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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 MASS, 3/F
Washington, D.C. 20536

File: LIN 01 019 51880 Office: NEBRASKA SERVICE CENTER Date: SEP - 2 20[illegible]

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)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director of the Nebraska Service Center. In a subsequent motion to reconsider, the director affirmed his previous decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Seventh-Day Adventist 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), to perform services as a music director.

The director denied the petition, finding that the petitioner had failed to establish that the position qualifies as that of a religious worker or that the beneficiary had been engaged in a qualifying religious occupation for the two-year period immediately preceding the filing date of the petition.

On appeal, counsel asserts that the occupation of church music director is a religious occupation and that the beneficiary has the requisite two years of experience in a religious occupation. Counsel contends that the denial of the petition is unconstitutional because it violates the establishment of religion clause of the First Amendment to the United States Constitution.

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 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 in this matter is a tax-exempt Seventh Day Adventist Church. The petitioner wishes to employ the beneficiary as music director.

The first issue to be addressed in this proceeding is whether the petitioner has established that the proposed position constitutes a qualifying religious occupation for the purpose of special immigrant classification.

Pursuant to 8 C.F.R. § 204.5(m)(2), the term "religious occupation" is defined as follows:

> *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 the regulations.

In a letter that accompanied the original I-360 petition, the petitioner described the beneficiary's duties as follows:

> Train and direct adult and children church choirs. Coordinate with the pastor in selecting and performing religious music to be played at worship services, and other religious functions.
>
> Provide religious and music teaching and counseling to choir members and congregants. Provide spiritual and moral guidance. Aid the pastor, including the selection of religious music, in planning religious services and ceremonies, such as Sabbath worships, Wednesday evening services, Sabbath Bible school, baptisms, communions, weddings, funerals and fellowship activities. Assist the pastor in preparing and conducting main SDA events and festivals. Provide the church's youth and adult congregants with religious education, counseling and guidance.

> Organize and direct various church activities and functions related to religious music and choir. . . .

After reviewing the additional evidence submitted requested to show that the position in question qualifies as that of a religious worker, the director found that the petitioner had not shown that the duties of the position are directly related to the creed of the denomination, that the position is defined and recognized by the governing body of the d4enomination, or that the position is traditionally a permanent, full-time salaried occupation within the denomination or the petitioning church.

On appeal, counsel asserts that church music and choir director positions are professional religious occupations. In support of his assertion, counsel cites the holding reached in *Full Gospel Portland Church v. Thornburgh*, 730 F.Supp. 441 (D.D.C. 1988). Finally, counsel contends that the denial of the petition is unconstitutional because it violates the establishment of religion clause of the First Amendment of the U.S. Constitution.

After a careful review of the record, it is concluded that, in this case, the petitioner has not established that the offered position constitutes a qualifying religious occupation.

To establish eligibility for special immigrant classification, the petitioner must establish that the offered position qualifies as a religious occupation as defined in the regulations. The statute is silent as to 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," but instead provides a brief list of examples. A review of the list reveals 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 cantor, missionary, or religious instructor are examples of qualifying religious occupations. The non-qualifying positions are those that are primarily administrative or secular in nature, such as janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

The Bureau interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed or beliefs of the denomination, 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 or the petitioning religious organization.

In this case, the petitioner has not shown that the position of music director is defined and recognized by the governing body of the denomination. The *Church Manual* states the following at page 70:

> Great care should be used in selecting the choir leaders or those who have charge of the music in the services of the church. Only those who are known to be thoroughly consecrated should be chosen for this part of the church work. Untold harm may be done by selecting unconsecrated leaders. . . .
>
> Choir leaders should work in close collaboration with the minister or church elder in order that the special musical selections harmonize with the theme of the sermon. The choir leader is under the direction of the pastor or elders of the church and does not work independently of them. The choir leader should counsel with them, not only as to the music to be rendered, but also concerning the selection of singers and musicians.

The *Church Manual* specifies only that the choir leader must be "consecrated." When read in context, the word "consecrated" does not appear to refer to an investment ceremony such as ordination, but rather to the fact that the individual chosen as choir director should be dedicated to his work. Although the *Church Manual* indicates the choir leader works under the authority of the minister or church elder in selecting music to harmonize with the sermon, no specific duties are described for choir leaders throughout the denomination, and there is no indication that the position is a salaried, full-time position within the denomination.

Additionally, the petitioner has not submitted sufficient evidence to show that the petitioning church has ever employed a person in the position of permanent, full-time music director in the past.

Finally, the petitioner has not shown that the duties of a music director are directly related to the creed of the Seventh Day Adventist denomination.

