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U.S. Citizenship and Immigration Services

PUBLIC COPY

FILE: [redacted] EAC 04 071 51110 Office: VERMONT SERVICE CENTER Date: DEC 1 6 2005

IN RE: Petitioner: Beneficiary: [redacted]

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]

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

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and 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 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 choir director. The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition, that the position qualifies as that of a religious worker, that the petitioner has extended a qualifying job offer to the beneficiary, or that it has the ability to pay the proffered wage.

On appeal, the petitioner submits a letter and additional documentation.

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 presented on appeal is whether the petitioner established that the beneficiary had been continuously employed in a qualifying religious vocation or occupation for two full years prior to the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file a Form I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States." The regulation 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."

The regulation at 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.

The petition was filed on January 13, 2004. Therefore, the petitioner must establish that the beneficiary was continuously working as a choir director throughout the two-year period immediately preceding that date.

The petitioner stated in its letter of December 27, 2003, that the petitioner had employed the beneficiary since October 2000. The petitioner stated, "At that time she was hired for a one year supervised training program. She applied for, and received a visa allowing her to continue working for the church until July 2004." The petitioner further stated that the beneficiary was currently employed by the petitioning organization as a choir director at an annual salary of $18,700 plus an annual housing allowance of $3,600.

The described duties of the position include:

- Direct the choir in singing responses . . .
- Sing responses for services . . . when a choir is not required or available; accompany the priest for the blessing of homes and cemeteries for the purpose of singing responses for prayers offered . . .
- Teach church music to the choir members . . .
- Instruct choir members in singing church Slavonic.

The petitioner submitted no evidence with the petition to corroborate the beneficiary's employment during the qualifying period. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In a request for evidence (RFE) dated November 15, 2004, the director instructed the petitioner to:

> Submit evidence that establishes that the beneficiary has the continuous two years full-time experience in the religious vocation, professional religious work, or other religious work for the period immediately prior to January 13, 2004. Such evidence may be statements which include all of the following information: detailed listing of the beneficiary's duties, the commencement and termination dates of employment, and the time spent per week by the beneficiary performing these duties . . . However, documentation to establish that employment dates, training, and salary of the beneficiary should consist of more than a statement. Objective documentary evidence, such as payroll records, tax return forms,

> contracts, etc., should be submitted to confirm the claimed employment dates and compensation for services performed.

In response, the petitioner, in a letter dated January 10, 2005, stated that it had employed the beneficiary as a full-time choir director since October 2000. Although the petitioner stated that it was including supporting documentation to verify this employment, no additional documentary evidence was submitted in response to the RFE.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." *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).

The term "continuously" also is 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 generally salaried. To hold otherwise would be contrary to the intent of Congress.

On appeal, the petitioner submits a "sample weekly schedule" of the beneficiary's duties; copies of the beneficiary's Forms W-2, Wage and Tax Statements, for 2002 through 2004; and copies of the beneficiary's Forms 1040, U.S. Individual Income Tax Returns, for 2002 through and 2004. An April 10, 2005 letter signed by members of the petitioner's choir indicates that the beneficiary was selected as "Director of Choral Music" in September 2000.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. The appeal will be adjudicated based on the record of proceeding before the director.

The record before the director does not establish that the beneficiary worked continuously as a choir director for two full years prior to the filing of the visa petition.

The second issue is whether the petitioner established that the position qualifies as that of a religious worker.

According to the regulation at 8 C.F.R. § 204.5(m)(1), the alien must be coming to the United States at the request of the religious organization to work as a religious worker. 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 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. Persons in such positions would reasonably be expected to perform services 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. The lists of qualifying and nonqualifying occupations derive from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

Citizenship and Immigration Services (CIS) therefore 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 duties of the proffered position, outlined in the petitioner's letter of December 27, 2003, are listed above. The petitioner also stated that, in its experience, "a trained person is required for the job." In his RFE, the director instructed the petitioner to submit evidence to establish that the duties of the proffered position related to a traditional religious function.

In response, the petitioner stated:

> Training and education was given in, but not limited to, the directing of a 4-part a cappella choir, arranging music for specific church services, interpreting the language of many musical pieces, translating music from church Slavonic to English, knowledge of appropriate music for various church services and occasions. According to Church law and the tradition of the Orthodox faith, none of the services can be served by the priest himself. There always must be

> a canter [sic] or choir director to provide the responsibilities. This person must be professionally trained in order to assist the priest.

The petitioner further indicated that it was submitting documentary evidence to support its statements. However, it included no further evidence in response in response to the RFE.

