

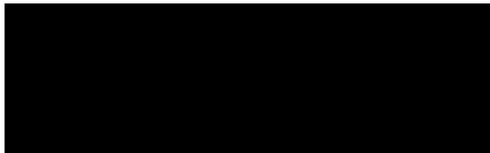
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



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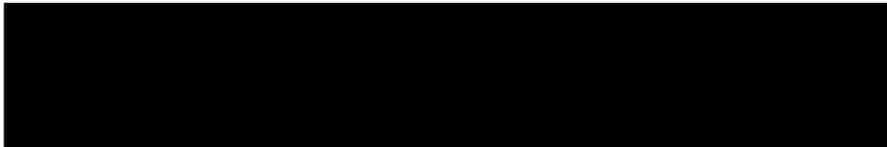
DATE: **JUN 29 2011** OFFICE: CALIFORNIA SERVICE CENTER

FILE:

IN RE: 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (TSC), initially approved the employment-based immigrant visa petition. Upon further review, the Director, California Service Center (CSC), 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 AAO will dismiss the appeal.

The petitioner operates a Sunni Islamic mosque and religious 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 a female minister. The CSC director determined that the petitioner had not established: (1) that the beneficiary was in a valid nonimmigrant status with employment authorization after 2004; (2) its ability to compensate the beneficiary; or (3) that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits an affidavit from a mosque official and documentation relating to repair of storm damage.

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 September 30, 2012, 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 September 30, 2012, 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 petitioner filed the Form I-360 petition on August 7, 2000. The TSC director approved the petition on September 26, 2000, and the beneficiary filed a Form I-485 adjustment application on October 31, 2000. The USCIS District Director, Houston, denied that application on April 21, 2004, and denied a motion to reopen that application on August 7, 2006. The petitioner filed another adjustment application on April 20, 2007, which the USCIS District Director, Houston, denied on August 23, 2007.

As required under section 2(b)(1) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008), U.S. Citizenship and Immigration Services (USCIS) published a rule setting forth new regulations for special immigrant religious worker petitions. Supplementary information published with the new rule specified: "All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

On January 4, 2011, the CSC director issued a notice of intent to revoke the approval of the petition (ITR), informing the petitioner that USCIS would revoke the approval of the petition unless the petitioner submitted evidence newly required under the revised regulations. In response, counsel

stated that, because the TSC director approved the petition in 2000, the petition was not “pending” on November 26, 2008. Therefore, the revised regulations do not apply to the proceeding at hand.

On March 7, 2011, the CSC director issued a superseding ITR, based on the pre-2008 regulations. For the remainder of this decision, the term “director” shall refer to the CSC director, and the term “ITR” shall refer to the March 7, 2011 ITR. The director allowed the petitioner 30 days to respond to the ITR.

In response to the ITR, counsel protested that the director issued the ITR “over 10 years” after the approval of the petition, but allowed the petitioner “only 30 days to respond.” Counsel requested “a year” to gather the requested evidence, and submitted documentation showing that he had scheduled a vacation in Europe. Counsel did not cite any statute, regulation, or case law to support the implied claim that the ITR response period should be proportionate to the amount of time that had elapsed after the approval of the petition. Section 205 of the Act permits revocation “at any time,” with no indication that an older petition entitles the petitioner to a longer ITR response period. The USCIS regulation at 8 C.F.R. § 103.2(b)(8)(iv) states: “in no case shall the maximum response period provided in a request for evidence exceed twelve weeks, nor shall the maximum response time provided in a notice of intent to deny exceed thirty days. Additional time to respond to a request for evidence or notice of intent to deny may not be granted.” There is no provision for a one-year extension.

Counsel also protested that the director had mailed a copy of the ITR to the petitioner’s previous attorney of record instead of the current attorney, which delayed counsel’s receipt of the notice by 11 days. The use of the incorrect attorney’s information was an error by the director, but the record shows that the director also sent a copy of the ITR directly to the petitioner, which was free to respond to the ITR on its own or bring the matter immediately to counsel’s attention. The director’s error, therefore, did not reduce the amount of time available to the petitioner to respond to the ITR.

