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

PUBLIC COPY

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[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: MAR 21 2008

EAC 03 019 51028

IN RE:

Petitioner:

[Redacted]

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:

[Redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) rejected the petitioner's untimely appeal. The director then moved to reopen the proceeding. The director again denied the petition, and certified the decision to the AAO for review. The AAO will affirm the director's decision to deny the petition.

The petitioner is identified as a mosque and Islamic center. 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 petitioner qualifies as a tax-exempt religious organization, or that the beneficiary had the requisite two years of continuous work experience as an imam immediately preceding the petition's filing date.

The director also cited, as a ground for denial, the beneficiary's violation of his B-2 nonimmigrant status. The director found: "the Beneficiary's disregard for the truth and his apparent inability to adhere to the law leave the Service disinclined to believe any evidence or testimony the Beneficiary has to offer." The beneficiary's failure to maintain lawful status is an issue of admissibility, not of eligibility for the immigrant classification. The visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws. When eligibility for the claimed status is established, the petition should be granted. *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Therefore, the beneficiary's violation of status is an issue that should be handled (and, as Citizenship and Immigration Services records show, has been handled) in separate proceedings. The AAO will return, later in this decision, to the overall issue of credibility.

Pursuant to 8 C.F.R. § 103.4(a)(2), the director allowed the petitioner thirty days in which to submit a brief or other written statement in response to the certified decision. The record contains no subsequent submission from the petitioner or from counsel.¹ The AAO therefore considers the record to be complete as it now stands.

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--

¹ The AAO notes that the most recent addition to the record, five months prior to the certified denial, was submitted not by the petitioner's attorney of record but by an attorney who represents the beneficiary. The record contains no Form G-28 Notice of Entry of Appearance as Attorney or Representative, designating that attorney as the petitioner's attorney. Pursuant to 8 C.F.R. § 103.3(a)(1)(iii)(B), the beneficiary is not an affected party in this proceeding, and therefore neither is the beneficiary's attorney. Because the record contains neither a written notice of withdrawal from the existing attorney of record, nor a duly executed Form G-28 establishing the other attorney as the petitioner's attorney of record, there has been no recognizable substitution of attorneys pursuant to 8 C.F.R. § 292.4(a).

(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 issue concerns the petitioner's tax status. 8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization seeking to employ the beneficiary 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.

According to a February 28, 1986 letter from the Internal Revenue Service (IRS), the petitioner's tax-exempt status derives from classification not under section 170(b)(1)(A)(i) of the Internal Revenue Code of 1986 (the Code), which pertains to churches, but rather under section 170(b)(1)(A)(vi) of the Code, which pertains to publicly-supported organizations as described in section 170(c)(2) of the Code, "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes," or for other specified purposes. This section refers in part to religious organizations, but to many types of secular organization as well.

Clearly, an organization that qualifies for tax exemption as a publicly-supported organization under section 170(b)(1)(A)(vi) of the Code can be either religious or non-religious. The burden of proof is on the petitioner to establish that its classification under section 170(b)(1)(A)(vi) of the Code derives primarily from its religious character, rather than from its status as a publicly-supported charitable and/or educational institution.

The director, in denying the petition, acknowledged that "the term 'religious organizations' is *not* strictly limited to churches" (director's emphasis), but nevertheless denied the petition in part because the petitioner

“has not been granted tax exempt status as a religious organization, which is defined separately in Section 170(b)(1)(A)(i), Churches.”

The Code and its implementing regulations do not specifically define “religious organization,” but IRS regulations indicate that the terms “religious organization” and “church” are not synonymous; for instance, 26 C.F.R. § 1.511-2(a)(3)(i) acknowledges the existence of “religious organizations” that are “not themselves churches.” IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*, also specifically states that the term “religious organizations” is *not* strictly limited to churches: “Religious organizations that are not churches typically include nondenominational ministries, interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion.” *Id.* at 2. The proper test, therefore, is not whether the intending employer is a church *per se*, but rather an entity whose principal purpose is the study or advancement of religion.

The petitioner has filed several IRS Form 990-EZ returns for 2002, copies of which are contained in the record. On Part IV of each return, instructed to identify its tax-exempt classification, the petitioner marked “A church, convention of churches, or association of churches. Section 170(b)(1)(A)(i).”

The petitioner’s assertions on the Form 990 returns do not correspond to the information provided by the IRS. As noted above, the IRS letter classified the petitioner under section 170(b)(1)(A)(vi) of the Act, not section 170(b)(1)(A)(i) thereof. The IRS letter also indicated that the petitioner is required to file Form 990 returns, a requirement not applied to section 170(b)(1)(A)(i) churches. It is clear, therefore, that the IRS, as of 1986, did not consider the petitioner to be a section 170(b)(1)(A)(i) church, and the record does not contain any later correspondence from the IRS to indicate that the designation had been appealed or changed.