On appeal, the petitioner submits a copy of its bylaws, which indicate that the choir director is to assist the rector-priest in all church services; a copy of April 1992 "Guidelines for Choir Directors" issued by the Diocese of New England Orthodox Church in America; a copy of guidelines for the petitioning organization, which address the role of the choir director in the church; an April 15, 2005 letter from David Drillock, who states that he is an emeritus professor of liturgical music and that "there is not a single Orthodox church which does not make provision for a choir director;" an April 11, 2005 letter from the petitioner's pastor and the April 10, 2005 letter signed by members of the petitioner's choir, who attest to the role of music in the organization; letters from three other Orthodox Churches indicating that they employ full-time choir directors; letters from the St. Vladimir's Orthodox Theological Seminary, which address the role of music in the denomination's faith and an April 20, 2005 letter from one of the petitioner's previous choir directors.

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). As noted above, the petitioner submitted none of this evidence when provided with the opportunity prior to the adjudication of the petition, and submits it for the first time on appeal. Therefore, the AAO will not consider this evidence for any purpose, *Matter of Soriano*, 19 I&N Dec. 764; *Matter of Obaigbena*, 19 I&N Dec. 533, and will adjudicate the appeal based on the record of proceeding before the director.

The petitioner submitted no evidence as part of the record before the director to establish that the position qualifies as that of a religious worker within the meaning of the statute and the regulation. The record before the director therefore does not establish that the position is that of a religious occupation within the meaning of these proceedings.

The third issue on appeal is whether the petitioner established that it had extended a qualifying job offer to the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(4) states, in pertinent part, that:

> *Job offer.* The letter from the authorized official of the religious organization in the United States must state how the alien will be solely carrying on the vocation of a minister, or how the alien will be paid or remunerated if the alien will work in a professional capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support.

In its December 27, 2003 letter accompanying the petition, the petitioner stated that the position offered full-time employment with a salary of $18,700 yearly plus an annual housing allowance of $3,600.

The director determined that as the petitioner had not established that the beneficiary had been compensated in the position in the past and had not established that the beneficiary was not solely dependent upon supplemental employment for support, the petitioner had not established that it had extended a qualifying job offer to the

beneficiary. We withdraw this statement by the director. This is an offer of prospective employment, and the petitioner is not required to establish that it has employed the beneficiary in the past at the proffered rate of pay or that the prior employment met the requirements of 8 C.F.R. § 204.5(m)(4). Nonetheless, the record before the director did not establish that the position qualifies as that of a religious worker within the meaning of the statute and regulation.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). As the petitioner failed to establish that the position qualifies as that of a religious worker, it has not established that it has extended a qualifying job offer to the beneficiary.

The fourth issue on appeal is whether the petitioner established that it has the ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner submitted no evidence of this regulatory criterion with the petition. In response to the RFE, the petitioner indicated that it was submitting copies of "payroll forms: copies of W-2 for 2001-2003," "excerpts" from its monthly financial statements, and "IRS forms." None of this evidence, however, was included in the petitioner's response to the RFE.

On appeal, the petitioner submits copies of the beneficiary's Form W-2, reflecting that it paid her wages of approximately $22,965 in 2004, and copies of pay stubs for the period January 2, 2005 through April 10, 2005, indicating that it paid the beneficiary a bi-monthly salary of $764.91.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. The AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 *Matter of Obaigbena*, 19 I&N Dec. 533.

The record before the director does not establish that the petitioner had the continuing ability to pay the proffered wage as of the date the petition was filed.

Counsel asserts on appeal that CIS "failed to apply the appropriate evidentiary standard" in adjudicating the petition, in that it "seemed to decide the case applying the 'clear and convincing' or 'beyond a reasonable doubt' standard," and failed to "consider the evidence as a whole."

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought. *See e.g. Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997) (noting that the petitioner must prove eligibility by a preponderance of evidence in visa petition proceedings); *Matter of Patel*, 19 I&N Dec. 774, 782-3 (BIA 1988) (noting that section 204(a)(2)(A) of the Act requires a higher standard of clear and convincing evidence to rebut the presumption of a fraudulent prior marriage); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965) (finding that the petitioner had not established eligibility by a preponderance of the evidence because the submitted evidence was not credible).

Counsel does not state why she believes that the director applied a higher standard of proof than that of preponderance of the evidence. The director stated in his decision:

> In your response of January 13, 2005, you submitted evidence, as requested, that the instant petitioning entity is a bona fide religious entity with non-profit status under Section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations. You also provided a detailed cover letter highlighting other evidence requested by this services. However, that evidence was not provided in your response.

It appears that counsel read this statement to indicate that the director chose only to accept the petitioner's evidence of its status as a bona fide religious organization while ignoring the remaining evidence. However, a review of the record indicates, as noted by the director, that while the petitioner's letter accompanying the RFE detailed the evidence that it intended to submit in support of the petition, the only evidence submitted was that of its status as a bona fide nonprofit religious organization.

The petitioner provided evidence of its qualifying tax-exempt status, but otherwise failed to submit requested evidence until it filed the appeal. Accordingly, the director had no opportunity to consider whether the petitioner had established that the petition was otherwise approvable based on the preponderance of evidence. Counsel's assertions that the director used an incorrect evidentiary standard are therefore without merit.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.