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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: **OCT 28 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.

Thank you,

Perry Rhew
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 (AAO) on appeal. The AAO will withdraw the director's decision. Because the record, as it now stands, does not support approval of the petition, the AAO will remand the petition for further action and consideration.

In this decision, the term "prior counsel" shall refer to Naomi J. Bang, who represented the petitioner at the time the petitioner filed the petition. The term "counsel" shall refer to the present attorney of record, whose signature appears on the most recent Form G-28, Notice of Entry of Appearance as Attorney or Representative in the record.

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 a Qur'anic and religious studies teacher. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous, lawful work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel.

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 U.S. Citizenship and Immigration Services (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 USCIS regulation at 8 C.F.R. § 204.5(m)(11) requires that qualifying prior experience, if acquired in the United States, must have been authorized under United States immigration law.

The petitioner filed the Form I-360 petition on August 25, 2009. On that form, the petitioner indicated that the beneficiary held R-1 nonimmigrant religious worker status, valid until December 27, 2009. The petitioner's initial submission included evidence of the beneficiary's December 28, 2006 entry as an R-1 nonimmigrant.

On April 28, 2010, the director issued a notice of intent to deny the petition. In that notice, the director stated: "on or about June 27, 2007, the R-1 visa that had been issued to the beneficiary was revoked by the Department of State for just cause."

In response to the notice, prior counsel stated that the beneficiary's "R-1 visa has NEVER been revoked – for just cause or otherwise. We ask that the Service re-check their records before making unfounded allegations." The petitioner submitted no evidence from the Department of State to show that the beneficiary's nonimmigrant visa remained valid.

The director denied the petition on November 3, 2010, stating that USCIS had confirmed the revocation of the beneficiary's R-1 nonimmigrant visa. The director cited case law to the effect that counsel's unsubstantiated claims are not evidence. See *Matter of Obaighbena*, 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).

On appeal, counsel quotes the USCIS regulation at 8 C.F.R. § 205.2(a), which authorizes USCIS to revoke the approval of a visa petition "upon notice to the petitioner." Counsel asserts that neither the petitioner nor the beneficiary "ever received notice of the alleged R-1 Visa revocation on or about June 27, 2007." Counsel also argues that the lack of notice deprived the petitioner of its appeal rights under 8 C.F.R. § 205.2(d).

The cited regulations do not apply to the proceeding at hand. The regulations at 8 C.F.R. § 205 apply only to immigrant petitions filed under section 204 of the Act, not to nonimmigrant petitions. Furthermore, the regulations refer to the revocation of the approval of a petition filed with USCIS, rather than revocation of the visa itself. In this instance, the petitioner never filed a nonimmigrant petition on the beneficiary's behalf prior to her 2006 entry into the United States. Rather, the beneficiary applied for a nonimmigrant visa at the United States Consulate in Islamabad, Pakistan. Because there was no petition, the regulations governing revocation of the approval of petitions do not apply. It was the Department of State, not USCIS, that first granted and then revoked the visa.

This distinction is critical, because the Department of State did not revoke the beneficiary's R-1 nonimmigrant status. Rather, it only revoked the nonimmigrant visa – the instrument through which the beneficiary requested permission to enter the United States. Upon admission into the United States, the beneficiary held R-1 nonimmigrant status, under the jurisdiction of USCIS. When the Department of State revoked the visa, USCIS did not revoke the beneficiary's R-1 nonimmigrant status. Therefore, the revocation of the visa means that the beneficiary can no longer use that visa at a port of entry to gain admission to the United States. The beneficiary remained in lawful R-1 nonimmigrant status so long as she remained in the United States and continued performing qualifying work for the petitioner. She would have lost that status only upon its expiration, or upon leaving the United States, whichever came first.

