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**U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: APR 07 2006
SRC 01 192 54882

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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 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, Texas Service Center, denied this employment-based immigrant visa petition and dismissed a subsequent motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Islamic organization whose purpose is “to carry on religious, charitable and educational activities in conformity with the religion of Islam.” 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 instructor. The director determined that the petitioner had not established that the position qualifies as that of a religious worker, that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition, or that the petitioner has the ability to pay the beneficiary the proffered wage.

On appeal, counsel submits a copy of previously submitted documentation.

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 presented on appeal is whether the petitioner established that the position qualifies as that of a religious worker.

The alien must be coming to the United States at the request of the religious organization to work as a religious worker. 8 C.F.R. § 204.5(m)(1). The regulation at 8 C.F.R. § 204.5(m)(2) states, in pertinent part:

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious

hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters.

In its letter accompanying the petition, the petitioner stated that the beneficiary "has been active in teaching younger children about [the] Islamic Faith and religion" at the petitioner's affiliate, the Islamic Academy of Alabama, "a religious educational institution." The petitioner submitted no other information regarding the proffered position or the Islamic Academy of Alabama.

In a request for evidence (RFE) dated September 18, 2002, the director instructed the petitioner to "submit a detailed job description of the current proffered position . . . including how much the applicant will be paid, number of hours and other compensations." In response, the petitioner submitted a copy of a brochure for the Islamic Academy of Alabama and a copy of a "Parent Handbook;" however, none of the documents addressed the duties of the proffered position.

In his December 16, 2002 letter accompanying the petitioner's response to the RFE, counsel stated:

The current proffered position . . . is a full time (30 hours minimum per week) teacher of Islamic studies for students ten years of age and younger in both the Islamic Academy and the Sunday School curriculum. Her duties include but are not limited to instructing the students in the Islamic faith and traditions, Islamic history and religious practices, proper reading and memorization of the Quran, and Arabic language skills so that the students may read the Quran in its original language. The pay amount for this position is tuition credit for [the beneficiary's] children plus an hourly wage of at least minimum wage.

Counsel submitted no evidence to support his statements. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On motion, however, counsel submitted a September 22, 2003 affidavit from [redacted] chairman of the education committee for the Islamic Academy of Alabama. According to [redacted]

In her position [with the petitioner, the beneficiary] instructs children ten years of age and younger in the Islamic faith and traditions, Islamic history and religious practices, proper reading and memorization of the Quran, and Arabic language skills so that the students may read the Quran in its original language.

The required credentials for employment in this position are a demonstrated strong background in Islamic studies . . . and a demonstrated knowledge of Islamic faith and teachings, including knowledge of the Quran and ability to recite Quranic passages properly from memory. The position also requires a person with prior teaching experience and basic computer skills.

We find that the evidence submitted sufficiently establishes that the duties of the proffered position are consistent with those of a religious instructor, and that the proffered position qualifies as a religious worker pursuant to the statute and regulation.

The second issue presented on appeal is whether the petitioner established that the beneficiary had been continuously employed in a qualifying religious vocation or occupation for two full years prior to the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that “[a]n alien, or any person in behalf of the alien, may file a Form I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States.” The regulation 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.”

The regulation at 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 May 2, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as a religious instructor throughout the two-year period immediately preceding that date.

In its undated letter accompanying the petition, the petitioner stated that the beneficiary “has served as a teacher of Islamic Religion and Faith . . . for about 2 years.” The petitioner submitted no corroborative evidence of the beneficiary’s work experience during the qualifying two-year period. 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)).

In her RFE, the director instructed the petitioner to:

Submit a detailed description of the beneficiary’s prior work experience including duties, hours and compensations . . . accompanied by appropriate evidence (such as copy of pay stubs or checks, W-2’s or other evidence as appropriate). Submit a copy of the income tax returns with all the pertaining W-2s for the two years preceding the filing of this petition. All this information requested must include the two years preceding the filing of this petition.

In response, the petitioner submitted a December 16, 2002 letter from [REDACTED] the principal of the Islamic Academy of Alabama, stating that as compensation for her services, the beneficiary received tuition credit for her four children in the amount of \$4,000 for the 1998-1999 school year, \$4,500 for the 1999-2000 school year, and \$5,000 for the 2000-2001 school year. The petitioner submitted no evidence of the tuition credit reportedly received by the beneficiary. *See Matter of Soffici*, 22 I&N Dec. at 165. The petitioner also

submitted a copy of a wage report for the year ending 2001 and a document entitled "W-2 State Wage and Tax Listing." These documents and the corresponding copies of the beneficiary's 2001 Forms W-2, Wage and Tax Statements, reflect that the petitioner issued two Forms W-2 to the beneficiary, with earnings of \$1,400 and \$2,004. The beneficiary's name appears under one employee number on similar reports for 2000, indicating that she received \$877.06 for the year.¹ The petitioner submitted a partial copy of the beneficiary's year 2001 Form 1040, U.S. Individual Income Tax Return, that she filed jointly with her husband and on which they claimed adjustable gross income of \$11,174. The Form 1040 also reflects the wages of \$3,404 that were reflected on the two 2001 Forms W-2; however, the petitioner submitted no other evidence regarding compensation received by the beneficiary in 1999 or evidence of work performed by the beneficiary during the qualifying period. *Id.*

