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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 02 142 50492

Office: VERMONT SERVICE CENTER

Date: **MAR 04 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.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a Greek Orthodox 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 sacristan. The director determined that the petitioner had not established: (1) that it possessed the required tax-exempt status as a religious organization; (2) that the position offered to the beneficiary constitutes a religious occupation; (3) that the beneficiary had the requisite two years of continuous work experience in a religious occupation immediately preceding the filing date of the petition; or (4) the petitioner's ability to pay the beneficiary's salary.

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 basis for the director's denial concerns the petitioner's tax status. 8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization qualifies as a non-profit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases, evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

The petitioner has submitted a copy of its Certificate of Exemption issued by the District of Columbia Department of Finance and Revenue. This certificate shows that the petitioner is exempt from local sales and use taxes, but it does not demonstrate exemption from federal taxation under section 501(c)(3) of the Internal Revenue Code. [REDACTED] of the petitioning church states that the petitioner is exempt from federal income tax because it is a constituent church of the Greek Orthodox Archdiocese of America, but the petitioner's initial submission includes no documentation of the archdiocese's exemption, or to show that the petitioner is under the umbrella of such an exemption.

On November 1, 2002, the director instructed the petitioner to submit documentation from the Internal Revenue Service (IRS) or other evidence to satisfy 8 C.F.R. § 204.5(m)(3)(i)(A) or (B). In response, the petitioner requested an additional 60 days to prepare a response. We note that 8 C.F.R. § 103.2(b)(8) specifically grants petitioners 12 weeks (84 days) to respond to a request for evidence, and that additional time may not be granted. The petitioner's response was, therefore, due during the first week of February 2003, and the director would have been entirely justified in rejecting any evidence submitted after the due date and denying the petition for abandonment pursuant to 8 C.F.R. § 103.2(b)(13). Nevertheless, the director accepted the beneficiary's untimely response on February 28, 2003, despite the lack of regulatory authority to do so.

The only element of the petitioner's response that is relevant to the petitioner's tax status is a letter from the petitioner's accountant, [REDACTED] who states: "The church is affiliated with the Greek Orthodox Archdiocese of America. . . . Under Internal Revenue Code 501(c)(3), Churches are automatically exempted from the federal income taxes and are not required to file for a federal exemption number. The church has never applied for a tax-exempt number."

While [REDACTED] is correct in stating that churches are not required to apply for recognition of exemption, it remains that the petitioner must still establish that it would be *eligible* for such recognition should it choose to apply for it. The general assertion that churches are automatically exempt begs the question of whether the petitioner is a qualifying church in the first place. The petitioner's own claims, and those of the petitioner's accountant, are not satisfactory evidence under 8 C.F.R. § 204.5(m)(3)(i)(B). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The director denied the petition, in part because the petitioner had failed to submit the required evidence of tax-exempt status. On appeal, the petitioner submits a copy of a May 15, 1978 letter from the IRS, verifying that the IRS had issued a group determination letter to the Greek Orthodox Archdiocese of North and South America in 1942. The petitioner also submits a letter from [REDACTED] Bishop of Troas and chancellor of the Archdiocese of America, confirming that the petitioner "is a constituent member in good standing of the Greek Orthodox Archdiocese of America."

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). Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

This finding is without prejudice to a newly filed petition, in which the petitioner does not withhold the required evidence until after the denial thereof. As we shall discuss, however, this appeal would have been dismissed even if the beneficiary had submitted this evidence of exemption in a more timely fashion.

The next 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) defines "religious occupation" as 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 regulation specifically excludes workers whose principal duties involve maintenance or administrative functions.

describes the position offered to the beneficiary:

A Sacristan (in Greek, the title is Neokoros) in the Greek Orthodox Church is an integral participant in the accomplishment of both the sacraments and sacramental services of the Church. The Sacristan must be an Orthodox Christian, must be male, and also, in our particular parish, must be knowledgeable in the Greek language.

[T]he position of the sacristan has been governed by the Rubric (the book of the order of services, Sacraments, and sacramentals). . . .

As an example, the celebration of The Divine Liturgy . . . requires that the Sacristan has chosen the correct linens for the Holy Table upon which the Divine Liturgy will be celebrated. He must also present the correct Chalice Set for the season. This is learned after proper instruction and attention.

The Sacristan must also have either made or solicited from the faithful the proper Prosforon (The bread from which the Body of Christ is taken and consecrated at the most Sacred moments of the Divine Liturgy itself) in order to begin and complete not only the service in preparation, but also The Divine Liturgy. . . .

The Sacristan serves an irreplaceable role in the celebration of [the] sacraments.

