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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: NEBRASKA SERVICE CENTER
LIN 00 184 50473

Date: **DEC - 1 2008**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 foundation that operates the Islamic School of Kansas City (ISKC). 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 curriculum consultant and teacher. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a curriculum consultant and teacher immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established its ability to pay the beneficiary's proffered salary.

On appeal, the petitioner submits a brief and additional exhibits.

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 Dec. 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. *Id.* 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 589.

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 March 6, 2009, 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 March 6, 2009, 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 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 June 5, 2000. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a curriculum consultant and teacher throughout the two years immediately prior to that date.

In a May 21, 2000 letter accompanying the initial filing of the petition, [REDACTED], president of ISKC and chief executive officer of the petitioning entity, stated that the beneficiary "has been employed in this position [curriculum consultant and teacher] in R-1 status since his entry to the United States in March, 1999."

A copy of the petitioner's "Master List" payroll records shows the beneficiary's hire date as December 12, 1998. In those records, the beneficiary is one of four employees classified under "Administration." To establish the beneficiary's employment prior to December 12, 1998, the petitioner submitted a copy of a July 29, 1998 letter from [REDACTED] Secretary of the Canadian Islamic Trust Foundation, Toronto, Canada. [REDACTED] stated:

[The beneficiary] was appointed as Principal, for the ISNA-Islamic School, Mississauga, Ontario in 1981. . . . As Principal, [the beneficiary] is responsible for the overall administration of the school as well as teaching in various areas like basic Islamic faith, Islamic history, Quranic and Arabic language.

[The beneficiary] in addition to the above mentioned responsibilities also conducts the religious services, such as leading the prayers, delivering Friday prayer sermons (Khutaba), leading Eid prayers (Eidul Fitr & Eidul Adha – the two major Muslim mass prayers) performing marriages . . . and many other social services for the Muslim community not only in OTA but across Canada.

The letter cannot serve as direct evidence of the beneficiary's employment after July 29, 1998.

After the director approved the petition, the beneficiary filed a Form I-485 adjustment application on January 11, 2001, which included Form G-325A, Biographic Information. On Form G-325A, instructed to list his employment over the past five years, the beneficiary identified two positions he had held. The beneficiary stated that he was a "School Principal" for the Canadian Islamic Trust Foundation from September 1981 to November 1999 and "Director of Education" for the petitioning entity from November 1999 onward. Likewise, the beneficiary indicated that he resided in Mississauga, Ontario until November 1999. In all, the petitioner listed the date November 1999 three times on Form G-325A and then signed the form directly above this warning: "severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact."

secretary general of the Islamic Society of North America, stated in a September 29, 1998 letter:

[The beneficiary] has served in various leadership positions in Islamic Society of North America (ISNA) for the last 20 years. He was the president of ISNA for 4 years, 1993 – 1997. He is currently the member of ISNA Majlis Shura and the executive council.

[The beneficiary] is an educationist and has helped in establishing Islamic Schools in America. His professional support of Islamic Education and mobilizing financial support for Islamic Schools has been of immense value to [the] Muslim Community.

In a letter accompanying the adjustment application, [REDACTED] repeated his earlier claim that the beneficiary has worked for the petitioner "since March 1999." The petitioner and the beneficiary have thus provided three different starting dates for the beneficiary's work with the petitioner – December 1998, March 1999 and November 1999. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

On December 7, 2007, the director issued a notice of intent to revoke the approval of the petition. In the notice, the director stated:

[I]t is not clear that the experience in an administrative position, such as a principal, is in the same capacity as that of the proffered position. The letter [from ██████████] also indicates that the beneficiary's services were utilized across Canada, but does not provide any explanation. A second letter from The Islamic Society of North America indicates that the beneficiary contributes by "mobilizing financial support."

First of all, the record does not contain evidence of the beneficiary's work experience during the requisite period. Letters verifying experience should be from the employers utilizing the beneficiary's services between June 5, 1998 and June 4, 2000. . . . As it appears that the beneficiary was also a public speaker, fund-raiser, and actively involved in other organizations during that time frame . . . evidence should demonstrate how the beneficiary was continuously and primarily engaged in the religious profession.

In response to the notice, counsel stated that the beneficiary "was engaged in the exact same work in Canada" before he entered the United States, and that the beneficiary "had been engaging in the same activity for [the petitioner] since March, 1999." Counsel therefore contends that "it is without doubt that [the beneficiary] had the requisite two-year job experience necessary immediately prior to filing his I-360 application." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel did not address the contradictory evidence that placed the beneficiary's hire date well before or after March 1999.

