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U.S. Citizenship
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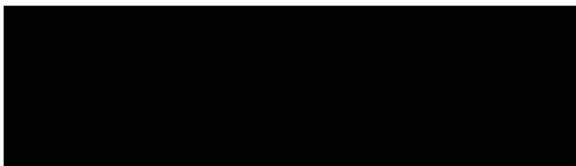
Petitioner:

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 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.

A handwritten signature in cursive script, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter 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 (the Act), 8 U.S.C. § 1153(b)(4), to perform services as an imam (minister). The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as an imam 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, or that it had made a qualifying job offer to the beneficiary.

On appeal, the petitioner submits a brief from counsel and several exhibits.

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 and second grounds for denial are interrelated, as each ground concerns the beneficiary's current and prospective compensation.

The Citizenship and Immigration Services (CIS) regulation at 8 C.F.R. § 204.5(m)(4) requires the prospective employer to establish the terms of the job offer. An authorized official of the religious organization in the United States must state how the alien will be solely carrying on the vocation of a minister (including any terms of payment for services or other remuneration).

Once the petitioner establishes the terms of compensation, the prospective employer must show its ability to meet those terms. The CIS 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.

In a letter accompanying the initial filing, [REDACTED], President of the petitioning mosque, stated: "Compensation of [the beneficiary] is currently at a base annual rate of \$19,200 per year. He also receives a housing allowance and other contributions which are valued at more than \$11,000 per year." Dr. [REDACTED] stated that the petitioner has employed the beneficiary "since April 15, 2003." The "base annual rate of \$19,200 per year" translates to monthly payments of \$1,600 each.

The petitioner's initial submission included bank statements and other documents relating to the petitioner's past financial status and the beneficiary's past compensation. We shall address these documents in the context of the beneficiary's past work. The initial submission did not establish the petitioner's then-current financial status or show that the petitioner compensated the beneficiary at the level claimed.

On December 11, 2006, the director issued a request for evidence (RFE), instructing the petitioner to submit additional financial documentation. In response, the petitioner submitted a copy of [REDACTED]'s previously submitted letter. As noted previously, [REDACTED] indicated that the beneficiary receives "\$19,200 per year. He also receives a housing allowance and other contributions which are valued at more than \$11,000 per year." The adverb "also" indicates that the "housing allowance and other contributions" are in addition to, rather than part of, the \$19,200 annual salary. Therefore, evidence that the petitioner pays or has paid the beneficiary \$1,600 per month cannot, by itself, suffice to show that the petitioner meets, or is able to meet, the terms of the job offer.

In response to the director's RFE, the petitioner submitted copies of bank statements from February through November 2006, showing monthly \$1,600 checks. The petitioner also submitted copies of several \$1,600 checks issued to the beneficiary during 2006.

Counsel stated that the bank statements are from the petitioner's "principal bank account." It is not clear how many other accounts the petitioner maintains. We note that a printout from the Weslaco (Texas) Water Department shows monthly debits for the petitioner's water bill from August 2005 to February 2006. The petitioner's bank statements from that same period do not reflect the water bill payments. Therefore, it appears that the petitioner pays its water bills from a separate account not documented in the record.

On September 13, 2007, the director denied the petition, finding that the petitioner failed to submit the types of evidence required by 8 C.F.R. § 204.5(g)(2). The director also noted that the petitioner did not establish that it has actually paid, or is able to pay, the beneficiary's full rate of compensation as described by [REDACTED]

We note that, in denying the petition, the director stated that there was "[n]o way to confirm" that most of the beneficiary's paychecks were ever presented for payment. While the photocopied checks themselves show no marks of processing, the bank statements show payment of checks with numbers and amounts matching the checks dated during the period covered by those bank statements. Taken together, therefore, the bank statements and checks show that the petitioner paid the beneficiary \$1,600 per month for most of 2006, but they do not show that the petitioner provided additional compensation worth "more than \$11,000 per year."

We further note the director's assertion that "it appears there were no withdrawals in the amount of \$1600 during the month of April 2006 or November 2006 for the beneficiary's salary." The April 2006 bank statement shows a \$1,600 check, number [REDACTED], processed on April 17. The November 2006 bank statement shows check number [REDACTED], also for \$1,600, processed on November 7. The November 2005 bank statement shows no \$1,600 check, but the October 2005 bank statement shows two such checks: number [REDACTED], processed October 4; and number [REDACTED], processed October 31. The spacing of the checks suggests that the October 31 check was intended for November's payment.

