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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] data deleted to prevent unwarranted invasion of personal privacy

File: [redacted] Office: Nebraska Service Center Date: JAN 03 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: 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)

IN BEHALF OF PETITIONER: [redacted]

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Nebraska Service Center. An appeal was dismissed by the Associate Commissioner for Examinations. The matter is again before the Associate Commissioner on motion to reconsider. The motion will be granted; the decision will be affirmed.

The petitioner is described as a non-profit organization providing religious, educational, and charitable services to persons of the Muslim faith. It seeks classification of 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), in order to employ him as a "religious instructor and counselor" under unstated terms of remuneration.

The director denied the petition finding that the petitioner failed to establish the ability to pay a qualifying wage as required.

The petitioner filed a timely appeal from the decision.

The Associate Commissioner dismissed the appeal finding that the petitioner was not a qualifying religious organization.

The petitioner now files a timely motion to reopen and reconsider that decision arguing that the petitioner is a qualifying tax exempt religious organization.

On review, the motion to reopen the proceeding will be granted and the record will be reviewed *de novo*.

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,
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> (II) before October 1, 2003, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or
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> (III) before October 1, 2003, 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 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 is described as a non-profit organization devoted to the large immigrant Muslim community in the area. An official of the petitioner stated that the organization is presently negotiating to build a mosque and a school. The beneficiary is described as a native and citizen of Bahrain, currently residing in England and is employed by a religious organization in that country.

In order to establish eligibility for classification as a special immigrant religious worker, the petitioner must satisfy each of several eligibility requirements.

A petitioner must establish that it is a qualifying religious organization as defined in this type of visa petition proceeding.

8 C.F.R. 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

> (i) Evidence that the organization qualifies as a nonprofit organization in the form of either:
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> (A) Documentation showing that it is exempt from taxation in accordance with section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations; or
>
> (B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under section 501(c)(3).

To address this requirement, the petitioner submitted a letter from the Internal Revenue Service (IRS) dated November 3, 1998, reflecting that the petitioner is a tax exempt organization under section 501(c)(3) of the Internal Revenue Code (IRC). The basis for that determination, however, is that the petitioner is an organization described in section 509(a)(2) of the IRC.

Both the statute and the regulations rely on the IRS determination of tax exempt status in defining a qualifying religious organization for the purpose of special immigrant classification. 8 C.F.R. 204.5(m)(3)(i)(B) relies on section 501(c)(3) "as to

relates to religious organizations." There are several classes of nonprofit organizations eligible for tax exemption under section 501(c)(3) of the Internal Revenue Code. Only organizations classified, or classifiable, as "churches" pursuant to sections 509(a)(1) and 170(b)(1)(A)(i) of the IRC are considered qualifying religious organizations for the purpose of special immigrant religious worker classification. For example, charitable or community organizations classified under sections 509(a)(2) and 170(b)(1)(A)(vi) are not qualifying, even if they are organized and operate under the principles of a particular religious faith. Such organizations are not "churches" and do not employ religious workers as contemplated by the statute. The IRS letter submitted by the petitioner does not confirm that the organization is recognized as a tax-exempt religious organization under sections 509(a)(1) and 170(b)(1)(A)(i) of the IRC. Accordingly, the petitioner has failed to establish that it is tax-exempt as a religious organization and is ineligible to receive special immigrant classification for any prospective alien employees.

The next issue is whether the petitioner has established that the proposed position qualifies as a religious occupation for the purpose of special immigrant classification.

8 C.F.R. 204.5(m)(2) states, in pertinent part, that:

> *Religious vocation* means a calling to religious life evidenced by the demonstration of commitment practiced in the religious denomination, such as the taking of vows. Examples of individuals with a religious vocation include, but are not limited to, nuns, monks, and religious brothers and sisters.
>
> *Religious occupation* means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

On review, the petitioner has failed to establish that the proposed position is a qualifying religious occupation. First, as noted above, the petitioner is not a qualifying religious organization and therefore its positions are not qualifying for special immigrant religious worker classification.

Second, the duties of the position were described as "provide much-needed religious instruction, as well as social and psychological

counseling." The provision of social services such as mental health counseling, even when sponsored by a religious non-profit organization, are considered wholly secular duties not qualifying as a lay religious occupation. Even if the prospective employee was a clergy person, such as a priest or minister, providing social services for a non-profit charitable organization would not be a position eligible for special immigrant classification.

The petitioner also must establish that the beneficiary had had the requisite two years of continuous experience in a religious occupation.

8 C.F.R. 204.5(m)(1) states, in pertinent part, that:

> All three types of 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.

The petitioner asserted that the beneficiary has been employed in a similar capacity in England. However, absent proof that the beneficiary was engaged in a qualifying religious occupation for a qualifying religious organization, it cannot be concluded that he has satisfied the prior experience requirement for special immigrant classification.

The petitioner also must demonstrate that a qualifying job offer has been tendered.

8 C.F.R. 204.5(m)(4) states, in pertinent part, that:

> *Job offer.* The letter from the 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, or how the alien will be paid or remunerated if the alien will work in a professional capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support.

In this case, the petitioner has not identified the terms of remuneration or shown that the alien would not be dependent on supplemental employment. Therefore, it has not tendered a qualifying job offer.

A petitioner also must demonstrate its ability to pay the proffered wage.

8 C.F.R. 204.5(g)(2) states, in pertinent part, that:

> 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 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 annual reports, federal tax returns, or audited financial statements. (Emphasis added.)

The petitioner in this matter asserted that the beneficiary's foreign employer would be responsible for his salary for the first two years. The petitioner indicated that it has no paid employees as of the date of filing.

First, the petitioner has not furnished the petitioner's annual reports, federal tax returns, or audited financial statements. Therefore, the petitioner has not satisfied the documentary requirement of this provision.

Second, the petitioner must establish eligibility as of the date of filing. Matter of Katigbak, 14 I&N Dec. 49 (Comm. 1971). The petitioner has not shown it had the financial ability to support the beneficiary at the time of filing. A simple statement pledging financial support from an affiliated organization is not sufficient to satisfy this requirement.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden.

The petitioner is free to file a new visa petition under alternate sections of the Act.

ORDER: The appeal is dismissed.