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Bureau of Citizenship and Immigration Services

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

AUG 21 2003

File:  Office: VERMONT SERVICE CENTER

Date:

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 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 the Bureau of Citizenship and Immigration Services (Bureau) 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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a mosque. 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 religious instructor. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established that it had made a qualifying job offer to the beneficiary, or that the beneficiary would not be solely dependent on outside income.

On appeal, counsel argues that the director arbitrarily denied the petition despite having “conceded” that the petitioner’s evidence is sufficient.

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, 2003, 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, 2003, 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 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 regulation at 8 C.F.R. § 204.5(m)(1) echoes the above statutory language, and states, in pertinent part, that “[a]n alien, or any person in behalf of the alien, may file an 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.”

Two related issues in this proceeding are whether the petitioner has established that the beneficiary has the required past experience, and whether the prospective employment will be a full-time religious occupation. 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 May 1, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working in the job offered throughout the two-year period immediately preceding that date.

The director requested information regarding the beneficiary’s schedule and compensation. In response, the petitioner asserts that the beneficiary “receives compensation directly from Muslim member families for his services. His compensation is about \$200 weekly.” Counsel states that the beneficiary has not filed income tax returns or otherwise reported this income. Affidavits indicate that the beneficiary teaches, every weekday, at one family’s home from 3:15 to 6:45 p.m. and at another family’s home from 7:15 to 10:45 p.m. Each family claims to pay the beneficiary \$100 per week. The affidavits do not indicate when the beneficiary began providing these lessons and therefore the affidavits do not establish two years of continuous full-time employment.

The director denied the petition, stating that the petitioner has “not established that the beneficiary would be a full-time religious worker” or “was a full-time religious worker for the 2-year period from May 1999 to May 2001.” On appeal, counsel states:

In its denial letter, INS conceded that the beneficiary worked 35 hours per week from May 1999 through May 2001. [*Denial letter, pg. 2*]. This concession was based on documentary evidence presented on behalf of the beneficiary. [*see documentary evidence reviewed by INS in support of the petition included herein as Exhibit “A”*].

We are unable to find any such “concession” on page 2 (or any other page) of the decision. Indeed, page 2 of the decision contains two separate assertions that the evidence was insufficient in that regard. The director acknowledged the petitioner’s submission of a work schedule and a “letter . . . stating that the beneficiary has been a full-time religious teacher from May 1999 to present,” but simply describing the content of the letter is not tantamount to a “concession” or stipulation as to the accuracy of the claims in the letter.

Counsel cites 8 C.F.R. § 204.5(g)(1), which states in part “[e]vidence relating to qualifying experience . . . shall be in the form of letter(s) from current or former employer(s).” Nevertheless, 8 C.F.R. § 204.5(m)(3)(iv) states “[i]n appropriate cases, the director may request appropriate additional evidence.” Clearly, the director was not required by law to accept the petitioner’s claims without question, and the director had discretion to request further evidence.

Furthermore, as noted above, the affidavits from the families that the beneficiary instructed do not specify when the beneficiary began teaching. Thus, the affidavits do not establish two years’ continuous employment. The petitioner did not pay the beneficiary for this work, and there is no evidence that the petitioner maintained any paperwork at all regarding this instruction. If the beneficiary was paid directly by the families, as claimed, then it is not clear what employment relationship has existed, or will exist, between the petitioner and the beneficiary. There is no evidence that the beneficiary has done any religious work recently apart from providing private instructions to these two families, and this situation, by its nature, does not appear to represent a stable or permanent employment situation.

We note that the petitioning mosque claims to have “about 150 families who are active members,” and that the beneficiary works full-time providing instruction to only two of those families. This reasoning, carried to its logical conclusion, leads to the implausible conclusion that this one mosque could provide full-time work for up to 75 instructors.

We conclude that the petitioner has not credibly established that the beneficiary has continuously worked full-time throughout the two-year qualifying period, and will continue to work full-time, providing religious instruction to a total of eight children in two households.

Another issue raised by the director is the sufficiency of the beneficiary’s earnings. The petitioner claims that the beneficiary receives \$200 per week and that the average family in the mosque receives religious instruction 45 weeks per year. Thus, the petitioner’s annual income would appear to be roughly \$9,000 per year. The petitioner’s evidence includes a certificate issued to the beneficiary in 1970, stating that the beneficiary “will not charge any remuneration for teaching [the] Holy Quran.”

The director denied the petition, in part because the petitioner has “not established that the beneficiary would not be solely dependent upon supplemental employment or solicitation of funds for his financial support.” On appeal, counsel states “[t]he certificate was issued by a Pakistani organization in Pakistan 32 years ago. Petitioner, a modern day, American organization has no problem compensating the beneficiary for services rendered.” The certificate contains no

provisions for an expiration date, or to limit its effect to within Pakistan's borders. Counsel's argument that the terms of the certificate expire with time and/or distance is unsubstantiated.

Notwithstanding the above, the regulation at 8 C.F.R. § 204.5(m)(4) states only that the petitioner must "clearly indicate that the alien will not be *solely* dependent on supplemental employment or solicitation of funds for support" (emphasis added). The beneficiary's annual earnings of between \$9,000 and \$10,400 are quite low, particularly for an individual residing in a high-cost area such as New York City, but the beneficiary does purportedly receive remuneration for his work and thus he would not be *solely* dependent on other sources of support. While the statute and case law strongly indicate that an alien minister can have no other employment, the same is not the case with other categories of religious workers. Thus, the terms of employment appear to conform to the pertinent regulations and we hereby withdraw this particular finding by the director. We note nevertheless the absence of contemporaneous evidence to prove that the beneficiary has in fact received the remuneration claimed.

Review of the record reveals an additional issue. 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's Form 990-EZ, Return of Organization Exempt from Income Tax (Short Form), indicates \$147,149 in revenue during 2001, and \$147,724 in expenses, for a net deficit of \$575. Under "total assets," the petitioner stated "0."

Of course, the above information may be irrelevant if the petitioning mosque is not the source of the beneficiary's remuneration. The petitioner has not indicated that any of the beneficiary's wages will come from the mosque's funds, nor has the petitioner produced any documentation showing that it pays or has paid any other instructors for comparable work.

The petitioner has indicated that the beneficiary is paid directly by the parents of the children whom he teaches. In that case, they, and not the petitioner, are responsible for the beneficiary's remuneration and the petitioner must submit acceptable documentation showing that those households are able to pay the beneficiary's proffered wage.

Of course, if the beneficiary is working directly for two individual families, then it is the families, and not the petitioning mosque, that have "hired" the beneficiary (to quote a term from one of the families' affidavits). Employment by individual families cannot qualify the beneficiary for immigrant classification as a religious worker, because a family or household is not a *bona fide* nonprofit religious organization. Even if the petitioner referred the beneficiary to those

households, in the absence of any evidence of the petitioner's financial or administrative involvement in the transaction it would be disingenuous to assert that the petitioner is the beneficiary's true employer. The petitioner asserts that the beneficiary works under the petitioner's "supervision," but the record discloses nothing about the nature of this supervision. The record suggests that the petitioner may have acted in the role of a placement agency for the beneficiary, who is then paid directly, akin to an independent contractor.

The evidence of record does not persuasively establish that the beneficiary has engaged in qualifying full-time employment throughout the entire two-year period immediately prior to the filing of the petition, or that the petitioner has set forth a valid offer of permanent full-time employment. The petitioner has not overcome these 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 appeal will be dismissed.

ORDER: The appeal is dismissed.