In his letter accompanying the petitioner's response to the RFE, counsel stated:

I would like to point out that the statute requires the beneficiary to have at least two years of experience in the religious occupation for which the petitioner is sponsoring him or her immediately prior to the filing of the petition. The plain language of 8 C.F.R. § 204.5(m)(3)(ii)(A) indicates that the experience may not be gained subsequent to the filing of the petition, but does not require the experiential work to have occurred at any specific date. Further, in contrast to the language contained in the REQUEST FOR EVIDENCE, 8 C.F.R. § 204.5(m)(3)(ii)(A) does not contain the term "continuous experience," but rather "experience."

It is the position of this office that this interpretation by the service is based neither on the regulations, nor the statute, nor the legislative history of the Act . . . [T]he requirement [is] for the proffered position to be remunerated prospectively, that is upon the approval of the petition. Any other conclusion would show a blatant disregard for the plain language of this regulation.

Furthermore, this matter was conclusively settled in **St. John the Baptist Ukrainian Catholic Church v. Novak, 00-CV-745 (Northern District, New York)**, whereas the INS (Service) conceded that voluntary employment was acceptable for the two-year period prior to the filing of the Special Immigrant petition. [Emphasis in the original.]

Counsel's claim that this has been "conclusively settled" is not supported by the record as counsel has not provided a copy of the court's decision. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Further, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, however the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

¹ Although it is subsequent to the filing date of the petition, we note that the beneficiary's name does not appear on documentation reporting wages for 2002.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." See H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

The term "continuously" also is discussed in a 1980 decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

In line with these past decisions and the intent of Congress, it is clear, therefore, that to be continuously carrying on the religious work means to do so on a full-time basis. That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is not paid, the assumption is that he/she is engaged in other, secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who in accordance with their vocation live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and generally salaried. To hold otherwise would be contrary to the intent of Congress.

On motion, counsel appeared to modify his argument, acknowledging that:

I.N.A. § 101(a)(27)(C)(iii) requires that the alien has been employed in the same position as the proffered position continuously for at least the 2-year period immediately preceding the time of the application for admission. Because this section requires that the alien must have been employed in the "same position" as the proffered position, the Service maintains that the prior work experience must have been in a paid position as well.

Counsel also stated that, unlike the alien in *St. John the Baptist Ukrainian Catholic Church v. Novak*:

[The beneficiary of the present petition] has received a tuition credit and a small salary for her work for the two years prior to the filing of the religious worker petition--she has not been volunteering her services. Like the alien in *St. John* who was supported by her family, [the beneficiary] was not solely dependent for her support during those two years on supplemental (non-religious) employment or solicitation of funds, instead she received a small salary and she was supported by her husband.

In her affidavit submitted on motion, the beneficiary stated that her husband supported her during her employment with the petitioner. Nonetheless, the petitioner submitted no evidence of the tuition credits that it allegedly provided to the beneficiary and submitted no evidence that the beneficiary's husband provided the

financial support for the family during 1999 and 2000. The petitioner also failed to submit any other evidence, such as authenticated work or class schedules, or similar documentary evidence that corroborates the beneficiary's employment during the qualifying two-year period. *Matter of Soffici*, 22 I&N Dec. at 165.

Accordingly, the evidence submitted does not establish that the beneficiary was continuously employed as a religious instructor for two full years preceding the filing of the visa petition.

The third issue on appeal is whether the petitioner established that it has the ability to pay the proffered wage.

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 petitioner stated that the beneficiary's compensation for the proffered position would consist of tuition credit for her four children and an hourly wage of "at least the minimum wage." The petitioner submitted no evidence of its ability to compensate the beneficiary with the petition.

In response to the RFE, the petitioner submitted copies of its profit and loss statements for the periods 1999 through October 2002, copies of its year 1998 through 2001 Forms A-3, State of Alabama Annual Reconciliation of Alabama Income Tax Withheld, and the previously discussed wage report documents.

On motion, counsel cited an unpublished AAO decision in which the AAO concluded that the alternative evidence submitted by the petitioner was sufficient to establish its ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS) are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The above-cited regulation 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 primary evidence.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner has employed the beneficiary at the stated salary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner's evidence did not establish that it had previously employed the beneficiary at the stated salary prior to the filing of the petition.

Accordingly, as the petitioner has not established that it has paid the beneficiary the proffered salary in the past and failed to submit any of the primary types of evidence, it has failed to establish that it has the continuing ability to pay the beneficiary the proffered wage as of the filing date of the petition.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.