The director issued a notice of revocation on May 29, 2008, stating that the petitioner failed to submit "evidence of the beneficiary's experience between June 5, 1998 and March 29, 1999." On appeal, counsel observes that the beneficiary held an R-1 nonimmigrant religious worker visa, and "[t]here has [sic] never been questions raised that [the beneficiary] was not, at any time, in compliance of his R-1 visa." Counsel reasons that the director's failure to question the beneficiary's R-1 status is tantamount to a finding that the beneficiary "was properly engaged in a religious occupation during the requisite period." This argument does not persuade the AAO. The issuance of a nonimmigrant visa necessarily predates the work to be done in accordance with that visa; therefore, the existence of the visa is not evidence of subsequent employment. Furthermore, we reject the contention that, once an alien receives a nonimmigrant visa, we must assume that the petitioner adhered to the terms of that visa unless there is evidence that USCIS (or legacy INS) disputed that visa at the time. This contention improperly posits a presumption of eligibility and impermissibly puts the burden of proof on USCIS rather than on the petitioner.

Regarding the beneficiary's work in Canada prior to his entry into the United States, counsel asserts that the beneficiary "was employed by ISNA from 1979 thru October 1998." The record contains copies of processed monthly paychecks issued to the beneficiary by ISNA Islamic School, Toronto, Ontario. The checks are dated from January 30, 1996 to October 27, 1998, and do not account for the beneficiary's activities after the latter date. As we have already noted, when the petitioner first filed the petition, the petitioner claimed that the beneficiary began working for the petitioner in March 1999; the petitioner has since repeated that starting date. Later documents pushed that date back by several months and, in the case of the beneficiary's own claims, forward by over one year. These inconsistencies cast doubt on the petitioner's credibility.

We note the existence of a payroll record indicating that the petitioner hired the beneficiary in December 12, 1998 (not October 1998 as counsel claims on appeal), but that record itself dates from mid-2000 and includes no evidence of payments prior to 2000. Even then, if the beneficiary's employment in Canada ended in October 1998 and his employment in the United States did not begin until December 1998, then the intervening period was not merely a vacation or sabbatical, but a period of apparent unemployment during which he was apparently not engaged in any religious work whatsoever. Such unemployment would, itself, interrupt the continuity of his qualifying religious work.

The petitioner's appeal submission includes copies of various ISKC teacher rosters including the beneficiary's name. The earliest relates to the 1999-2000 school year. A photocopy of a document identified as ISKC's graduation program from June 13, 1998 identifies the beneficiary as the keynote speaker and states that the beneficiary "is leaving the Muslim community in Toronto at the end of this year to join forces with us." No specific date was given, and the beneficiary is known to have been in Toronto after the 1998-99 academic year began *circa* September 1998.

Based on the above discussion, the AAO affirms the director's finding that the petitioner has not credibly or persuasively established that the beneficiary continuously carried out qualifying religious duties during the two years immediately preceding the petition's filing date.

The second and final issue concerns the petitioner's ability to compensate the beneficiary at the proffered rate 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 payroll records included with the petitioner's initial submission indicate that the petitioner had paid the beneficiary \$12,000 between January and June 2000, consistent with the proffered base salary.

The petitioner submitted a copy of its Internal Revenue Service (IRS) Form 990, Return of Organization Exempt From Income Tax, for the tax year ending June 30, 1999. This income tax return covered the most recent year for which a Form 990 return would have been available as of the June 5, 2000 filing date. According to this return, the petitioner collected \$492,166 in revenue, with a net excess of \$9,652 after expenses (including salaries).

In the notice of intent to revoke, the director stated: "The record lacks evidence that the prospective employer (ISKC) has the ability to pay the proffered wage of \$24,000 as of June 5, 2000, and continuing to the present." The regulation at 8 C.F.R. § 204.5(g)(2) clearly requires that the intending employer establish its

ability to pay the beneficiary from the petition's filing date until the beneficiary becomes a lawful permanent resident.

In response, counsel stated "[t]he school remains solvent and is not at risk of bankruptcy." The petitioner submitted copies of the petitioner's profit and loss statements from 2000 to 2006. There is no evidence that these statements are audited. Even then, the documents facially indicate that the petitioner is losing money. Four of the six submitted profit and loss statements show negative net income; the 2001-2002 statement shows a loss in excess of \$70,000. In the aggregate, the six statements show a net loss of \$130,167.86 from July 1, 2000 to June 30, 2006. Because the profit and loss statements address only cash flow, they do not show that the petitioner holds sufficient liquid assets to offset these significant losses.

