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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 10 2003

IN RE: Petitioner:
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)

PUBLIC COPY

ON BEHALF OF PETITIONER:

[redacted]

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 Citizenship and Immigration Services (CIS) 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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. 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 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, 8 U.S.C. § 1153(b)(4), to perform services as a priest. The director denied the petition because the evidence of record does not establish the beneficiary's continuous employment as a priest throughout the two-year period immediately preceding the petition's filing date. The director also found "[t]he record fails to clearly establish that the beneficiary has been performing duties normally associated with a priest in a compensated position." The AAO affirmed the director's findings, and added that the record does not establish that the beneficiary has worked or will work solely as a minister, or that the petitioner has the ability to pay the beneficiary's proffered wage.

In response to the AAO's finding that "[t]here is no contemporaneous documentation that the beneficiary was compensated, housed or fed by the petitioner or an affiliated church," counsel cites a June 2000 "letter of invitation" from Archbishop Zena Markos of the Ethiopian Orthodox Church in America, submitted with the initial petition and again on motion. Counsel also notes a "current letter written by the Archbishop [that] confirms that the beneficiary was invited to participate as a priest and the church continued to care for his needs while he remained in the US doing church work." Counsel states that the AAO was in error when it found that the record lacks contemporaneous evidence of the beneficiary's work in the United States, but he fails to explain how one letter written before the relevant period, and another letter written after that period, constitute "contemporaneous evidence" or contradict the AAO's findings regarding the lack of such evidence. The assertion of one witness pertaining what the beneficiary will do in the future, or has done in the past, is neither "contemporaneous" nor "documentation."

The regulation at 8 C.F.R. § 103.2(b)(2)(i) states, in pertinent part:

> The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document . . . does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence . . . pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The petitioner has not explained why there is neither primary nor secondary evidence to confirm several months of payment and lodging. In this case, the petitioner has not even submitted affidavits from parties who are not parties to the petition; the petitioner submits only an unsworn letter from Archbishop Markos, who asserts "[t]he food, housing and incidental expenses for [the

beneficiary] did not generate documents . . . but there is no question among fair minded men that the church took care of its priest." Simply declaring that those who dispute this claim are not "fair minded" does not, and cannot, serve as an acceptable substitute for actual evidence.

The petitioner submits a letter from the property manager of Stonebridge Apartment Company, which counsel asserts "confirm[s] the petitioner provided and paid for the beneficiary's housing." The letter states that the beneficiary "started living in our apartments . . . September 1st 2002 and the rent has been paid by [the petitioner]." This letter does not establish that similar arrangements were in place in February 2001 when the petition was filed, or at any earlier time. It shows only that the petitioner made these arrangements nearly a year after the petition was first denied. The absence of comparable letters pertaining to the relevant time period is unexplained.

The petitioner has not overcome the finding that the record lacks contemporaneous documentary evidence (i.e., non-testimonial evidence that demonstrably dates from within the two-year qualifying period), and Archbishop Markos has effectively stipulated that no such evidence exists. Therefore, there is no support for counsel's claim that this finding was in error.

The next issue is whether the beneficiary was continuously engaged in the vocation of a priest throughout the two-year period immediately prior to the filing of the petition, as required by 8 C.F.R. § 204.5(m)(1). The term "continuously" is discussed in a 1980 decision in which 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 case law 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.

Upon reviewing the evidence of record, the AAO found "[i]t does not appear that the beneficiary performed any church work at all from August to December 2000, and then provided only intermittent volunteer services for the church during the remainder of the qualifying period." This conclusion derived in part from a sworn statement from the beneficiary, which reads in part:

> I initially arrived in this country in August of 2000 as a visitor and spent much of my early months visiting with church members and officials in the Seattle area and volunteering my services for church-related activities. I then accepted an invitation to Portland in December 2000 to visit our sister church . . . and to perform a Baptism and a church service. During my stay in Portland, I began visiting with church members and began volunteering to serve these members because they had no priest or spiritual leader. . . .
>
> [I]n January, 2001, the church asked me if I would consider staying as a full-time priest. I thought about it for awhile and finally accepted. . . .
>
> While I am waiting for my papers I continue to travel to Seattle and continue to volunteer at both churches in Seattle and Portland.

While this statement does not support the AAO's finding that the beneficiary did not work at all between August and December 2000, it nevertheless suggests that the beneficiary's church work was at best sporadic during those months. Certainly nothing in the beneficiary's statement firmly indicates that the beneficiary regularly performed the full range of ministerial duties during that period. An individual with the title "minister" who does not actually perform these duties does not necessarily qualify as a minister for immigration purposes. *See Matter of Rhee*, 16 I&N Dec. 607 (BIA 1978).