The revocation of a nonimmigrant visa by the Department of State is not the same as the revocation of nonimmigrant status by USCIS. Therefore, the beneficiary continued to be lawfully present in the United States as an R-1 nonimmigrant during the period in question. Therefore, the revocation of the visa is not a ground for denial of the special immigrant religious worker petition. The AAO therefore withdraws that ground for denial. Because the director's decision rested entirely on that ground, the AAO also withdraws the denial decision.

The AAO notes that the withdrawal of the decision does not imply that the petition will or should be approved. This remand order is not a finding that the beneficiary is admissible into the United States.

Other deficiencies exist that prevent the AAO from approving the petition outright. 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 (9th 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).

Review of the record shows issues of concern regarding the beneficiary's compensation. The USCIS regulation at 8 C.F.R. § 204.5(m)(10) reads:

Evidence relating to compensation. Initial 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 [Internal Revenue Service] 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 USCIS regulation at 8 C.F.R. § 204.5(m)(11) reads, in part:

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 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.

In an employer attestation that accompanied the initial filing of the petition, the petitioner stated: "The alien will be paid \$1,500.00 per month as her salary, and housing and utilities at the value of \$750.00 per month." The petitioner must, therefore, establish not only that it has the funds available to pay the beneficiary's salary, but also that arrangements are in place to provide or pay for her housing and utilities. The petitioner must also establish its past compensation of the beneficiary.

The petitioner submitted uncertified copies of IRS Forms 990, Return of Organization Exempt From Income Tax, for 2006 and 2007, along with a compiled financial report for 2008. These documents indicate that the petitioner has paid salaries every year well in excess of the beneficiary's stated salary, but they do not show any non-salaried compensation in the form of housing and utilities.

The petitioner submitted photocopies of monthly paychecks issued to the beneficiary between February and August 2009. The four most recent checks are shown in bank-provided images, showing processing of the checks. Most of these checks are in the amount of \$1,108.20; the most recent (August 2009) check is in the amount of \$1,385.25. This change suggests a salary increase effective August 2009.

In a letter dated August 13, 2009, [REDACTED] of the petitioning entity, stated that the beneficiary "currently receives a salary of \$1,500, which is paid monthly." The letter contains no reference to housing or other non-salaried compensation, and no information about the beneficiary's rate of compensation before August 2009.

The petitioner also submitted copies of IRS Form W-2 Wage and Tax Statements for 2008, indicating that the petitioner paid the beneficiary \$12,300, and her spouse \$13,000. An IRS transcript of the beneficiary's 2008 income tax return showed that the beneficiary and her spouse jointly reported a total of \$25,300 in salary income, consistent with the combined earnings reported on the IRS Forms W-2.

In subsequent correspondence dated May 26, 2010, prior counsel stated that “the Beneficiary was making \$1,200/month until August 2009 when her salary increased to \$1,500/month plus living accommodations and board.” As noted above, the evidence of record is consistent with the general claim that the beneficiary’s salary increased in August 2009, but the petitioner submitted no evidence to show that it provided “living accommodations and board” at that time. The assertions of counsel do not constitute evidence. *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).

Furthermore, if the beneficiary earned \$1,200 per month for the first seven months of 2008, and \$1,500 per month thereafter, then she should have received \$15,900 for the year. An entire year’s pay at the lower rate of \$1,200 per month would add up to \$14,400 per year, but the beneficiary received \$2,100 less than that amount. The IRS documentation in the record, therefore, indicates that the petitioner was not consistently paying the beneficiary \$1,200 every month before August 2009. Either the beneficiary received less pay per month, or there was an interruption in her paid employment.

The petitioner claimed to have employed the beneficiary throughout 2007, but did not submit documentation, from the IRS or otherwise, of the beneficiary’s compensation for that year. Therefore, the petitioner’s initial submission did not document at least two years of compensation immediately preceding the August 25, 2009 filing date. Also, the petitioner has not submitted evidence to show that it has provided, or will provide, housing and utilities worth \$750 per month to the beneficiary. Either of these deficiencies would, by itself, constitute sufficient grounds for denial of the petition.

Therefore, the AAO will remand this matter to the director. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director’s decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.