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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

JAN 26 2005

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:
EAC 01 231 55270

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, 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 a religious teacher. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a religious teacher immediately preceding the filing date of the petition, or that the petitioner had made a qualifying job offer. The AAO, in dismissing the petitioner's appeal, affirmed the director's findings and also determined that the petitioner had failed to establish that it was a qualifying tax-exempt religious organization as of the petition's filing date.

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 first issue concerns 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 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 performing the duties of a religious teacher throughout the two years immediately prior to that date.

Counsel, on motion, states "petitioner provided documentary evidence that the beneficiary was engaged in full time religious employment for the qualifying period. Petitioner further showed that even though the

beneficiary was not paid directly by the petitioner during this period, the beneficiary was paid $275 per week by Mosque members whose children the beneficiary taught." Counsel argues that, because "the Mosque exercised supervisory control over the religious work performed by the beneficiary," this work ought to count as qualifying experience toward the two-year requirement.

Counsel is correct that the exact payment mechanism is not as important as the work the beneficiary performed during the relevant two-year period. Still, the petitioner has the burden of showing that the beneficiary was compensated as claimed. We note a certificate from a madrasa (religious school) in Pakistan that reports the beneficiary's work as a teacher from 1986 to 1988, indicating that the beneficiary "never charged any remuneration [for] his services." If the beneficiary worked without remuneration, even in his native country where work authorization would not be an issue, then it is not readily apparent that the position the beneficiary seeks is traditionally a paid occupation.

At the same time, the dates given (1986 to 1988) are of some concern because the beneficiary was born in 1975; the period mentioned occurred when the beneficiary was 11 to 13 years old. A second certificate attests to the beneficiary's work from 1988 to 1991, a period ending when the beneficiary was 16 years old.

The petitioner indicates that, throughout the qualifying period, the beneficiary taught the children of three local families every weekday: the [redacted] family from 3:15 p.m. to 5:45 p.m.; the Ahmad family from 6:00 p.m. to 8:30 p.m.; and the [redacted] family from 8:45 p.m. to 10:45 p.m. In separate affidavits [redacted] and [redacted] state that the beneficiary teaches their children, but they do not state when the beneficiary began to do so, nor do they specify the days or hours that the beneficiary works. [redacted] states only that the beneficiary "has been chosen to be the teacher of my children"; his statement is ambiguous as to whether the beneficiary had yet begun to do so. Thus, the affidavits do not establish two years of continuous (i.e., uninterrupted full-time) work from 1999 to 2001.

We note that [redacted] three children, who supposedly receive instruction until 10:45 p.m. every weeknight, were five, seven, and nine years of age as of May 2002, and thus would have been two, four, and six years of age when the qualifying period began in May 1999. We are not required to presume that children so young would even be awake at nearly 11:00 p.m., let alone capable of comprehending meaningful religious instruction.

The record contains no actual documentation of any payments issued to the beneficiary during the qualifying period, and the affidavits contain insufficient information to support the claim that the beneficiary has worked full-time throughout the two-year qualifying period. Having been asked by the petitioner, via the present motion, to reconsider the issue of the beneficiary's past experience, we reaffirm the prior finding that the petitioner has not adequately demonstrated that the beneficiary possesses that experience.

We turn now to the issue of whether the petitioner was a qualifying religious organization as of the filing date. 8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization 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.

Prior to the denial of the petition, but after the filing date, the petitioner had submitted a copy of an IRS determination letter dated December 20, 2001, indicating that the petitioner is tax-exempt as an organization classified under section 170(b)(1)(A)(i) of the Internal Revenue Code, a section of law that regards churches and their integrated auxiliaries. While the director did not raise the issue of the petitioner's tax-exempt status, the AAO noted that this letter was issued after the petition's May 2001 filing date. Therefore, the AAO determined, the petitioner had not shown that it possessed the qualifying exemption as of the filing date.

The regulations, however, do not require that a determination letter has been issued as of the filing date. They merely indicate that the petitioner must show that it was *eligible* for qualifying tax-exempt status as of that date. This rule accommodates churches that choose not to apply for recognition of exemption, because IRS regulations encourage, but do not require, churches to apply for such recognition.

In this instance, the record shows that the IRS received the petitioner's application for recognition on March 31, 2001, a month before the petition's filing date. There is no indication that the petitioner significantly changed its activities or structure during the nine months that elapsed between the filing and the approval of the application for recognition.

From the available evidence, it appears that the petitioner was already eligible for recognition of exemption as of the petition's filing date, as evidenced by the eventual approval of the application that the petitioner had already filed with the IRS. We therefore withdraw the prior finding regarding the petitioner's status as a qualifying, tax-exempt religious organization.

The remaining issue from the AAO's prior appellate decision concerns the nature of the job offer. 8 C.F.R. § 204.5(m)(4) requires the petitioner to show how the alien will be paid or remunerated if the alien will work in a professional religious capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or solicitation of funds for support.

The AAO, in dismissing the appeal, stated "the petitioner has not identified the specific terms of the beneficiary's remuneration. The record is not clear as to whether the beneficiary is to continue with his self-employment or he is to receive an annual salary from the petitioner." On motion, counsel argues that the petitioner had previously specified the terms of employment: "petitioner showed that once the beneficiary was approved as a religious worker, he would be employed directly by the petitioner at an annual salary of $22,500.00." In a letter dated April 28, 2001, [redacted] president of the petitioning entity, stated "we have offered employment to" the beneficiary. While this letter did not mention terms of payment, other documents indicate that the petitioner pays religious teachers $22,500 per year, and that the petitioner has included payments to religious teachers in its projected 2001 budget.

Given the above documentation, we cannot uphold the finding that the petitioner has failed to set forth the terms of employment and remuneration. Review of this same documentation, however, raises a new question previously unaddressed. 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.

An unaudited 2000 financial statement indicates that the petitioner, at that time, had one teacher on staff, and that income exceeded expenses by only $3,035. A 2001 "pro forma financial statement," containing "projections" for the year, predicted that the petitioner would take in $140,625 in "tuition revenue," sufficient to pay five teachers a total of $112,500 ($22,500 x 5). The same statement projected total revenues of $190,575 and total expenses of $166,040, for a net balance of $24,535. Because these figures are predictions, rather than reports of actual revenues and expenses, these figures carry negligible weight.

The petitioner's Form 990-EZ Return of Organization Exempt From Income Tax for 2001, prepared in April 2002, indicated total revenues of $147,149, and total expenses of $147,724, for a net loss of $575. The petitioner reported no salaries, but paid $108,000 in "professional fees and other payments to independent contractors." The petitioner's revenues thus fell far short of projections. Expenses fell short as well, but by a smaller margin. The petitioner acknowledges that it did not pay the beneficiary in 2001, and therefore the "professional fees" and contractor payments do not include any payments to the beneficiary. Given the net loss of $575 for the year, we cannot conclude that the petitioner had sufficient funds on hand to pay the beneficiary's proffered wage of $22,500 in 2001.

The petitioner has indicated that client families directly paid the beneficiary $275 per week. The regulations plainly require that the *prospective employer* be able to pay the proffered wage. Here, the petitioner is the prospective employer. The regulations contain no provision to indicate that the employer need not show its ability to pay, provided some other entity pays the beneficiary instead. Furthermore, weekly payments of $275 add up to only $14,300 per year, well short of the proffered wage of $22,500 per year. The evidence does not establish that the beneficiary has received, or that the petitioner is able to pay, the proffered wage.

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 26, 2003 is affirmed. The petition is denied.