Counsel asserts that it was held in *Full Gospel Portland Church v. Thornburgh*, 730 F.Supp. 441 (D.D.C. 1988) that a music director is a professional religious occupation. However, the holding reached in *Full Gospel* concerned the question of whether an accompanist and choir director qualified as a member of the professions, not whether such position qualified as that of a special immigrant religious worker. The statutory and regulatory requirements for classification as a third preference professional do not correspond to those required for classification as a special immigrant religious worker. Furthermore, the third preference immigrant category discussed in Full Gospel was later superseded by the Immigration Act of 1990. Therefore, counsel'' assertion is not persuasive.

The petitioner has failed to establish that the offered position is religious occupation. For this reason, the petition may not be

approved.

The second issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has had the requisite two years of continuous work experience in the proffered position.

Pursuant to 8 C.F.R. § 204.5(m)(1):

> 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.

In this case, the petition was filed on September 28, 2000. Therefore, the petitioner must establish that the beneficiary was continuously employed in a full-time, salaried religious occupation from September 28, 1998 to September 28, 2000.

The petitioner states that the beneficiary has served as music director since November 13, 1998.

The director determined the petitioner had not shown that the beneficiary had the required two years of work experience in a religious occupation.

On appeal, counsel states that the beneficiary has served as music director at the petitioning church since November 13, 1998 in nonimmigrant R-1 religious worker status and therefore has the requisite two years of work experience in a religious occupation.

The legislative history of the religious worker provision of the Immigration Act of 1990 reflects that a substantial amount of case law has developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision. *See* H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Comm. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 1963).

The term "continuously" is also discussed in a 1980 decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

In line with these past decisions and the intent of Congress, it is clear, therefore, that to be continuously carrying on the religious work means to do so on a full-time basis. That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is not paid, the assumption is that he/she is engaged in other, secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who in accordance with their vocation live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and salaried. To find otherwise would be outside the intent of Congress.

The record indicates that the beneficiary served as choir master and choir director at the Seventh-Day Adventist Seoul English Institute Church in Korea from July 1984 to November 11, 1988. The petitioner submitted a letter from Pastor Hong Sin Jo confirming the beneficiary's service at that church. Pastor Jo did not, however, provide a specific description of the beneficiary's duties as choir master and choir director, nor did he indicate whether the beneficiary was a full-time salaried employee of the church during that period. Furthermore, the petitioner did not submit any evidence that this was a full-time salaried position.

The beneficiary was admitted to the United States as a nonimmigrant B-2 visitor for pleasure on November 12, 1998, with stay authorized to May 11, 1999. The beneficiary was subsequently granted change of nonimmigrant status to R-1 religious worker, valid from January 20, 1999 to January 20, 2002.

According to the employment offer letter contained in the record, the beneficiary was appointed music director at [redacted] on November 13, 1998. In a letter dated September 7, 2000, Reverend [redacted] Pastor of [redacted] stated: "Since coming to the United States, Mr. [redacted] has attended the [redacted] and has volunteered his music teaching skills

to our church." In his letter that accompanied the initial I-360 petition, counsel stated:

> Mr. [redacted] original intention when he entered the U.S. was to visit various religious activities. However, because of his abilities, he overwhelmed the church by his exceptional musical talents. In the absence of the choir director of the church, Mr. [redacted] volunteered his time and energy to the [redacted] church's choir program.

These statements would appear to suggest the beneficiary served as music director on a voluntary basis for at least part of the two-year period immediately preceding the filing of the I-360 petition.

The employment offer letter indicated the beneficiary was to be paid 42000 per month from November 13, 1998 to November 12, 1999; $2300 per month from November 13, 1999 to November 12, 2000; and $2500 per month from November13, 2000 to November 12, 2001. The petitioner submitted photocopies of six canceled checks in the amount of $2000 payable to the beneficiary from [redacted] The checks were issued in the period from June 1999 to December 1999. The petitioner has not submitted copies of cancelled paychecks or any other evidence such as federal or state tax documents to corroborate the claim that the beneficiary was a full-time salaried music director during the entire period from November 1998 to September 28, 2000. Mr. [redacted] may have served as the petitioning church's music director during that period, but the evidence of record does not support a finding that he was a full-time salaried music director during that entire period. Therefore, the Bureau is unable to conclude that the beneficiary was performing services in a full-time salaried religious occupation during the two-year qualifying period. For this reason as well, the petition may not be approved.

Counsel asserts that the Bureau's refusal to generally recognize the traditional religious occupations of church choir and music directors as religious occupations constitutes excessive "entanglement" with religion and as such violates the establishment of religion clause of the First Amendment to the U.S. Constitution. While the determination of an individual's status or duties within a religious organization is not under the Bureau's purview, the determination as to the individual's qualifications to receive benefits under the immigration laws of the United State rests with the Bureau. Authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States. *Matter of Hall,* 18 I&N Dec. 203 (BIA 1982); *Matter of Rhee*, 16 I&N Dec. 607 (BIA 1978). Accordingly, the assertion that the director's decision violated the free exercise of religion clause of the First Amendment of the U.S. Constitution is not persuasive.

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

ORDER: The appeal is dismissed.