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U.S. Citizenship
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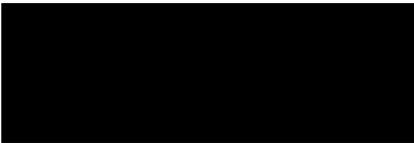
Office: VERMONT SERVICE CENTER

Date: FEB 03 2005

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the AAO's previous decision will be affirmed and the petition will be denied.

The petitioner is a health care facility for the elderly operated by a Roman Catholic order. 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 certified nursing assistant. The director determined that the petitioner had not established that the position qualifies as a religious occupation. The AAO affirmed the denial and dismissed the appeal, and added the findings that the petitioner had insufficiently documented that the beneficiary possessed the necessary qualifications or had the requisite two years of continuous work experience as a certified nursing assistant immediately preceding the filing date of the petition.

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, 2008, 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, 2008, 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 is whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The regulation at 8 C.F.R. § 204.5(m)(2) offers this definition of the term:

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.

Citizenship and Immigration Services interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed 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.

The director noted that the beneficiary's duties appear to be secular nursing duties. The director reasoned that, if the beneficiary's position is open to workers of different faiths, then there is nothing inherently religious or Roman Catholic about that position. The director requested additional evidence and information, including the number of Roman Catholics on the petitioner's 115-member staff. The director considered this information to be material to the question of whether the beneficiary's position is a religious occupation rather than a secular position in what happened to be a church-owned facility. While the petitioner responded to that request, that response did not include the information that the director had requested. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal from the denial, counsel asserted "[a] large majority of the Residence's employees are Catholic . . . and the Sisters of Charity's preference would be to hire those who profess to be practicing Catholics and who are qualified. However, this is not always possible due to the prevailing nursing shortage. . . . Out of the Certified Nursing Assistants, 78% are Catholic."

In dismissing the appeal, the AAO stated that the petitioner had not shown that "the performance of the duty is . . . directly related to the creed and practice of the denomination." The AAO also noted that the petitioner has not adequately documented the beneficiary's past experience or qualifications for the position offered.

Counsel acknowledges that, prior to the denial, the director had "requested a statement as to whether the facility will hire non-Catholics for their patient care staff." Counsel does not acknowledge or explain the petitioner's failure to address that issue in response to the director's request. The director had put the petitioner on notice that the information was required. When the director requests such evidence or information prior to the denial, and the petitioner fails to provide the requested material prior to the denial, subsequent submission of the requested material cannot overcome the grounds for denial, or show that the director was not justified in denying the petition based on the information available at the time of denial. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

We acknowledge the discussion of a nursing shortage; but it remains that the Catholic Church would not engage non-Catholics as priests or catechists based on shortages in those fields. The duties within those positions are so infused with religious content and significance that someone from a different faith would simply be unqualified to perform them. The fact that hiring non-Catholics is even an option serves to demonstrate that there is nothing inherently Catholic about being a certified nursing assistant at the petitioning facility.

Counsel observes that the list of qualifying religious occupations at 8 C.F.R. § 204.5(m)(2) includes "workers in religious hospitals or health care facilities." Counsel states that this is *prima facie* evidence that the beneficiary's occupation is a religious occupation, and that neither the statute nor the regulations require a separate showing that the beneficiary's duties relate to a traditional religious function.

We do not interpret the regulatory reference to "workers in . . . religious health care facilities" to mean that every such worker who is not a janitor, clerk, etc., *must* qualify as a worker in a religious occupation. The regulatory definition also indicates that the activity must relate to a traditional religious function. There is no indication that the two requirements represent different options; i.e., that the position must relate to a traditional religious function *or* be among the occupations listed as qualifying. Therefore, the "traditional

religious function” test applies to all positions for which a petitioner seeks the designation of “religious occupation.”

Counsel notes that 8 C.F.R. § 204.5(m)(2) includes two lists under the definition of “religious occupation” – a list of qualifying occupations, and a list of non-qualifying occupations. Counsel asserts that the list of qualifying occupations is illustrative, rather than exhaustive, because it begins with the phrase “[e]xamples of individuals in religious occupations include, but are not limited to. . . .” Counsel then contends that the list of non-qualifying occupations (“janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations”) is an exhaustive list.

Counsel asserts that a 1992 decision by the Administrative Appeals Unit (AAO, later renamed the AAO) “determined that the excluded list was meant to be an exclusive list.” The cited decision is not a published precedent decision and therefore it is not binding with regard to other AAO decisions. By counsel’s logic, accountants and architects are religious workers if employed full-time by a church or other religious organization.