The director issued a request for evidence (RFE) on January 19, 2007, instructing the petitioner to submit documentation to satisfy 8 C.F.R. § 204.5(m)(3)(i). In response, the beneficiary’s attorney submitted documentation showing that the State of Pennsylvania recognizes the petitioner as a religious organization, but no federal documentation specifically designating the petitioner as religious. It is not clear that the IRS, when designating organizations under section 170(b)(1)(A)(vi), distinguishes between religious and non-religious organizations. IRS designation letters contain no such distinction.

In denying the petition on September 5, 2007, the director acknowledged the distinction between a “church” and a “religious organization,” but nevertheless concluded: “the Petitioner has been granted tax exempt status as a charitable organization under . . . section 170(b)(1)(A)(vi), and has not been granted tax exempt status as a religious organization, which is defined separately in Section 170(b)(1)(A)(i), Churches. Thus, the IRS has not determined that the Petitioner is a religious organization.”

This finding by the director cannot stand, as it is based on the flawed premise that section 170(b)(1)(A)(i) of the Code pertains to all religious organizations, whereas in fact it applies only to churches, associations of churches, and their integrated auxiliaries. The error of limiting eligibility to section 170(b)(1)(A)(i) churches is discussed in a memorandum from William R. Yates, Associate Director of Operations, *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003).

In that same memorandum, Mr. Yates described the evidence that can be used to determine the primary purpose(s) of a given organization, including “[a] copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization” and “[b]rochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.”

The director erred, in this instance, by failing to acknowledge that an organization classified under section 170(b)(1)(A)(vi) of the Code may qualify as a religious organization, and by failing to solicit specific documentation that would have permitted a clearer understanding of the petitioner’s exempt purpose. Because the director failed to specify the documentation required, the petitioner has not had the opportunity to establish the nature of its exempt purpose. Absent such evidence, while the record certainly does not rule out the possibility that the petitioner is a religious organization, the petitioner has not met its burden of proof in this regard. To solicit such evidence at this late stage would serve no constructive purpose, because, as we shall discuss below, other, independent grounds for denial exist, and therefore the ultimate outcome of the director’s decision will be affirmed. Further evidence of the petitioner’s exempt purpose would not result in approval of the petition.

The remaining issue regards the beneficiary’s past experience. 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 October 24, 2002. 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.

On the Form I-360 petition, the petitioner indicated that the beneficiary had entered the United States on April 29, 1997, under a B-2 visitor’s visa that expired October 29, 1997.

The petitioner submitted a copy of a job offer letter/contract dated January 15, 1998, signed by the beneficiary and by [REDACTED], the petitioner’s President, and [REDACTED] the petitioner’s Selection Committee Chairman. The agreement was temporary, valid “for a three year period and . . . renewable for two additional three year terms thereafter,” for a maximum of nine years ending January 15, 2007. The body of the document begins:

We are pleased to offer you the position of resident Imam of [the petitioning entity] beginning on the 15th of January, 1998, under the following terms:

1. An annual salary of \$26,000 to be paid in monthly installments
2. Free accommodation at the Islamic Center worth approximately \$18,000 a year. . . .

As recreated above, the date "1998" and the figure "26,000" appear in a smaller font than the rest of the document.

The petitioner also submitted a copy of a nearly identical document, dated September 10, 1989, relating to the employment of one [REDACTED]. On that document, the date, the name of [REDACTED], and some other elements likewise appear in a smaller font than the rest of the document.

The petitioner submitted photocopies of checks identified as the beneficiary's processed monthly paychecks, dated between 1998 and 2003. For most of the qualifying period, these checks were in the amount of \$1,134.00 per month. Copies of the petitioner's bank statements indicate that the checks thus reproduced were processed shortly after their respective dates of issuance. Checks dated after the petition's filing date are in the amount of \$804.39 each. Copies of bank statements in the name of the beneficiary's spouse show deposits that often, but not always, correspond with those checks.

A payroll history report, generated March 9, 2004, indicates that the petitioner paid the beneficiary \$1,370.42 gross (\$802.39 net after withholding) per month from September 2002 through December 2003. The payroll history report does not reflect any wages paid to the beneficiary, or taxes withheld from his wages, prior to September 30, 2002. Similarly, the petitioner's IRS Form 941 quarterly tax return for the third quarter of 2002 (July through September) reflects only \$1,370.42 in wages paid, equivalent to one month's pay. The petitioner's Pennsylvania Form UC-2 quarterly report specifically states that the petitioner had "0" covered employees in the first two months of the third quarter of 2002, and "1" covered employee in the third month. Pennsylvania Form UC-2A identifies the beneficiary as the covered employee, with "04" credit weeks. Thus, the petitioner repeatedly and consistently told state and federal tax authorities that the beneficiary worked only one month during the third quarter of 2002.