The petitioner has not submitted a copy of the Rubric, or any relevant excerpt therefrom. Therefore, the petitioner has not demonstrated how, exactly, the Rubric defines or refers to the position of a sacristan. The director instructed the petitioner to submit evidence to establish that the beneficiary's job duties relate to traditional religious functions typically carried out by paid church employees rather than volunteers from the congregation. In response, lists the beneficiary's specific duties. These duties are almost exclusively preparatory in nature, e.g., "Assists the priest with dressing in the appropriate vestments," "Prepares the censer with charcoal and incense," "Lights the candles at the appropriate times," "Prepares the oil necessary for baptism service," and "Places all flowers . . . in the proper places." Virtually the only

function not associated with preparation of materials is that the beneficiary "Assists the priest in performing liturgical functions." [REDACTED] does not elaborate on this rather vaguely-worded point.

The director, in denying the petition, acknowledged that the beneficiary's work has some religious overtones, but found that the petitioner had not satisfactorily demonstrated that the Greek Orthodox denomination traditionally regards the position of sacristan to be a religious occupation. On appeal, the petitioner provides yet another description from [REDACTED] stressing the liturgical importance of the preparation of bread, selection of wine, cleaning of vestments, and so on.

The record does not establish that the Greek Orthodox denomination generally considers the role of a sacristan to be a religious one, as opposed to a more utilitarian role devoted to the upkeep and procurement of supplies and objects used in various church rituals. Absent the written Rubric itself, the assertion that the Rubric mentions the sacristan is of negligible value in this proceeding.

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 March 21, 2002. Because the director found that the beneficiary does not work, and has not worked, in a qualifying religious occupation, it necessarily follows that the beneficiary did not work in a qualifying occupation during the two-year qualifying period that ended March 21, 2002.

Apart from the nature of the beneficiary's work, another factor affects the finding regarding the beneficiary's fulfillment of the two-year experience requirement. [REDACTED] states that the beneficiary began working for the petitioner on July 11, 2000 and thus "has worked for our parish for approximately 17 months" as of January 2002, the date of [REDACTED] letter. The beneficiary arrived in the United States six months earlier, on January 11, 2000. There is no evidence, and the petitioner does not claim, that the beneficiary worked for the petitioner or any other church during his first six months in the United States. Therefore, the initial submission does not show that the beneficiary worked continuously from March 2000 through March 2002, as required by the statute and regulations.

The director requested evidence to show that the beneficiary performed the duties of a sacristan throughout the entire qualifying period. In response, counsel repeats the assertion that the beneficiary was "originally admitted as a visitor" in January 2000, and "began working . . . on July 11, 2000," six months after he entered. Thus, there remains a gap of at nearly four months at the beginning of the qualifying period during which the beneficiary apparently did not perform any of the duties of a sacristan. Even if there were no doubt that the duties of a sacristan fall within the regulatory definition of a religious occupation, the record indicates that the beneficiary did not perform those duties continuously from March 2000 to March 2002.

The final issue concerns the petitioner's ability to pay the beneficiary's salary of \$23,400 per year. The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner's initial submission includes "Compiled Financial Statements" for the calendar years 1998 through 2000. The statements indicate over \$1,000,000 in current assets, although expenses exceeded income each year, by increasing margins. The accountant who prepared the statements states: "We have not audited or reviewed the accompanying financial statements and supplementary schedules and, accordingly, do not express an opinion or any other form of assurance on them. . . . Statements of cash flows . . . have not been presented. Generally accepted accounting principles require that such statements be presented when financial statements purport to present financial position and results of operations."

The above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be" in the form of tax returns, *audited* financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only *in addition to*, rather than *in place of*, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The director requested financial documentation that conforms more closely to the regulatory requirements. In response, the petitioner has submitted a 2001 compilation report, of the same type that the director had already deemed insufficient. While the petitioner has submitted a new letter from its accountant, that individual has limited his comments to the petitioner's tax status. We note that the report shows that the beneficiary's income deficit continues to accelerate, as expenses exceeded income by over \$200,000 in 2001, but the petitioner continues to claim over a million dollars in current assets.

The director, in denying the petition, stated that unaudited compilation reports "are not acceptable as objective evidence." On appeal, the petitioner submits yet another compilation report, accompanied by a note from the petitioner's accountant, indicating that the previous 2001 compilation report contained an accounting error which has since been corrected.

The petitioner also submits a letter from [REDACTED] president of the petitioner's parish council, who indicates that the petitioner "is on sound financial foundation." Pursuant to 8 C.F.R. § 204.5(g)(2), such attestations of financial soundness are acceptable only when the prospective employer has 100 or more employees. There is no reason to believe that the petitioning church employs 100 or more workers, and therefore [REDACTED] attestation of financial soundness cannot overcome the relevant ground for denial.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.