Counsel cites the same 1992 decision as indicating that, according to the 1988-1989 edition of the Department of Labor’s *Occupational Outlook Handbook*, the beneficiary’s “occupation . . . may be performed by a lay person or it may relate to a traditional religious function.” Counsel concludes that “[a]ccording to the Department of Labor, this occupation may relate to a traditional religious function.” The record contains no direct quotation from the 1988-1989 *Handbook*, or any other Department of Labor documentation. Rather, the AAU mentioned a decision by the Service Center director, who in turn mentioned the *Handbook*. Even if the *Handbook* once referred to the beneficiary’s position as a position which “may relate to a traditional religious function,” subsequent editions of that book make no such mention of a religious context, and in any event the Department of Labor’s determinations are not controlling in this particular area.

There remains a key point: the petitioner employs several non-Catholic individuals in the same job as the beneficiary; nearly a quarter of its certified nursing assistants are not Catholic. These individuals would definitely be ineligible for consideration as religious workers (although the petitioner could file I-140 immigrant petitions with labor certifications). The petitioner has articulated no logical reason why its Catholic certified nursing assistants are entitled to an immigration benefit that non-Catholics performing the same tasks cannot receive. The statute and regulations both plainly require that the alien has been, for at least two years, a member of the petitioner’s religious denomination, and thus the religious affiliation of the beneficiary is obviously a material consideration.

The fact that the petitioner would *prefer* to hire Catholics is irrelevant to the issue of whether the position is a qualifying religious occupation. The petitioner has not described a circumstance comparable to, for instance, Christian Science, where the very practice of health care is fundamentally determined by religious factors, and differs in broad details from standard secular medicine (hence the term “religious health care facility,” not necessarily synonymous with “health care facility operated by a religious institution”). Here, the performance of one’s duties as a certified nursing assistant depends on secular factors such as job training rather than inherently religious factors. We cannot conclude that exactly the same duties relate to a traditional religious function when the worker is Catholic worker, but not when the worker is (for instance) Jewish or Baha’i.

On this point, counsel has cited a 1994 AAU decision. As with the other decision discussed earlier, this is an unpublished decision with no weight as precedent. When faced with two workers performing the same duties in the same place, we cannot conclude that only one of them, based on that person’s religion, performs a religious occupation relating to a traditional religious function. Taking the above into account, we conclude.

that the petitioner has not overcome the grounds for dismissal cited in the director's denial and, later, the AAO's initial appellate decision.

As noted earlier in this decision, the AAO added supplementary findings in its dismissal notice, beyond the grounds that the director cited. On motion, counsel asserts that, in its dismissal notice, "[t]he AAO uses facts that were never disputed by the Bureau as a basis for the denial" (specifically, regarding the beneficiary's experience and qualifications). While the AAO did make observations beyond the director's prior decision, the AAO first affirmed the director's findings. Because the AAO had determined that the director's findings, by themselves, warranted denial of the petition, it was not prejudicial for the AAO to offer additional observations; the appeal would have been dismissed even without those additional findings.

The next issue on motion regards the beneficiary's past experience. The regulation at 8 C.F.R. § 204.5(m)(1) indicates 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." 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate that, immediately prior to the filing of the petition, the alien has the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on April 20, 2001. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a certified nursing assistant throughout the two years immediately prior to that date.

On motion, the petitioner submits Form W-2 Wage and Tax Statements indicating that the petitioner paid the beneficiary during 2000, 2001, and 2002. The two-year qualifying period extended from April 1999 to April 2001, and therefore the 2000-2002 documents do not establish employment throughout the qualifying period. Furthermore, as the AAO noted previously, the petitioner had indicated under penalty of perjury that the beneficiary has never worked in the United States without permission. The petitioner had also indicated that the beneficiary's current visa status is as a B-2 nonimmigrant visitor for pleasure, a status that does not include work authorization. Thus, the statements that the beneficiary (1) has worked for the petitioner since 1994; (2) has never worked in the United States without authorization; and (3) is a B-2 nonimmigrant visitor, cannot all be true; they are mutually contradictory.

Finally, 8 C.F.R. § 204.5(m)(3)(ii)(D) requires the petitioner to demonstrate the alien is qualified in the religious vocation or occupation in which the alien seeks to work. In response to the AAO's determination that the petitioner had not met this requirement, the petitioner has submitted a copy of an undated certificate from the Massachusetts Department of Public Health/Division of Health Care Quality, indicating that the beneficiary passed the Long-Term Care Facility Nurse Aide Competency Evaluation Program, with an expiration date of January 30, 2005. There is no indication that this certificate was valid as of the petition's filing date in April 2001.

For the reasons stated above, the petitioner's new submissions on motion do not overcome the AAO's supplemental findings. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of August 21, 2003 is affirmed. The petition is denied.