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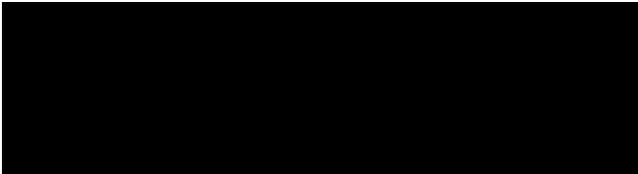
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U.S. Department of Homeland Security

Citizenship and Immigration Services

CI

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



File:  Office: VERMONT SERVICE CENTER

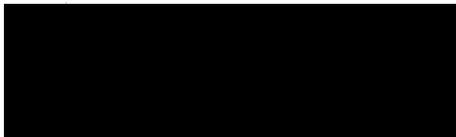
Date: **NOV 19 2003**

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:



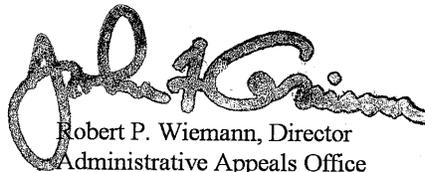
INSTRUCTIONS:

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 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, 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 an imam, a title which the petitioner claims the beneficiary has held since age 10. The director determined that the petitioner had not established its ability to pay the beneficiary's proffered wage.

On appeal, counsel states that the director unfairly ignored financial documentation provided by the petitioner. The petitioner subsequently submits a financial statement.

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 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 director's decision hinges on the issue of the petitioner's ability to pay the beneficiary's proffered wage of \$24,000 per year. 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.

The initial submission includes no annual reports, federal tax returns, or audited financial statements. Instead, the petitioner has submitted an "accounting report" for calendar year 2000.

The director informed the petitioner that this documentation would not be sufficient. Subsequently, the petitioner has submitted an "accountant's compilation report," the prefatory statement to which indicates that the accountant who prepared the report relied entirely on "the representation of the management. We have not audited or reviewed the accompanying financial statements."

The director subsequently advised the petitioner that the compilation report could not meet the petitioner's regulatory obligation to establish its ability to pay the beneficiary's proffered wage. In response, counsel asserts "an audited financial statement is extremely expensive and burdensome for a non-profit religious organization of this nature." The petitioner submits copies of bank statements, which are not on the list of required documentation.

The director denied the petition, because the petitioner had not submitted acceptable financial evidence despite repeated requests to do so. On appeal, counsel states that the director's decision "is arbitrary and capricious" because the petition was denied "for the sole reason that an audited financial statement was not submitted, despite the submission of an unquestioned unaudited financial statement." Counsel asserts that the director never questioned the information contained in the financial documents that the petitioner has submitted.

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 regulation allows the petitioner 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 regulation contains no express or implied exception for religious institutions, and the petitioner has no discretion to substitute other documentation. Counsel fails to explain why the director's mandatory adherence to the plain wording of the regulation is arbitrary or capricious. Indeed, it would be arbitrary and capricious for the director to disregard the regulations.

In this instance, the petitioner has not submitted any of the types of evidence required by 8 C.F.R. § 204.5(g)(2), and therefore the petitioner has not met its burden of proof. The director's adherence to the clearly stated regulatory requirements does not constitute error or abuse of discretion.

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.

In this instance, the required evidence is described at 8 C.F.R. § 204.5(g)(2). The petitioner's only explanation for the absence of an audited statement is the complaint that obtaining such a statement is "expensive." The claim that the petitioner cannot afford an audit is not a strong demonstration of the petitioner's financial status. Because the petitioner has failed to provide required documentation, and has not adequately explained the absence of that documentation, the regulations plainly state that this failure creates a presumption of ineligibility.

Subsequent to the filing of the appeal, the petitioner has submitted a financial statement prepared by South Shore Capital Tax Specialists, Inc. The statement repeatedly misspells the petitioner's name [REDACTED]. South Shore Capital Tax Specialists states "[w]e have reviewed the accompanying balance sheet," and advises "[a] review . . . is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express an opinion." Counsel, on appeal, observes that the director had previously requested "a photocopy of a current financial statement that has either been reviewed or audited by a Certified Public Accountant." The director's instruction that the statement could be "reviewed or audited" conflicts with the plain language of the regulation, which clearly refers to "audited financial statements." The disclaimer on the petitioner's reviewed statement highlights the differences between a review and an audit, and the director's error does not supersede or nullify the controlling regulatory language.

Beyond the issue of ability to pay, review of the record reveals another major issue. The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, 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) 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 April 12, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as an imam throughout the two-year period immediately preceding that date.

Materials submitted with the initial filing indicate that the beneficiary worked at a mosque in Akarca, Turkey, from April 15, 1997 to September 15, 2000, and that the beneficiary entered the United States on October 23, 2000 and considered himself to be a "tourist" as of the filing date. The initial filing contains no indication that the beneficiary had worked as an imam in the United States between his October 23, 2000 arrival and the petition's filing date nearly six months later.

In a letter submitted with the petition, [REDACTED] chief imam and president of the petitioning entity, states that the beneficiary is "an active member of our mosque" but he does not indicate that the beneficiary has worked as an imam for that mosque. Mr. [REDACTED] repeatedly and consistently describes the beneficiary's duties in the future tense, discussing what the beneficiary "will" do at some future point.

The director instructed the petitioner to submit evidence to establish the beneficiary's continuous work as an imam throughout the two-year qualifying period, as required by the statute and regulations. In response, counsel states:

We note that the beneficiary entered the United States on October 23, 2000 in B-2 [nonimmigrant visitor for pleasure] status and that this status was changed to R-1 [nonimmigrant religious worker] effective May 7, 2001. It is respectfully requested that the short difference in time be considered as vacation and to get organized and set up with his family and in the position.

The law requires two years of continuous engagement in the religious occupation or vocation during the two years leading up to the filing date. Here, there is a gap of nearly seven months in the beneficiary's work during this period, from September 15, 2000 to the April 12, 2001 filing date. Nearly another month elapsed before the beneficiary finally resumed his work. This very substantial interruption in the beneficiary's work, comprising more than one fourth of the entire qualifying period, is not a "short . . . vacation" by any reasonable usage of that term. The record demonstrates that the beneficiary was not continuously engaged as an imam throughout the two-year qualifying period, and therefore the petition cannot be approved.

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.