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

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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 25 2005
WAC 96 250 52314.

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Islamic center that operates a mosque and a school. 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: (1) that the beneficiary had the requisite two years of continuous work experience as an imam immediately preceding the filing date of the petition; (2) that the petitioner qualifies as a tax-exempt non-profit religious organization; or (3) that it has the ability to pay the beneficiary's proffered salary.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

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 employment. 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 September 20, 1996. 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 a letter dated May 14, 1996, [redacted] administrator of the petitioning center, states that the beneficiary "has been an active member of the [petitioning] community for the past three years."

The director approved the petition on January 16, 1997, and the beneficiary subsequently applied for adjustment of status. During his adjustment interview, the beneficiary indicated that he worked for the petitioner "volunteering without getting paid" from 1993 until he received employment authorization in 1997. In a letter dated February 8, 1999, [redacted] chairman and president of the petitioning entity, stated that the beneficiary "has been working with us as a minister (Imam) since 1993, although he was volunteering his services before, however he was placed on the payroll on 3/1/1998."

The Board of Immigration Appeals has ruled that an alien's work is not qualifying for special immigrant status "when his work at the church has been of a voluntary nature . . . and he is not compensated." *See Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

The director issued a notice of intent to revoke on February 20, 2003, citing the beneficiary's description of his experience as "volunteer" work. In response, counsel stipulates that entirely uncompensated work is non-qualifying, but counsel claims that the beneficiary "was compensated not in the form of strict salary, but rather with a housing allowance and an education allowance." Counsel claims that this claim is corroborated by "petitioner's attached Form 1023¹ at page 12 and in the letter from petitioner attached hereto." Page 12 of the Form 1023 includes the following instruction and (shown here in italics) the petitioner's response:

Show how many hours a week the minister/pastor and officers each devote to church work and the amount of compensation paid to each of them. If the minister or pastor is otherwise employed, indicate by whom employed, the nature of employment, and the hours devoted to that employment.

¹ Internal Revenue Service Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code.

IMAM (Pastor) at minimum 70hrs per week. Salary \$3,000 per month and \$1,000 per month housing allowance.

Board Officers average 40hrs and are not compensated.

There is nothing in the wording of the instruction or the response (written in early 2003) to expressly state or imply that the imam received "a housing allowance and an education allowance" between 1994 and 1996.

[REDACTED] in a new letter dated March 18, 2003, states "between 1992 and 1997 [the beneficiary] was compensated in the form of a housing allowance and an educational allowance to continue in his Islamic studies."

The director denied the petition, stating that the petitioner had failed to overcome the finding that the beneficiary was an unpaid volunteer during the qualifying period. On appeal, counsel cites several appellate decisions that are said to support the claim that unpaid volunteer work is qualifying experience. The cited decisions are unpublished and have no force as precedents; they certainly do not overrule *Matter of Varughese* which specifically addresses the issue of an alien who sought immigration benefits as a minister based on unremunerated volunteer work.

Another precedent decision, *Matter of Hall*, 18 I&N Dec. 203 (BIA 1982), indicates that work compensated by room, board, or other consideration is "employment" even in the absence of a fixed salary. Counsel does not cite *Hall*, but does argue that the director failed to take into consideration the claim that "beneficiary was compensated in the form of a housing and education allowance."

The record contains no contemporaneous documentation of these allowances, nor any evidence that the beneficiary was pursuing "Islamic studies" that necessitated an "educational allowance" during the 1994-1996 qualifying period. The beneficiary's most recent documented education was a Bachelor of Science degree from Jackson State University, Mississippi, awarded in May 1992. Furthermore [REDACTED] new letter appears to conflict with his prior letter from 1999, in which he stated that the beneficiary "was volunteering his services." There is also some conflict between the assertion that the beneficiary "was placed on the payroll on 3/1/1998," and the later claim that the petitioner "began paying him a regular salary in 1997." There was never any mention of these claimed "allowances" until after the director informed the petitioner that uncompensated volunteer work could not suffice to establish eligibility.