The director revoked the approval of the petition on April 7, 2011. On appeal, the petitioner submits an affidavit from [REDACTED], president of the petitioning organization, who states:

Prior to 2008, all the records were stored by me at the mosque. . . . Our records included all the payroll records, bank statements, office records, business records, correspondence files – all the inactive files from the mosque. We never threw anything away. We kept everything.

But in October 2008, Hurricane Ike hit the mosque very hard. . . . The room where all our records had been stored was damaged, and filled with water, and empty[d] of its contents.

The petitioner submits copies of invoices, documenting extensive repairs to the petitioner’s property.

The AAO notes that, in the response to the ITD, counsel did not mention the destruction of the petitioner's records.

The director stated that there were four grounds for revocation, but two of the four grounds are essentially the same; they both concern the petitioner's ability to pay the beneficiary's salary. Therefore, the director's decision effectively concerns three grounds for revocation.

NONIMMIGRANT STATUS

The first issue under consideration is, in the director's words, "whether the beneficiary's original Nonimmigrant Visa as an E-2 dependent of a Treaty Investor remains valid." The director, in the ITR, stated:

[T]he beneficiary entered the United States in E-2 status on May 30, 2000. . . .

[T]he principal E-2 Treaty Investor's visa was revoked on August 5, 2004. The beneficiary's status as an E-2 spouse is dependent upon the principal I-129 beneficiary's status. As of August 5, 2004, the beneficiary no longer had a basis of employment for the approved I-360.

. . . Absent additional evidence, USCIS is unable to determine whether the beneficiary has a valid status for employment authorization.

The director did not explain how the above assertions are relevant to the matter at hand. The revocation occurred in August 2004, nearly four years after the approval of the Form I-360 petition. The beneficiary's loss of nonimmigrant status in 2004 did not retroactively affect the prior approval of an immigrant petition in an unrelated classification in 2000. It neither disqualified the beneficiary for the classification sought, nor demonstrated that the approval had been in error. Whatever the consequences for the beneficiary's eligibility to adjust status, the 2004 revocation of her E-2 nonimmigrant status is not a valid reason to revoke the earlier approval of the immigrant petition. The visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws. *Matter of O*, 8 I&N Dec. 295 (BIA 1959). The AAO will, therefore, withdraw this ground for revocation, not because the AAO disputes the director's stated facts, but because those facts have no bearing on the matter at hand.

ABILITY TO PAY

The second stated basis for revocation concerns the petitioner's ability to compensate the beneficiary. Under the regulations applicable to special immigrant religious worker petitions at the time of filing, the petitioner, as the prospective employer, had to demonstrate its ability to compensate the beneficiary at the proffered rate:

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 United States 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.

8 C.F.R. § 204.5(g)(2). In a letter dated July 5, 2000, [REDACTED] stated that the beneficiary would receive "an annual salary of \$16,000."

The petitioner's initial submission included copies of bank statements showing the following month-end balances:

Month	Zakat Account	General Account
October 1999	\$29,399.07	\$72,257.09
November 1999	31,464.78	58,467.42
December 1999	28,791.03	62,661.94
January 2000	34,135.75	69,830.64
February 2000	32,644.75	75,865.19
March 2000	32,718.47	71,742.94
April 2000	18,445.73	73,156.63
May 2000	20,956.07	74,050.02
June 2000	21,492.30	73,457.51

An Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement indicated that the petitioner paid the beneficiary \$9,600 in 1999. This amount is only 60% of the stated annual salary.

In the ITD, the director instructed the petitioner to submit financial evidence, including an audited financial statement for 2000, quarterly wage reports for 1998-2000, IRS Forms W-2 and/or 1099 issued to the beneficiary since 2000, and other materials to show the petitioner's ability and intent to pay the beneficiary the full offered salary. In the revocation notice, the director noted the petitioner's failure to submit the requested documentary evidence.

The petitioner's assertion on appeal that a 2008 hurricane destroyed the petitioner's records would certainly account for the petitioner's inability to submit its own records. The materials requested, however, included numerous materials that ought to have been available from third parties such as

the IRS and the petitioner's bank. The petitioner did not document any attempts to obtain copies of those records.