In July 2003, after having filed the petition, the petitioner reported on its IRS 990-EZ short form return for 2002 that it had paid the beneficiary \$17,109 for the year. This amount does not correspond to the \$5,481.68 consistently reflected on the petitioner's prior tax documents or payroll reports. It also does not match the sum of the amounts shown on the checks dated 2002 (\$13,089.71). Several checks issued after the filing date were in the amount of \$804.39 each (compare with the net pay of \$802.39 per month shown on the payroll reports).

The beneficiary's 2002 IRS Form 1040 income tax return reflects only \$5,482 in wages, corresponding to the four months' pay shown in the payroll history report and tax documents. The petitioner claimed a \$1,909 tax refund but did not report the \$9,072 shown on the checks dated January to August 2002.

The above evidence indicates that the petitioner paid the beneficiary throughout the qualifying period, but these payments (either \$1,370.42 or \$1,134.00, depending on the documents) have consistently been well below the stated rate of \$26,000 per year (which would require monthly payments of \$2,167). Although the petitioner's contract with the beneficiary stipulates that the beneficiary's compensation includes "Free accommodation at the Islamic Center," tax returns and bank statements consistently place the beneficiary's residence not at the Islamic Center, but a block away on Pottsville Street in the same town. The record contains no evidence that the petitioner owns, rents or otherwise controls the Pottsville Street property.

Therefore, the record consistently establishes that the petitioner has not been providing the beneficiary with a level of compensation commensurate with full-time employment as specified in the contract dated 1998 and submitted by the petitioner.

Also, on the beneficiary's 2002 income tax return, the beneficiary claimed \$785 in "Other income." A 2002 IRS Form 1099-MISC Miscellaneous Income statement indicates that this \$785 derived from "Nonemployee compensation" paid by College Hill Poultry, Inc., in Fredericksburg, Pennsylvania.

In the January 2007 RFE, the director instructed the petitioner to submit more complete tax documents from 2002 and "an explanation of the Form 1099-Misc for 2002 issued by College Hill Poultry, Inc." In response, the beneficiary's attorney stated that the beneficiary's "additional compensation from College Hill Poultry . . . was not work that in any way interfered with the beneficiary's regular full-time position." In an accompanying letter, the beneficiary asserted that he "trained and reviewed the processes of the butchers at that company in order to ensure that their processes were halal and that the animals were killed and butchered in a manner consistent with our religious beliefs." [REDACTED], President of the petitioning entity, made a similar statement in a separate letter. The record contains nothing from College Hill Poultry to corroborate the petitioner's and the beneficiary's explanation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner also submitted another copy of the beneficiary's employment contract. The body of this copy begins:

We are pleased to offer you the position of resident Imam of [the petitioning entity] beginning on the 15th of January, 1997, under the following terms:

1. An annual salary of \$10,000 to be paid in monthly installments. . . .

This version of the 1998 contract does not feature smaller letters, such as are found in the other copy and in the 1989-document relating to another individual. The salary amount is drastically lower than the figure provided in the petitioner's earlier submission. Neither the petitioner nor counsel explained or even acknowledged this change. 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 statutory or regulatory requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Having previously represented the beneficiary's compensation as \$26,000 per year, but having paid the beneficiary substantially less than that amount, the petitioner cannot resolve the discrepancy by submitting additional, backdated documentation showing a lower salary.

In denying the petition, the director found that the petitioner had not shown that it had ever met the terms of payment specified in the initial submission, and that therefore there was no credible evidence that the

petitioner had employed the beneficiary on a continuous, full-time basis according to those stated terms. The director also noted the petitioner's inconsistent claims regarding the amount of the beneficiary's compensation, and the tax documents in which the petitioner repeatedly and specifically denied having any paid employees in July and August of 2002. The director cited various discrepancies that undermined the petitioner's credibility, most significantly the alteration of the January 15, 1998 contract which changed the amount of the compensation shown on that document. The director noted that the signatures on the different versions of the contract appear to be identical, supporting the finding that one contract did not simply supersede the other, but was in fact a deliberately altered copy. Also, a copy of an IRS Form W-2 Wage and Tax Statement for 2003 contains an apparent alteration in the beneficiary's Social Security number (which appears in a markedly different font than the rest of the form). The record before the AAO contains no evidence that the petitioner has answered or disputed these findings, which therefore stand undisturbed.

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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The fact that the petitioner apparently submitted the altered copy first, and later submitted the true copy showing the lower salary, does not eliminate the credibility issues or change the fact that, at the time of filing, the petitioner represented the beneficiary's salary as \$26,000 per year rather than the much lower \$10,000. At no time did any immigration authority compel the petitioner to overstate the petitioner's salary, and the petitioner alone is ultimately responsible both for its failure to meet the terms of employment and for the submission of altered documents. Between the submission of altered documents and the petitioner's contradictory assertions regarding the beneficiary's employment (with canceled checks alleging employment and tax documents denying employment), the petitioner has gravely compromised its own credibility in this proceeding, and therefore we cannot give the petitioner's claims the weight they might otherwise carry.

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 AAO will affirm the denial of the petition.

ORDER: The director's decision of September 6, 2007 is affirmed. The petition is denied.