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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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[REDACTED]

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DATE: **MAY 25 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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:**

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,

*Mari Johnson*

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Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The petitioner filed a motion to reopen and reconsider the AAO's decision. The director erroneously dismissed the motion, and the AAO reopened the proceeding on its own motion to consider the merits of the petitioner's motion.

The petitioner is a Sunni Islamic 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. The director determined that the petitioner had not established that the beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing date of the petition. The AAO agreed with that finding, and also found that the petitioner had not submitted sufficient evidence relating to the beneficiary's past and intended future compensation.

The AAO dismissed the petitioner's appeal on August 19, 2010. The petitioner filed its motion on September 20, 2010. On motion, the petitioner submits a brief and various exhibits.

Under the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.5(a)(1)(ii), the official who made the latest decision in the proceeding generally has jurisdiction over a motion. Therefore, the AAO has jurisdiction over the petitioner's motion. Nevertheless, the director dismissed the petitioner's motion on October 5, 2010. Because the director had no jurisdiction to dismiss the motion, the AAO reopened the proceeding on April 11, 2011. At that time, as required by the regulation at 8 C.F.R. § 103.5(a)(5)(ii), the AAO allowed the petitioner an additional 30 days to supplement the record. The AAO has received no further submission during that time, and therefore the AAO considers the record to be complete.

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).

There follows a brief summary of the proceeding to date. Further details are available in the AAO's appellate decision of August 19, 2010.

The USCIS regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation, either abroad or in lawful immigration status in the United States, continuously for at least the two-year period immediately preceding the filing of the petition.

The petitioner filed the Form I-360 petition on August 19, 2009. The beneficiary entered the United States as a B-2 nonimmigrant visitor for pleasure on February 5, 2009, and his B-2 nonimmigrant status expired on August 4, 2009, 15 days before the filing date. The USCIS regulation at 8 C.F.R. § 214.1(e) states that a B-2 nonimmigrant may not engage in any employment, and that any unauthorized employment by a nonimmigrant constitutes a failure to maintain status.

The petitioner submitted a translated certificate dated January 19, 2009, indicating that the beneficiary worked at [REDACTED] (mosque) as musebbih ([M]uslim leader in prayers) in Sarajevo." The AAO found that the translation was incomplete, and therefore did not meet the requirements of the regulation at 8 C.F.R. § 103.2(b)(3). Another translated document, also dating from January 2009, identified the beneficiary as the editor of a "magazine for the education of children in the religious field" published by "[REDACTED]

The petitioner's initial submission did not include any documentation of the beneficiary's activities in the United States during the six months immediately preceding the petition's filing date.

The director denied the petition on November 5, 2009, noting that "there is no provision in the regulations that allows a B-2 visitor to work in the U.S." Indeed, there is a provision in the regulations (8 C.F.R. § 214.1(e)) that specifically prohibits such employment. Therefore, the beneficiary could not have engaged in qualifying employment while in lawful immigration status in the United States during the two-year qualifying period. The director also observed that the beneficiary's B-2 nonimmigrant status expired before the petition's filing date.

Counsel, on appeal, stated: "The [beneficiary] has not been working and is supported by the [petitioner] because he is fully aware that such action is illegal." Counsel claimed that the beneficiary traveled to the United States "for the sole purpose of visiting friends."

The AAO affirmed the director's decision, stating: "For the last six months of [the] two-year period [immediately preceding the filing of the petition], the beneficiary was in the United States, in a nonimmigrant status that did not permit him to engage in qualifying employment. The uncontested facts of the petition are facially disqualifying."

On motion, counsel claims that section 274(a)(1)(C) of the Act

allows for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

Section 274(a) of the Act does not concern eligibility for any immigrant classification. Rather, that section of the Act outlines criminal penalties for harboring aliens. The section cited by counsel does not state or imply that an alien harbored by a religious organization is eligible for employment authorization or any other immigration benefit. Rather, the cited section states that members of that denomination will not be prosecuted for harboring an alien under the conditions described above. The present proceeding is not a criminal prosecution, and therefore section 274(a)(1)(C) of the Act is irrelevant to the matter at hand.

On motion, counsel claims, for the first time, that the beneficiary "has volunteered his services so as not to fail to [abide] by US immigration law by working without permission." This claim flatly contradicts counsel's prior claim that the beneficiary "has not been working" in the United States. Indeed, in the original appeal, counsel protested that the director's "allegation that the [beneficiary] was working . . . clearly is an assumption unsupported by facts or evidence." Counsel, on motion, now claims, in effect, that the director's assumption was correct.

Of the beneficiary's newly claimed work in the United States, counsel claims: "Volunteering his services fulfilled the requirements under 8 CFR Sec. 204.5(m)(4)." This is not correct. The regulation at 8 C.F.R. § 204.5(m)(4) requires the beneficiary to have worked "in lawful immigration status." If the beneficiary "volunteered" for the petitioner, while receiving room, board, and other material support, then he was, for all practical purposes, "employed" during that time. The Board of Immigration Appeals has held that an alien who "receives compensation in return for his efforts on behalf of the Church" is "employed" for immigration purposes, even if that compensation takes the form of material support rather than a cash wage. See *Matter of Hall*, 18 I&N Dec. 203, 205 (BIA 1982).

