visa petition was denied by the Director, Vermont Service Center. An appeal was summarily dismissed by the Associate Commissioner for Examinations. The matter is again before the Associate Commissioner on motion to reopen. The motion will be granted; the appeal will be dismissed.

The petitioner is a church. It seeks classification of 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), in order to employ him as a "music director" at a salary of $800 per month.

The director denied the petition determining that the petitioner failed to establish that the beneficiary had been continuously employed in a religious occupation for the two years preceding filing of the petition as required or that the proposed position constituted a qualifying religious occupation for the purpose of special immigrant classification.

The petition was denied in a decision dated July 3, 1998. An appeal was summarily dismissed on June 6, 2000, based on the failure of the petitioner to submit a brief or evidence in support of the appeal.

On motion, counsel argues that a timely response was submitted to the Service. Counsel submitted a cover letter, a copy of the evidence furnished on appeal, and a Federal Express waybill as evidence of the timely submission.

Based on this evidence, the motion to reopen the proceeding is granted. The appeal will be reviewed on its merits.

On appeal, counsel for the petitioner submitted copies of two unpublished administrative decisions relating to special immigrant religious workers, a written opinion of the Service's general counsel, and a written statement from the deacon of the petitioning church. Counsel did not furnish a brief arguing the relevance of the documents submitted.

Section 203(b)(4) of the Act provides classification as a special immigrant religious worker to a qualified alien 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--

[redacted]

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

(II) before October 1, 2003, 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, 2003, 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 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 petitioner is a church affiliated with the Church of God denomination. The petitioner stated that the church has 146 members and no paid employees. A statement of its annual budget was not furnished. The beneficiary is described as a native and citizen of Romania who was last admitted to the United States on March 9, 1996, in B-2 visitor classification. The record shows that the beneficiary was granted R-1 nonimmigrant religious worker status valid from December 13, 1996 to December 12, 1999 authorized for temporary employment with the petitioner.

The first issue is whether the petitioner has established that the proposed position constitutes a religious occupation for the purposes of this visa petition proceeding.

8 C.F.R. 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

(ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:

(A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

* * *

> (D) That, if the alien is to work in another religious vocation or occupation, he or she is qualified in the religious vocation or occupation. Evidence of such qualifications may include, but need not be limited to, evidence establishing that the alien is a nun, monk, or religious brother, or that the type of work to be done relates to a traditional religious function.

8 C.F.R. 204.5(m)(2) states, in pertinent part, that:

> *Religious occupation* means 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.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a "religious occupation" and the regulation states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The examples listed reflect that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as religious counselor, catechist, and cantor, are examples of qualifying religious occupations. Persons in such positions must complete prescribed courses of training established by the governing body of the denomination and their services are directly related to the creed and practice of the religion. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature. Persons in such positions must be qualified in their occupation, but they require no specific religious training or theological education.

The Service therefore interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the creed and practice of the denomination, that specific prescribed religious training or theological education is required, 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.

In a letter dated August 22, 1997, the petitioner described the duties of the position as preparing the musical portion of worship services, leading the choir at worship services, playing the guitar at worship services, preaching the "Evangelie," and teaching church youngsters to "preach to God trough [sic] songs." The petitioner asserted that the position was full-time at 40 hours per week and permanent. The petitioner also stated that the position is qualifying because the R-1 nonimmigrant petition was approved for the same position.

The petitioner's arguments are not persuasive. First, the petitioner has not furnished any documentation from an official of the denomination verifying that the position of "music director" is a traditional religious occupation or what the qualifications are for such a position. Nor has the petitioner established that the beneficiary has any formal theological training.

Second, the record does not establish that a music/choir director qualifies as a religious occupation. The fact that music is traditionally a component of religious worship services is noted. However, it has not been shown that the duties of the position satisfy the intent of the statute. Here, musical ability is the principal qualification, not any formal theological training.