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).

The petitioner's vague and inconsistent assertions regarding housing and educational allowances raise more questions than they answer, and cannot suffice to overcome the director's finding in this regard.

The next issue concerns the petitioner's tax-exempt status. 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.

An early submission by the petitioner included documentation of its exemption from *state* franchise and income taxes, but this documentation neither establishes nor implies the required *federal* tax-exempt status. At the same time, the petitioner submitted a copy of a letter from the IRS, assigning the petitioner an Employer Identification Number. This letter advised the petitioner: "Assigning an Employer Identification Number does not grant tax-exempt status to nonprofit organizations." The letter instructed the petitioner to file IRS Form 1023 if the petitioner sought recognition as a tax-exempt non-profit organization.

In the notice of intent to revoke, the director informed the petitioner that the above evidence "does not show that [the petitioning] organization is exempt [from] Federal income tax." In response, counsel states:

When the petition was submitted in 1996, petitioner was affiliated with the Islamic Society of North America and issued their federal tax identification number. . . . Petitioner submitted a letter from the Internal Revenue Service recognizing petitioner as a tax-exempt religious organization. More recently, petitioner separated from the Islamic Society of North America and obtained its own tax identification number and has filed Form 1023 seeking Recognition of Exemption.

A1992 certificate indicates that the petitioner "is an affiliated chapter of the Islamic Society of North America." The record contains a 1983 IRS recognition letter addressed to the Islamic Society of North America, Inc., in Plainfield, Indiana. The letter does not state that the exemption is a group exemption, applicable to subsidiary or subordinate entities. Group determination letters are clearly marked as such.

Accountant [REDACTED] in a letter dated March 10, 2003, states: "We have just completed Form 1023 . . . and have submitted this to the Internal Revenue Service." The record contains this Form 1023 along with the required supporting documentation. On this form, the petitioner describes itself as a church and a school.

The director denied the petition, stating that the petitioner has not shown that the Islamic Society of North America ever held a group exemption that covered the petitioner. On appeal, counsel does not address this specific point but argues that the petitioner has submitted sufficient documentation to establish its qualifying tax-exempt status as a non-profit religious organization.

Upon consideration of the materials in the record, we conclude that the materials submitted satisfy 8 C.F.R. § 204.5(m)(3)(i)(B), amounting to the documentation necessary to establish qualifying status. We hereby withdraw this particular finding by the director.

The final issue raised by the director concerns the petitioner's ability to pay the beneficiary's salary. The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

states: "We will be able to pay [the beneficiary] a salary of \$3000.00 per month," equivalent to \$36,000 per year. states that the petitioner has "a large sustaining body of members (more than 500 members)." Members of a congregation are not employees, and therefore the size of the congregation does not entitle the petitioner to establish its ability to pay simply by providing a statement from an official.

Bank documents show that the petitioner had a balance of \$88,867.00 as of October 18, 1994, and \$82,899.06 as of July 19, 1996. An unaudited "Income Statement" indicates that the petitioner's income exceeded its expenses by \$87,521 in 1998. The statement reflects \$42,000 in "Payroll"; this amount is not broken down or itemized by individual recipient. A Form W-2 Wage and Tax Statement indicates that the petitioner paid the beneficiary \$27,000 in 1998. This is only three-fourths of the proffered annual compensation. Later Forms W-2 indicate that the petitioner paid the beneficiary \$20,000 in 2000 and \$21,400 in 2001. The forms show no withholding of taxes; the amounts shown are gross amounts rather than what remained after taxes. There is no evidence that the petitioner has ever paid the beneficiary the full proffered wage.

In the notice of intent to revoke, the director quoted the documentary requirements of 8 C.F.R. § 204.5(g)(2), and indicated that the petitioner's evidence does not conform to those requirements. In response, counsel states "the information for 1996 is no longer available" owing to the passage of time. The petitioner does not explain whether its 1996 records were destroyed or simply lost. Counsel cites the petitioner's Form 1023 "which reflects it[s] financial status for the past three years."