On motion, counsel protests that the beneficiary's activities from August to December 2000 "are priestly functions and should not be summarily dismissed as 'intermittent volunteer services,'" but there is no nexus between these assertions. Counsel does not explain how "priestly functions" and "intermittent volunteer services" are mutually exclusive. One can readily imagine a priest who, for instance, conducts only one mass every six weeks, with occasional weddings and baptisms, or a retired priest who serves as an interim pastor while a parish seeks a permanent replacement. Counsel cannot deny that the beneficiary's work was "volunteering" without contradicting the beneficiary's own statement. It remains that the beneficiary himself distinguishes between his activities in late 2000, and his subsequent "full-time" work as a priest after January 2001. He states that he traveled to Portland "to perform . . . a church service," and that he volunteered for unspecified church-related activities. The beneficiary's own description of his activities does not demonstrate or imply that he was acting, full-time and exclusively, in the role of a minister during late 2000.

Counsel cites case law indicating that "breaks in service affecting the two-year period have been considered with some flexibility," if the interruption "was: (i) caused by circumstances beyond his or her control; (ii) was accompanied by no intent to abandon the vocation; and (iii) if the alien has not engaged in activities inconsistent with the theory that he or she was attempting to carry on the vocation continuously."[1] Counsel does not explain what circumstances beyond the beneficiary's control were at play in this instance. The beneficiary's voluntary abandonment of his residence and permanent employment in Ethiopia to travel to the United States, where no comparable offer awaited him upon his arrival, is not by any reasonable standard a circumstance beyond his control.

The AAO found "the petitioner has submitted insufficient evidence that the beneficiary will be engaged 'solely' as a minister of religion in the United States." The AAO observed that one of the beneficiary's duties listed on the petitioner's job offer letter is to "teach language classes to church members," which is not a traditional ministerial duty. The AAO added "[t]he letter does not state that the beneficiary will be needed in a permanent ministerial capacity, or indicate the petitioner's need for a full-time minister."

On motion, Archbishop Markos asserts that the language lessons are necessary because the church conducts its services in Amharic and Ge'ez, "a liturgical language of the Ethiopian Orthodox church," rather than in English. This explanation is reasonable, and there is no

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[1] We note that, by making this argument, counsel effectively stipulates that there were, in fact, "breaks in service" in this particular instance. If there were no such breaks, then the argument would be entirely irrelevant to the fact pattern of this proceeding and there would have been no reason for counsel to raise it in the first place.

indication that the beneficiary has worked as a language teacher entirely outside the context of the church.[2] The AAO therefore withdraws its finding regarding this particular issue.

The final issue concerns the petitioner's ability to pay the beneficiary's proffered wage. In its prior decision, the AAO noted that the petitioner submitted a financial statement that lacked critical information, such as the identity of the entity for which the statement was prepared. Therefore, the AAO concluded, the petitioner had not established its ability to pay the beneficiary's proffered wage.

On motion, the petitioner submits a series of financial statements. There is no evidence that these statements are audited, as 8 C.F.R. § 204.5(g)(2) plainly requires. That regulation 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. The petitioner has also submitted copies of bank statements dating between October 2001, the month after the petition was denied, through September 2002. Bank statements do not provide a complete, reliable picture of the petitioner's financial status; for instance, they do not demonstrate the petitioner's current liabilities.

Furthermore, the petitioner must establish its ability to pay at the time the priority date is established, i.e. the petition's February 2001 filing date. While the petitioner's "Interest Maximizer Account" carried a balance that at one point exceeded $120,000, the petitioner then withdrew over $97,000 from that account in July 2002. Given these fluctuations in balance, we are not obliged to extrapolate a high balance as of February 2001. It appears that the funds in the "Interest Maximizer Account" had been set aside to purchase a building (which appears as a "fixed asset" in the July 2002 financial statement but not in the December 2001 financial statement). The assertion that the petitioner has paid the beneficiary in the past remains unsubstantiated by objective documentation, and the petitioner has not submitted evidence required under 8 C.F.R. § 204.5(g)(2), despite being put on notice of those specific requirements in the AAO's initial decision.

In sum, the petitioner's submission on motion does not adequately address or overcome most of the grounds for dismissal cited by the AAO in its initial decision. 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 October 16, 2002 is affirmed. The petition is denied.

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[2] *Webster's Ninth New Collegiate Dictionary* confirms that Ge'ez, like Latin, is an archaic language now used primarily in a liturgical context.