Third, the record does not credibly demonstrate that the small church, with no employees, could or would employ a full-time music director. The petitioner did not disclose the number of worship services per week or the number of members of its choir. Based on the description of the duties of the position, it is simply not reasonable that the position could rise to the level of 40 hours per week. The petitioner also conceded that it has never employed any paid workers and that even its clergy person and deacon serve as volunteers who support themselves with secular employment. It cannot be concluded that the petitioner has established that the small church will employ the alien beneficiary in a full-time permanent position as music director.

Finally, the fact that the Service approved a nonimmigrant petition for the same position is not dispositive. The Service is not bound by past decisions which may have been issued in error. See National Labor Relations Bd. v. Seven-up Bottling Co. of Miami, 344 U.S. 344, 349 (1953).

The next issue is whether the petitioner has established that the beneficiary has at least two years of experience in the religious occupation.

8 C.F.R. 204.5(m)(1) states, in pertinent part, that:

> All three types of 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.

The petition was filed on September 29, 1997. Therefore, the petitioner must establish that the beneficiary had been continuously engaged in a qualifying religious occupation for at least the two years since September 29, 1995.

The petitioner claimed that the beneficiary, prior to his entry into the United States, was employed by an adoption agency in Romania and that he volunteered with an affiliated church in that country as its "music director." The U.S. petitioner claimed that the beneficiary volunteered his services as music director since his entry in March 1996, and that it began employing him in December 1996. The director found that the petitioner failed to establish that the beneficiary had been continuously employed in a religious occupation since at least September 1995.

The statute requires that the alien have been "carrying on such vocation, professional work, or other work continuously" for the two years prior to filing. Section 101(a)(27)(C)(iii) of the Act. The regulations are silent on the question of part-time or volunteer work satisfying the requirement. This is in recognition of the special circumstances of some religious workers, specifically those engaged in a religious vocation, in that they may not be salaried in the conventional sense and may not follow a conventional work schedule. The regulations distinguish religious vocations from lay religious occupations. 8 C.F.R. 204.5(m)(2) defines a religious vocation, in part, as a calling to religious life evidenced by the taking of vows. The regulation defines religious occupations, in contrast, in general terms as an activity related to a traditional religious function. *Id*. In order to qualify for special immigrant classification in a religious occupation, the job offer for a lay employee of a religious organization must show that he or she will be employed in the conventional sense of full-time salaried employment and will not be dependent on supplemental employment. See 8 C.F.R. 204.5(m)(4). Because the statute requires two years of continuous experience in the same position for which special immigrant classification is sought, the prior experience must have been full-time salaried employment in order to qualify as well. Accordingly, volunteer activities does not constitute qualifying work experience in a religious occupation within the meaning of section 101(a)(27)(C) of the Act.

Counsel did not explain the submission of the two unpublished administrative decisions of this Service regarding appeals of special immigrant religious worker cases to support the instant appeal. Nevertheless, it has not been shown that the facts of the cases are similar and it must be noted that the unpublished

administrative decisions relied on by counsel do not have binding precedential value. See 8 C.F.R. 103.3(c).

Additionally, the written opinion of this Service's general counsel only opined that the prior experience of a special immigrant religious worker must have been in the same position for which classification is sought. The relevance of the submission also was not explained.

Accordingly, it must be concluded that the petitioner has failed to overcome the grounds for denial of the petition cited in the decision of the center director.

It is noted that the petitioner has failed to establish eligibility on additional grounds. The record is not persuasive in showing that the petitioner and his family could subsist on the proffered wage of $800 without resort to supplemental employment as required by 8 C.F.R. 204.5(m)(4). As noted above, there is a significant question as to the credibility of the job offer. Pursuant to 8 C.F.R. 204.5(g)(2), a petitioner must also submit its federal tax returns, audited financial statements, or annual reports to establish its ability to pay the proffered wage. The petitioner has not satisfied this documentary requirement. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.