On appeal, the petitioner submits a spreadsheet tabulation of checks issued by the petitioner from March 2003 to August 2007. The petitioner also submits front-and-back copies of processed checks dating back to 2003. The 2003-early 2006 checks relate to the beneficiary's employment prior to the March 30, 2006 filing date, and we shall address those checks elsewhere in the decision. Regarding the period after the filing date, the spreadsheet shows that the petitioner paid the beneficiary \$1,600 per month until April 2007, when the beneficiary's monthly pay increased to \$1,900. The spreadsheet also indicates that the petitioner paid the beneficiary \$4,000 in "Ramadan compensation" in October 2006, and the corresponding photocopied check identifies the beneficiary as the payee.

The petitioner asserts on appeal that the "Ramadan compensation" checks that the beneficiary has received in 2006 and in previous years is intended to cover the beneficiary's housing expenses for the entire year. The record does not contain documentation (such as a copy of the lease) to establish that \$4,000 suffices to pay a year's rent for the Weslaco apartment in which the beneficiary resides with his family.

in his initial statement of the beneficiary's job offer, did not specify that the petitioner itself was to be the source of all the beneficiary's income. His use of the term "contributions" to describe income beyond the "base annual rate" is consistent with reliance on contributions from members of the mosque. In a new letter, [REDACTED] stated that the beneficiary's "estimated total of \$11,000 annually for housing and living expenses . . . is paid in part directly by the Center, usually during the month of Ramadan, and in part directly by members of the community." Front-and-back copies of additional checks support this assertion, showing that sources other than the petitioner paid the beneficiary \$5,036.25 between April and December 2006. A table describes some of these checks as being for transportation, and the remaining checks as being for transportation, but the checks themselves are not marked with respect to their purpose. One check is marked "thank you."

8 C.F.R. § 204.5(m)(4) requires the prospective employer to set forth the terms of compensation. The petitioner asserts that some of the beneficiary's compensation is to be in the form of "contributions" from individual members of the congregation, rather than from the petitioner's own income or assets. Because the petitioner is not in a position to guarantee such gifts from individual members or to assure that those members will continue to be able to make such contributions, we cannot accept that a valid job offer includes the vague promise of indeterminate contributions from unidentified persons who are not officials of the petitioning entity. (We note also that the petitioner has not reported any of these third-party gifts as income, which makes it more difficult to consider such gifts to be compensation for services rendered.) The AAO affirms the director's finding that the petitioner has not set forth an acceptable job offer.

There remains the issue of the petitioner's non-compliance with the evidentiary requirements of 8 C.F.R. § 204.5(g)(2). That regulation states that evidence of ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." 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 evidence. The bank statements and other documents in the record provide only a partial view of the petitioner's financial status. One illustration of this, mentioned previously, is that the bank documents in the record do not show payment of the water bills shown in the record. It is therefore a fact, not speculation, that some of the petitioner's financial transactions are not reflected in the record.

Counsel, on appeal, submits a copy of a memorandum from William R. Yates, Associate Director for Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 4, 2004). Counsel has highlighted a section of that memorandum in which Mr. Yates stated: "CIS adjudicators should make a positive ability to pay determination in any one of the following circumstances," including "credible verifiable evidence that the petitioner . . . currently is paying the proffered wage." Counsel argues that the petitioner "has met this standard under all three alternatives" listed in the memorandum.

To support the above argument, counsel has taken a portion of the memorandum out of context. Preceding the highlighted excerpt of the memorandum is the prefatory statement that these circumstances are to be considered only "[i]f the record is complete with respect to all of the required initial evidence." Evidence regarding the petitioner's assets, payment of the proffered wage, and so forth are not "alternatives" to the evidentiary requirements, as counsel claims. Rather, they are factors by which the required evidence is to be judged. If the required evidence is absent from the record, then these evaluative factors never come into play.

The May 4, 2004 memorandum also indicates that an RFE is required "[i]f the record does not contain one of the three required documents (annual report, tax return, or audited financial statement)." The memorandum elsewhere states: "The petitioner must submit at least one of these required documents" (emphasis in original). The memorandum, like the regulation it clarifies, indicates that at least one of these three specified documents is required, not optional or discretionary, if the intending employer has less than 100 employees. The petitioner has indicated that the beneficiary is the petitioner's only paid employee. A full reading of the memorandum itself, therefore, utterly refutes the argument that counsel derives from an incomplete and selective reading of that memorandum.

The petitioner, on appeal, submits an eleven-item table, signed by [REDACTED] and labeled an "Annual Report" for calendar years 2005 and 2006. It contains almost no specific details except those relating to the beneficiary's compensation, and therefore it bears little resemblance to a corporation's annual report as contemplated in the regulations. The petitioner did not submit this document in response to the RFE; it appears, instead, to have been prepared for submission on appeal. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

The petitioner has demonstrated its payment of the "base annual rate" of compensation during 2006, but this does not establish the petitioner's ongoing ability to continue paying that rate. The petitioner has not submitted the evidence required by 8 C.F.R. § 204.5(g)(2). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Because the petitioner has not submitted the required evidence, the AAO must affirm the director's finding that the petitioner has not established its ability to pay the beneficiary the proffered wage.