Furthermore, the petitioner's claim that its records were destroyed in 2008 is not, itself, evidence that the records truly existed before 2008. 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 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Recent bank statements included in the appeal show the following end-of-month figures in the petitioner's general account:

January 2011	\$156,988.99
February 2011	138,002.06
March 2011	143,953.06
April 2011	143,953.06

The bank statements from 1999-2000 and from 2011 appear to show sufficient cash reserves to cover the beneficiary's salary, but the gap between those records means that the petitioner has not shown its ability to pay the beneficiary from the filing date through to the date the beneficiary adjusts status.

Furthermore, the regulation at 8 C.F.R. § 204.5(g)(2) requires 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 regulation at 8 C.F.R. § 103.2(b)(2)(i) states:

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.

The petitioner has not followed the above procedures to account and compensate for the lack of primary evidence. The petitioner has not submitted copies of annual reports, federal tax returns, or audited financial statements, and therefore the petitioner has not met the plain wording of the regulation at 8 C.F.R. § 204.5(g)(2).

The revised regulation at 8 C.F.R. § 204.5(m)(10) allows for alternative means of establishing the petitioner's ability and intent to compensate the beneficiary. As counsel has pointed out, however, that regulation is not applicable in this proceeding. The AAO cannot and will not selectively apply the new regulations in this proceeding because some provisions in the new regulations might be more favorable to the petitioner than their previous counterparts.

The record shows that the petitioner significantly underpaid the beneficiary's claimed salary in 1999, the last year for which records were available as of the filing date. This deficiency, on its face, casts doubt on either the petitioner's ability or its intention to pay the beneficiary the full salary of \$16,000 per year. The petitioner did not submit the financial documentation required under the regulations that applied at the time of filing. The AAO therefore agrees with the director's finding that the petitioner did not submit the required evidence of its ability to compensate the beneficiary starting at the filing date and continuing onward from that date.

PAST EMPLOYMENT

The third and final stated ground for revocation concerns the beneficiary's past experience. At the time the petitioner filed the petition, the U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. §§ 204.5(m)(1) and (3)(ii)(A) required the petitioner to establish that the beneficiary continuously engaged in qualifying religious work throughout the two years immediately preceding the petition's filing date.

In his initial letter dated July 5, 2000, [REDACTED] stated that the beneficiary had "been performing [ministerial] duties as a religious worker with us for more than the last two years." In addition to the aforementioned IRS Form W-2 showing that the petitioner paid the beneficiary \$9,600 in 1999, the petitioner submitted a copy of an IRS Form 1099-MISC Miscellaneous Income statement showing that the petitioner paid the beneficiary half that amount, \$4,800, in 1998. These two amounts, added together, total only \$14,400, less than one year's salary at the stated rate. These amounts are not consistent with the claim of continuous employment. The beneficiary's résumé indicated that she started working for the petitioner in 1998, but she did not specify a date during that year.

In the ITR, the director requested evidence including "an itemized record from the Social Security Administration," copies of the beneficiary's payroll, banking, and income tax records, "the exact dates in which the beneficiary worked at the petitioner's location," and "a detailed letter from the petitioner's employer [sic] that states the beneficiary's exact start date, job title, detailed position description, compensation and end date if applicable."

As noted previously, the petitioner's response to the ITR included no substantive evidence, and the petitioner's appeal chiefly concerns storm damage said to have destroyed the petitioner's records. The hurricane, however, would not have prevented the petitioner from contacting the Social Security

Administration, the IRS, or other outside recordkeeping entities, nor would the hurricane have prevented the petitioner from submitting the detailed letter that the director requested in the ITR.

The petitioner has not submitted the requested documents, adequately accounted for their absence, or shown that the requested materials are not necessary to establish eligibility. The AAO agrees with the director's finding that the petitioner has not adequately documented the beneficiary's required two years of continuous experience immediately preceding the petition's filing date.

The AAO will dismiss the appeal 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 met that burden.

ORDER: The appeal is dismissed.