

Identifying data deleted to
protect security unwarranted
invasion of personal privacy
PUBLIC COPY

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

[REDACTED]

C1

DATE: **JUN 14 2012** 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.

Thank you,

C *U Deardorff*
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, (“the director”) denied the employment-based immigrant visa petition. The self-petitioner timely filed an appeal to the denied petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The AAO will withdraw the decision of the director and remand the petition.

The alien¹ seeks classification 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 at the Islamic Center of Southwest Florida, Inc. in Orlando, Florida. On October 8, 2010, the self-petitioner filed a Form I-360 petition. On January 12, 2011, the director issued a Notice of Intent to Deny (“NOID”), to which the self-petitioner timely responded. On February 15, 2011, the director denied the petition, finding that the self-petitioner failed to establish that he had been working in lawful status for at least the two year period immediately preceding the filing of the petition.

On appeal, counsel for the self-petitioner submits a brief.

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

¹ In response to the AAO’s request for a new G-28 from the self-petitioner, counsel questioned why the AAO considered [REDACTED] to be the self-petitioner, and not as the beneficiary of a petition filed by [REDACTED], the alien’s employer. He stated, “This appeal is filed by the petitioner/employer for an appeal from the I-360 Special Immigrant petition for religious worker and not I-360 Self-Petition. [sic] Therefore, it was my understanding that the employer is the one who is required to sign the G-28 not the beneficiary just like I-140 petition. [sic]” In this case, even though [REDACTED] was listed in part one of the Form I-360 petition as the petitioner and [REDACTED] was listed in part two as the beneficiary, [REDACTED] signed Part 10 of the Form I-360 petition. Therefore, the AAO considers [REDACTED] to be the self-petitioner and does not consider the [REDACTED] to be the petitioner.

(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 issue is whether the self-petitioner possesses two years of continuous lawful work experience immediately prior to the filing of the Form I-360 petition. The regulation at 8 C.F.R. § 204.5(m)(4) states that:

(m) *Religious workers.* This paragraph governs classification of an alien as a special immigrant religious worker as defined in section 101(a)(27)(C) of the Act and under section 203(b)(4) of the Act. To be eligible for classification as a special immigrant religious worker, the alien (either abroad or in the United States) must:

(4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. A break in the continuity of the work during the preceding two years will not affect eligibility so long as:

(i) The alien was still employed as a religious worker;

(ii) The break did not exceed two years; and

(iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.

Further, the regulation at 8 C.F.R. § 204.5(m)(11) states that:

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.

(iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.

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

The Form I-360 petition was filed on October 8, 2010. According to the regulation above, the self-petitioner must have been continuously working in lawful status for two years prior to the filing of the petition, from October 8, 2008 to October 8, 2010. The record shows that the self-petitioner entered the United States in R-1 nonimmigrant status on August 6, 2008, and remained in lawful status when he departed the United States on April 22, 2009. On May 18, 2009, the self-petitioner reentered the country in R-1 nonimmigrant status and remained in lawful status up through the filing of the Form I-360 petition.

However, the director found that the self-petitioner was not in lawful status during the two year period immediately preceding the filing of the petition because the State Department revoked the beneficiary's R-1 visa on December 28, 2009. The director stated:

Beginning December 28, 2009, the beneficiary was employed without a valid R-1 visa. Therefore, the beneficiary's employment was not lawful based on the revocation of the beneficiary's R-1 visa.

Counsel appealed this adverse finding, arguing that:

Department of State's revocation of beneficiary's R-1 visa has no implication on the beneficiary's legal status inside the United States. Department of State has no authority to invalidate or remove an alien's status inside the United States. Only the U.S. Department of Homeland Security has the authority to determine how long an alien can be admitted to stay and work in the United States.

The AAO concurs with counsel's arguments. There is a distinction between an R-1 visa and R-1 nonimmigrant status. The self-petitioner used his R-1 visa to re-enter the United States on May 18, 2009. The self-petitioner re-entered the United States in lawful R-1 nonimmigrant status and was given until May 17, 2012 to remain in the United States in lawful R-1 nonimmigrant status. Since that time, the self-petitioner has been lawfully present inside the United States and has not departed. The fact that the Department of State revoked the self-petitioner's R-1 visa on December 28, 2009, over six months after the beneficiary entered the United States, has no bearing on the self-petitioner's current R-1 nonimmigrant status. Therefore, the AAO finds that the director's determination that the revocation of the self-petitioner's nonimmigrant visa resulted in his unauthorized employment was erroneous.

The above discussion indicates that the petitioner has overcome the only stated basis for denial of the petition. The AAO will withdraw that basis and, therefore, the denial decision. Nevertheless, there are issues that remain which the director must resolve before a definitive resolution is possible.

The AAO may identify additional grounds for denial beyond what the Service Center identified 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).

The USCIS regulation at 8 C.F.R. § 204.5(m)(12) reads:

Inspections, evaluations, verifications, and compliance reviews. The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

The AAO will remand the petition in order for the director to determine whether the petitioner has satisfied the regulatory requirements at 8 C.F.R. § 204.5(m)(12). 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.

Further, the regulation at 8 C.F.R. § 204.5(m)(2) requires that the self-petitioner come to the United States to work in a full time (average of at least 35 hours per week) position. The record however, contains no documentary evidence such as a schedule for the self-petitioner showing that he will be

working in a full time position. Therefore, on remand, the director may inquire into whether the proffered position will require the self-petitioner's full time work.

Finally, the regulation at 8 C.F.R. § 204.5(m)(10) requires that the self-petitioner's employer submit verifiable evidence of how it intends to compensate the self-petitioner. In the Form I-360 petition attestation clause, the self-petitioner's employer stated that it would pay the self-petitioner \$2,000 per month, plus \$1,600 per month in housing expenses and \$500 per month as a family health allowance, which totals \$49,200 per year. Regarding evidence that it has compensated the self-petitioner in the past, the employer showed only that it compensated the self-petitioner in this amount in 2009. The self-petitioner's employer also submitted a document entitled "transaction by payroll item" for the self-petitioner from January 2008 through September 2010. It also submitted an unaudited copy of its assets, liabilities and capital, a copy of its general ledger trial balance as of December 31, 2009, and a copy of the instructions to the Form I-990 but not the Form I-990 itself. The self-petitioner's reliance on unaudited financial records is misplaced. As there is no accountant's report accompanying these statements, and state on the documents that they are unaudited, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, on remand, the director may inquire into whether the self-petitioner's employer has the ability to compensate the self-petitioner.

The director's decision is withdrawn. The director may issue a request for evidence and allow the petitioner a reasonable period of time to respond.

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 the entry of a new decision, which, if adverse to the petitioner, must be certified to the Administrative Appeals Office for review.