



U.S. Citizenship
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FILE:



Office: VERMONT SERVICE CENTER

Date: SEP 23 2005

EAC 01 093 53669

IN RE:

Petitioner:



Beneficiary

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 on January 16, 2002. The director subsequently reconsidered the decision on the petitioner's motion, and reaffirmed the denial of the petition on August 21, 2002. The petitioner appealed the second denial, and the Administrative Appeals Office (AAO) dismissed the appeal on July 24, 2003. The petitioner filed a motion to reopen, which the director dismissed as untimely on September 22, 2004. 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 nursing home operated by [REDACTED] of the Roman Catholic 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 certified nursing assistant. The director determined that the petitioner had not established that the position qualifies as a religious occupation. The AAO affirmed the director's decision and dismissed the appeal, stating that the beneficiary's principal duties are inherently secular.

According to 8 C.F.R. § 103.5(a)(1)(ii), the official having jurisdiction over a motion to reopen or a motion to reconsider is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction. Because the petitioner's 2004 motion sought to reopen an AAO decision, the AAO, rather than the director, had jurisdiction over that motion. Therefore, the director lacked the jurisdiction to dismiss the petitioner's 2004 motion as untimely.

Furthermore, the petitioner initially submitted the motion during the time allotted by 8 C.F.R. § 103.5(a)(1)(i). The director refused to accept the motion on the grounds that the filing did not include the receipt number of the Form I-360 petition. Counsel observes that the regulations do not require the filing of a motion to include the receipt number, and that the director had not otherwise issued instructions to that effect. Counsel also notes that the AAO decision that the motion sought to reopen did not include the receipt number. The petitioner, therefore, had no explicit basis by which to conclude that it would be necessary to include the receipt number.

For the purposes of this proceeding, we shall consider all materials submitted by the petitioner since the AAO's dismissal to be part of the present motion.

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 sole 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.

The director, in the initial denial of the petition, stated that "the position [of certified nursing assistant] is not religious because it is being filled by a person who is not a religious sister within the Carmelite order. In this case, the beneficiary . . . appears to be a secular Certified Nursing Assistant and has no religious affiliation with the Carmelite order. He is a member of the lay staff." In dismissing the appeal, the AAO stated:

[T]he beneficiary's duties as described by the petitioner are those normally performed by certified nursing assistants in any residential care facility, whether the facility is a secular one or one owned and operated by a religious organization. . . . Indeed, the petitioner's description of the beneficiary's duties makes no mention of any activities that could be described as traditional religious functions.

On motion, counsel cites the reversal on appeal of the denial of an earlier petition filed by the petitioner on behalf of another alien. As the AAO observed in the July 24, 2003 dismissal notice, unpublished appellate decisions have no force as precedent. The AAO also indicated that, assuming that the two petitions involved identical evidence and fact patterns, the previously approved petition may have been approved in error.

Counsel observes that "workers in . . . religious health care facilities" are included in the regulatory definition of "religious occupation" at 8 C.F.R. § 204.5(m)(2), and that "[i]f Congress did not intend for a certified nursing assistant to qualify as a religious worker, that position would have been excluded" from the list of qualifying positions. Counsel contends: "The list of examples is meant to provide a non-exhaustive list of positions that Congress classified as religious occupations. There is no need for these listed positions to also establish that their activities relate to a traditional religious function. The first sentence of the regulations should **not** be read as a separate and distinct requirement" (counsel's emphasis).

Juxtaposing the last two arguments, counsel agrees with the AAO that the list of qualifying examples is "non-exhaustive," but appears to contend that the list of excluded occupations *is* exhaustive. This position is untenable. The petitioner, on motion, submits a "list of various positions we employ at our facility." One of these positions is that of a "hairdresser." Hairdressers are not among the occupations specifically excluded from the regulatory definition. We paraphrase counsel: if Congress did not intend for a hairdresser to qualify as a religious worker, that position would have been excluded. We cannot, however, accept that Congress created the special immigrant religious worker classification in order to benefit nursing home hairdressers.

It is critical to keep in mind that the actual regulatory *definition* of "religious occupation" is only a single sentence: "*Religious occupation* means an activity which relates to a traditional religious function." The examples which follow are not, strictly speaking, part of the definition, but rather illustrative examples. Counsel concedes that janitors and clerks are not religious workers, even going so far as to suggest that their exclusion is redundant because "[t]hese jobs would never be considered [as] involving a traditional religious function." Yet a janitor or clerk employed in a religious health care facility would be, by definition, a worker in a religious health care facility. We are, therefore, faced with a contradiction unless we recognize that the regulation recognizes only *certain* workers in religious health care facilities. A newly submitted letter from [REDACTED] does not resolve this contradiction.

A church or other religious employer can hire an alien janitor or clerk through the usual labor certification process, which is appropriate because the janitor or clerk would be performing duties that are indistinguishable from those of a janitor or clerk at a secular company. Similarly, the petitioner has not shown how the duties of a certified nursing assistant at the petitioning facility differ in any substantive way from the functions of a certified nursing assistant at a secular nursing home. Counsel maintains that the petitioner's employees must "[i]ntegrate values of [REDACTED] of Care in all job assignments." Adherence to a particular code or philosophy does not make the beneficiary's actual work intrinsically religious; secular employers can also have their own codes or accepted business practices. The list of the beneficiary's duties consists of secular duties such as serving food trays, bathing residents, and the like.

The Most [REDACTED] regional bishop of the Roman Catholic Church, states:

[T]he lay staff [of the petitioning institution] have been imbued with the values and training to maintain an atmosphere of dignity and spirituality. . . . The lay workers, that have direct contact with the residents, perform their duties while nurturing a spirit of Christian Community and offering a supportive presence and spiritual consolation. Certified Nursing Assistants are the staff members who spend the most time with the residents. Their main purpose is to meet the spiritual needs of the residents, rather than the medical needs. They are instrumental in creating the Christian atmosphere that sets this nursing home apart from secular nursing homes.

The Roman Catholic Church would not accept a non-Catholic as a [REDACTED]ster or catechist; these positions are intrinsically imbued with the spirit of Catholicism and are inseparable from the faith. The petitioner has not demonstrated that the position of certified nursing assistant, like the above positions, is open *only* to Roman Catholics. Counsel, on motion, does not establish that there is anything inherently "Catholic" about the care that the beneficiary provides to the home's residents (as opposed to the beneficiary's internal mindset or motivation while providing such care). A list of "Functional Job Requirements" submitted on motion indicates that workers must abide by the petitioner's "Mission and Philosophy Statements," but there is no apparent requirement that the workers must, themselves, belong to the Roman Catholic faith. If the petitioner will even *consider* non-Catholic applicants for the position of certified nursing assistant, the question immediately and inevitably arises as to why Catholic nursing assistants should receive an immigration benefit but non-Catholic nursing assistants performing the same tasks at the same facility should not.

There is also the issue of counsel's implicit assumption that every health care facility operated under the auspices of a church is a "religious health care facility." It is, to say the least, debatable to claim that a facility that admits patients of many faiths, employs staff from many faiths, and uses medical technology and methods that are identical to those utilized in secular hospitals and health care facilities, is a "religious"

hospital or facility in any relevant sense of the word. Contrast this with sects such as Christian Science, which, for religious reasons, reject certain basic tenets of secular medicine and instead practice alternative forms of health care based on religious principles and dogmas.

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 July 24, 2003 is affirmed. The petition is denied.