The third and final issue in this proceeding concerns the beneficiary's past experience. The CIS 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 March 30, 2006. 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.

An alien seeking classification as a special immigrant minister must have been engaged solely as a minister of the religious denomination for the two-year period in order to qualify for the benefit sought, and must intend to be engaged solely in the work of a minister of religion in the United States. See *Matter of Faith Assembly Church*, 19 I&N 391, 393 (Commr. 1986). We note that the Ninth Circuit Court of Appeals, with jurisdiction over the California Service Center, has upheld the AAO's interpretation of the two-year experience requirement. See *Hawaii Saeronam Presbyterian Church v. Ziglar*, 2007 WL 1747133 (9th Cir., June 14, 2007).

A copy of an Internal Revenue Service (IRS) Form 1040X amended income tax return dated September 3, 2004 indicated that the beneficiary reported \$12,384 in adjusted gross income for 2003. An accompanying IRS Form 1099-MISC, Miscellaneous Income, indicated that the petitioner paid the beneficiary \$13,500 in 2003, which is just under eight and a half months' pay at the stated rate of \$1,600 per month. A second Form 1099-MISC indicated that the Islamic Society of Alvin, Texas, paid the beneficiary \$4,500 in 2003.

According to a copy of an IRS Form 1040 income tax return, the beneficiary received \$19,500 in business income as a minister in 2004. That amount also appeared on IRS Form 1099-MISC, identifying the petitioner as the source of the reported income.

The beneficiary's IRS Form 1040A income tax return indicated that the beneficiary earned \$19,200 in wages in 2005. An IRS Form W-2c Corrected Wage and Tax Statement indicated that the petitioner accidentally overreported the beneficiary's 2005 income, by filing two IRS Form W-2 Wage and Tax Statements instead of one. This document repeats the claim that the petitioner paid the beneficiary \$19,200 in 2005.

The petitioner submitted copies of its bank statements from September 2005 through January 2006, as well as a photocopy of a \$1,600 check dated January 31, 2006. The bank statements show payment of monthly \$1,600 checks.

In response to the RFE, the petitioner submitted copies of bank statements and checks from 2006. Counsel observed that the petitioner had already submitted copies of the beneficiary's tax documents from 2004 and 2005.

The director, in denying the petition, noted that the beneficiary amended his 2003 tax return. Because the qualifying period did not begin until late March 2004, the beneficiary's 2003 earnings are not directly relevant to the question of his two years of qualifying experience. Furthermore, the reported amendment did not affect the amount earned, but rather the tax paid on those earnings. Similarly, the correction to the beneficiary's 2005 IRS Form W-2 was to eliminate a duplicate filing. In neither case did the beneficiary suddenly claim previously unreported earnings, which would have been consistent with a false claim fabricated for immigration purposes.

The director also observed that the petitioner had submitted copies of checks from 2006, but not from previous years. The director also stated that there was no evidence that the checks were cashed, but the bank statements establish that the checks were processed for payment.

On appeal, the petitioner submits copies of checks, many of them front-and-back, from 2003 through 2006. The copies show various forms of processing, but every check includes a bank's time stamp on the reverse. These time stamps appear on the 2006 checks which were definitely processed for payment (as the bank statements prove). If we subtract the special "Ramadan" payments, the amounts on the remaining 2004 and 2005 checks match the amounts shown on the IRS Forms 1099-MISC and W-2 for the corresponding years.

With respect to the exclusion of the "Ramadan" payments from the tax forms, the petitioner has stated that those payments were intended to cover the beneficiary's housing. The Internal Revenue Service does not include a minister's housing allowance in the minister's gross income for income tax purposes.¹

¹ Sources: <http://www.irs.gov/taxtopics/tc417.html>, <http://www.irs.gov/faqs/faq/0,,id=199753.00.html> (both visited November 18, 2008; copies incorporated into record).

The documentation of record is internally consistent, and supports the claim that the petitioner compensated the beneficiary at a level consistent with full-time employment. The record contains no evidence of an interruption in the beneficiary's work as an imam. While the petitioner did not submit the checks from 2004 and 2005 in response to the RFE, the petitioner had already submitted IRS forms establishing payment for those years. The checks submitted on appeal corroborate those IRS forms, and the available evidence gives no cause to doubt the authenticity or accuracy of either the checks or the IRS forms.

The AAO withdraws the director's finding that the petitioner has failed to establish the beneficiary's continuous employment during the two years immediately preceding the petition's filing date. Nevertheless, the petition cannot be approved because the AAO has affirmed the other stated grounds for denial.

The appeal will be dismissed 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.