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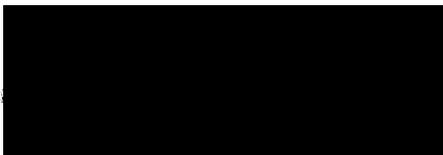
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

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FILE:



EAC 01 228 58892

Office: VERMONT SERVICE CENTER

Date: **FEB 24 2005**

IN RE:

Petitioner:
Beneficiary



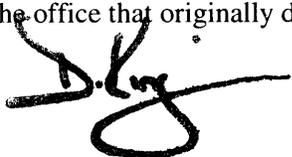
PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, and 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 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 (the Act), 8 U.S.C. § 1153(b)(4), to perform services as an imam. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as an imam immediately preceding the filing date of the petition. The AAO affirmed the director's decision and dismissed the appeal, adding that the petitioner had also failed to establish its ability to pay the beneficiary's proffered wage of \$350 per week.

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 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 August 3, 2001. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of an imam throughout the two years immediately prior to that date.

In dismissing the appeal, the AAO, like the director previously, noted that the beneficiary's passport identifies his occupation as "business." On motion, the petitioner submits a copy of the beneficiary's passport, newly modified on September 11, 2003, to change the beneficiary's occupation from "business" to "imam." This after-the-fact alteration, made directly in response to the AAO's finding, does not and cannot change the finding regarding what the passport said at the time of filing. A petitioner may not make material changes to a

petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

In dismissing the appeal, the AAO also noted contradictory claims by the petitioner. Originally, the petitioner had described the beneficiary as a “volunteer” who, at a later date, “will be paid a weekly salary of \$350.” Subsequently, the petitioner claimed that the beneficiary had been paid that salary all along, but provided no evidence to support that claim. The AAO concluded that these contradictory claims raise questions of credibility. The AAO concluded that the evidence suggests that the beneficiary is, and has been, a volunteer imam who supports himself through the business that he owns.

On motion, [REDACTED] president of the petitioning mosque, maintains “[t]he petition[ing] organization has been employing the Beneficiary as a full-time Imam of its Mosque, paying a weekly salary of \$350.00.” The petitioner submits affidavits from officials and worshippers at the mosque, indicating that the beneficiary has been a paid employee as the petitioner now claims. No contemporaneous evidence accompanies or supports these affidavits.

[REDACTED] on motion, asserts that the petitioner “was denied due process of law” owing to “ineffective assistance of counsel.” Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The record of proceeding does not indicate that any of these conditions have been met. The petitioner simply blames counsel for the denial of the appeal and the dismissal of the appeal.

In blaming counsel for the discrepancies in the record, [REDACTED] cites “former counsel’s mistake in stating that the beneficiary volunteered his services for the Mosque. There was no volunteering of his services. He has been a paid full-time employee of the Mosque.” The record of proceeding contradicts [REDACTED]’s assertion. The initial filing of the petition included a letter dated June 25, 2001, signed by [REDACTED] himself. In this letter [REDACTED] stated that the beneficiary “has been volunteering his services as an Imam continuously since September of 2000 for the petitioning organization.” Later in the same letter, [REDACTED] stated that the beneficiary “will be paid a weekly salary of \$350 for his services” – not “has been paid” or “is being paid,” but “will be paid.” [REDACTED]’s attempt to blame counsel for the content of [REDACTED]’s own letter serves only to raise even more questions of credibility.

We note that this is not the first time [REDACTED] has made inaccurate statements about his June 25, 2001 letter; his statement on appeal misstated the contents of that letter as well, as detailed in the AAO’s dismissal notice. These inconsistent and contradictory statements seriously compromise [REDACTED]’s credibility, and make it very difficult for us to accept claims or assertions that have no contemporaneous documentary support. [REDACTED] has also made contradictory statements about the beneficiary’s immigration status, first asserting that the beneficiary’s nonimmigrant visa expired several months before the filing date, then claiming on appeal that the beneficiary has been “maintaining his legal status,” before finally, on motion, conceding

the beneficiary's undocumented status after the AAO observed that the issue of status would be of concern at the adjustment stage, rather than the petition stage.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988). Pursuant to section 204(b) of the Act, 8 U.S.C. § 1154(b), we cannot support the approval of the petition without a determination that the facts stated in the petition are true.

The petitioner submits no documentation showing that the beneficiary was paid as claimed. [REDACTED] asserts that this is because the beneficiary had no Social Security number, but this would not explain why the petitioner's own financial records would contain no trace of payments to the beneficiary. The petitioner offers affidavits attesting, after the fact, to the beneficiary's claimed paid employment, but affidavits are not automatically considered sufficient or credible. The regulation at 8 C.F.R. § 103.2(b)(2)(i) states:

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, 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.

Given the credibility issues that necessarily arise from the petitioner's inconsistent and contradictory claims, further statements from the petitioner cannot resolve our concerns about this matter.

In dismissing the petition, the AAO raised the issue of the petitioner's ability to pay the beneficiary's proffered wage of \$350 per week. 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.

Here, the petitioner had submitted only bank statements. The AAO found this evidence to be insufficient, because 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).

On motion, in response to the AAO's assertion that, by regulation, bank statements are not sufficient evidence, the petitioner submits copies of more bank statements. The petitioner does not explain how this meets the regulatory requirements or otherwise overcomes the AAO's finding.

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 August 21, 2003 is affirmed. The petition is denied.