In the notice of revocation, the director stated that the profit and loss statements do not conform to the evidentiary requirements at 8 C.F.R. § 204.5(g)(2), and even if they did, the significant losses shown on those statements would be of concern. On appeal, the petitioner submits copies of various tax documents.

The petitioner submits uncertified copies of its IRS Form 990 returns for fiscal years 2001-2002 through 2006-2007. These returns show the following information:

Year ending June 30:	2002	2003	2004	2005	2006	2007
Total revenue	\$455,959	\$436,239	\$467,581	\$474,875	\$441,120	\$315,011
Total expenses	585,383	511,041	461,949	465,420	434,482	372,134
Excess or (deficit)	(129,424)	(74,802)	5,632	9,455	6,638	(63,363)
Net assets:						
Beginning of year	48,668	(80,756)	(36,655)	(31,023)	(21,568)	(14,930)
End of year	(80,756)	(36,655) ¹	(31,023)	(21,568)	(14,930)	(78,293)

The petitioner does not appear to have submitted Forms 990 for 1999-2000, the fiscal year that would include the petition's June 5, 2000 filing date, or for 2000-2001. The Forms 990 show that, in some years, the petitioner's revenue has slightly exceeded its expenses, albeit by an amount considerably below the proffered wage. In other years, the petitioner ran a very substantial deficit. A relevant question, here, is whether the petitioner has paid the beneficiary out of its revenues during those years. If the petitioner did not pay the beneficiary during a given year, then the petitioner's minimal excess revenue would not have been sufficient to cover the beneficiary's salary for that year. The petitioner's chronic negative assets do not escape our notice as we consider the petitioner's long-term financial prospects.

Copies of IRS Form W-2 Wage and Tax Statements show the following payments to the beneficiary:

Year	Employer	Amount
2000	The petitioner	\$28,000.00
2001	The petitioner	36,000.00

¹ The petitioner's deficit for 2002-2003 would have been significantly higher, but the return identifies \$118,903 in "debt forgiveness from ICM."

2002	The petitioner	44,000.00
2003	[not provided]	
2004	The petitioner	47,416.72
2005	Center For Islamic Education in North America	60,000.00
2006	[not provided]	
2007	The petitioner	60,000.00

The Form W-2 from the Center For Islamic Education in North America (CIENA) shows an Employer Identification Number (EIN) that does not match the petitioner's EIN. Thus, in 2005, the beneficiary received his salary not from the petitioner, but from a separate corporate entity. Therefore, the available documentation does not show that the petitioner was able to pay the beneficiary's salary in 2005; it shows, rather, that the petitioner did not pay the beneficiary that year. The petitioner has not shown that the petitioner's Form 990 returns incorporate CIENA's financial information. Because some of the beneficiary's IRS Forms W-2 are missing from the record, and because the beneficiary's salary for at least one year came from a separate corporate entity, with its own EIN, the available evidence does not establish that the petitioner has consistently compensated the beneficiary in the years following the filing of the petition.

Copies of the beneficiary's IRS Form 1040 income tax returns for 2000-2007 show that the beneficiary reported wages and salaries in amounts matching the Forms W-2 listed above. In 2003 and 2006, years for which the petitioner provided no Forms W-2, the beneficiary did not report any wages or salaries. Instead, all of his claimed income was in the form of "business income" for "consulting" – \$41,200 in 2003 and \$50,154 in 2006. Because the beneficiary claimed a different type of income in 2003 and 2006 than in the surrounding years, there is no reason to presume that his "business income" came from the same source as his salary.

We note that Schedule A of the Form 990 return instructs the tax-exempt entity to provide the "Name and address of each employee paid more than \$50,000." On its Form 990 returns, the petitioner consistently wrote "none," which appears to be in conflict with the claim to USCIS that, in recent years, the petitioner's salary has exceeded \$60,000. The petitioner also indicated that it did not pay any independent contractors \$50,000 or more per year, which would rule out the beneficiary's non-salary "business income" which exceeded \$50,000 in 2006. This additional contradiction necessarily undermines the credibility and evidentiary weight of the documents in question, pursuant to *Matter of Ho* at 591.

Based on the above discussion, the AAO concludes that, while there is some evidence that the petitioner has compensated the beneficiary at a level equal to or above the proffered salary, there are gaps and inconsistencies in that evidence that prevent us from finding that the petitioner has met its burden of proof regarding its ability to pay the beneficiary the proffered salary.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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.

ORDER: The appeal is dismissed.