As noted previously, the USCIS regulation at 8 C.F.R. § 214.1(e) prohibits B-2 nonimmigrants from engaging in any employment. The petitioner's motion rests on the claim that the beneficiary, who entered the United States as a B-2 nonimmigrant supposedly to visit friends, performed work for the petitioner, while the petitioner provided him with material support. The circumstances described are not an explanation; they are, rather, a stipulation of ineligibility. If the beneficiary truly worked for the petitioner in exchange for room and board, then he disqualified himself through those actions. If, on the other hand, the beneficiary did not perform those actions, then the motion rests on false claims. Neither of these alternatives is conducive to a finding in the petitioner's favor.

Furthermore, the regulation at 8 C.F.R. § 204.5(m)(11), which the AAO quoted in its dismissal notice, requires that past experience in the United States "must have been authorized under United States immigration law." The petitioner has identified no event or circumstance by which USCIS or any other government entity authorized the beneficiary, as a B-2 nonimmigrant visitor for pleasure, to work at the petitioning mosque.

For the above reasons, the AAO affirms the prior findings by the AAO and the director that the petitioner has not satisfied the regulatory requirements at 8 C.F.R. § 204.5(m)(4) relating to lawful past experience by the beneficiary.

Beyond the above finding, the AAO's decision contained two additional findings, either of which would, by itself, serve as grounds for denial of the petition. The AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The regulation at 8 C.F.R. § 204.5(m)(11) relates to the two-year employment requirement also found at 8 C.F.R. § 204.5(m)(4). That regulation reads:

*Evidence relating to the alien's prior employment.* Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:

- (i) Received salaried compensation, the petitioner must submit IRS [Internal Revenue Service] documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns.
- (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available. . . .

If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

The AAO acknowledged that no IRS documentation would exist for the beneficiary's time in the United States, but stated:

Nevertheless, the petitioner would still have to submit comparable evidence of foreign employment. The petitioner asserts that all of the beneficiary's claimed qualifying employment took place in Bosnia. The petitioner, however, did not submit evidence comparable to IRS documentation to show the beneficiary's claimed experience in Bosnia. A single certificate (with a poor and incomplete translation) is not comparable to IRS documentation.

On motion, counsel states:

The [petitioner] is unable to provide any Bosnian IRS documents since Imam's or religious persons do not pay taxes in Bosnia. In addition, upon research it has come to the attention of the undersigned attorney that [redacted] does not have personal income taxes. Therefore, it is impossible to provide the requested documentation.

The petitioner submits a translated certificate from the beneficiary's former mosque in Bosnia, stating: "According to the policy of Republic Bosnia and Herzegovina there are no taxes to be paid by imam in Bosnia and Herzegovina." The certificate does not cite any laws, regulations, or government publications to that effect. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973).

With respect to counsel's claim that "Bosnia Herzegovina does not have personal income taxes," the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel mentions unspecified "research" but does not elaborate or provide any corroborating evidence.

It is not clear what "research" counsel conducted, but the AAO, through the Google search engine, quickly located a page on a Bosnian government website that includes a table of personal income tax rates in [redacted]. This site, available at [redacted] (printout added to record May 24, 2011), contradicts counsel's unsupported claim that "Bosnia [redacted] does not have personal income taxes."

The petitioner cannot sidestep evidentiary requirements simply by claiming the evidence is unavailable. 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.

Under the above regulation, even if the petitioner were to prove that income taxes do not exist in Bosnia and Herzegovina, the petitioner would need to submit secondary evidence such as payroll records. The petitioner has not submitted affidavits or persuasively established and overcome the unavailability of both primary and secondary evidence. The petitioner has not even submitted any exhibits that clearly state the overseas mosque compensated the beneficiary at all.

Finally, the AAO, in its dismissal notice, cited the regulation at 8 C.F.R. § 204.5(m)(10):

*Evidence relating to compensation.* In any case, evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. If IRS documentation, such as IRS Form W-2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

The AAO stated:

██████████, president of the petitioning organization, stated: "██████████ monthly salary will be \$1000.00. Apartment and food will be taken care of by members of the organization." The petitioner did not provide any documentation, from the IRS or otherwise, to establish how it intends to compensate the beneficiary. Furthermore, the wording of the regulation requires evidence showing that "the petitioner intends to compensate the alien." Therefore, assurances of third-party support outside of the petitioner's assets (such as housing provided by an individual member of the congregation) cannot suffice in this regard. If the beneficiary's food and lodging are to come from sources outside of the petitioner's direct control, then the petitioner is not generally in a position to ensure that those sources provide what is promised. The