Because fees vary to file Form 1023, each applicant must complete Form 8718 to determine the appropriate filing fee. An organization with annual gross receipts that have averaged not more than \$10,000 during the preceding four years of operation pays a \$150 fee; entities averaging more than \$10,000 in annual gross receipts pay a higher fee of \$500. The petitioner's treasurer certified that the petitioner's annual gross receipts have averaged not more than \$10,000 per year, and thus the petitioner paid the lower fee. In Part IV of the Form 1023 itself, the petitioner claimed to have taken in more than \$800,000 per year for the past four years, the peak being over \$1.2 million in 2002. The petitioner also claimed to have paid hundreds of thousands of dollars in salaries each year. Another section of the Form 1023 lists depreciation on the petitioner's property dating back to 1989, suggesting that, as of early 2003, the petitioner's records were not entirely devoid of financial information dating back to the mid-1990s.

The director concluded that the petitioner had not met the requirements of 8 C.F.R. § 204.5(g)(2), because the petitioner had failed to submit tax returns, audited financial statements, or annual reports covering the period from the filing date onward. On appeal, counsel asserts that the initial submission included "a bank statement evidencing that petitioner maintained an account with over \$60,000.00, which was more than adequate to pay

the proffered wage.” Counsel contends that this bank statement “satisfied the requirement found at 8 C.F.R. § 204.5(m)(4).” The regulation cited does not supersede 8 C.F.R. § 204.5(g)(2), which 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.

With regard to counsel’s claim that financial documentation from the mid-1990s is no longer available, we cite, in full, the regulation at 8 C.F.R. § 103.2(b)(2)(i):

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.

There is no provision to nullify the above requirements for documents beyond a certain age. It is true that the petitioner has shown that, at times, it has had considerable funds available, but there are also significant gaps in these documents. The Forms W-2 provided by the petitioner do not indicate that the beneficiary has ever received his full annual wage of \$36,000.

Beyond the decision of the director, we note additional materials located in the beneficiary’s alien file. A “Certified Copy of Marriage Record,” maintained by the judge of the Probate Court of Lucas County, Ohio, indicates that a local minister solemnized a marriage between Salah Badran (the beneficiary’s name) and another individual on April 18, 1985.

On September 5, 1985, the other party named on the marriage certificate gave a sworn statement to a special agent of the Immigration and Naturalization Service. That individual stated that she received \$600 in cash in exchange for marrying a Syrian national named [REDACTED]. The individual added “I understand that this marriage was solely for the purpose of allowing Salah to stay in the United States, go to school and become a citizen.” A 1988 diploma from Cuyahoga Community College shows that the beneficiary was a student in Ohio some time after the affiant married a student (seeking to “go to school”) by that name in Ohio.

8 C.F.R. § 204.2(a)(2)(ii) states:

Fraudulent marriage prohibition. Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

A visa petition may be denied pursuant to section 204(c)(2) of the Act, 8 U.S.C. § 1154(c)(2), where there is evidence in the record to indicate that an alien previously conspired to enter into a fraudulent marriage. *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988). Testimony by the spouse, admitting knowledge of the fraudulent nature of the marriage, constitutes evidence of an attempt or conspiracy for the purposes of 8 C.F.R. § 204.2(a)(2)(ii). *Id.* at 807, n.3.

The marriage certificate and sworn statement in the beneficiary's file indicate that the beneficiary attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. Given this evidence, federal law prohibits the approval of any immigrant petition (including any special immigrant religious worker petition) on the beneficiary's behalf. The law includes no time limit on this prohibition.

We stress that the information regarding this 1985 marriage did not form a basis for the revocation of the approval of the petition, but it does, nevertheless, support a finding that the beneficiary is not entitled to an approved visa petition. It also compounds existing credibility issues in the record, already discussed elsewhere in this decision.

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.