U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 25 2004

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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Islamic organization whose purpose, according to its constitution, is "to carry on religious, charitable and educational activities in conformity with the religion of Islam." 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 "preparer of the deceased" and to "develop musical projects for [the petitioner's] obligatory observances." In later correspondence, the petitioner identified the proffered position as that of a "burial minister." The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition or that it had extended a valid job offer to the beneficiary.

On appeal, counsel submitted a brief and duplication of previously submitted documentation.

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 October 1, 2008, 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 October 1, 2008, 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 regulation at 8 C.F.R. § 204.5(m)(1) echoes the above statutory language, and states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file a Form I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States." The regulation indicates that the "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 regulation at 8 C.F.R. § 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

> (ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:
>
> > (A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

The petition was filed on May 1, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working in the religious vocation or occupation throughout the two-year period immediately preceding that date.

The petitioner states that the beneficiary has been "serving the religious needs of our community" since approximately May 25, 1999. In its letter accompanying the petition, the petitioner stated:

> [The beneficiary helped] in the obligatory religious occupation of performing the highly specialized procedure in the preparation of the body of a deceased Muslim for burial. In addition . . . [the beneficiary] assisted the Islamic Academy of Alabama, (a religious educational institution, k-9th grade, affiliate of [the petitioner]), with his expertise in Islamic music and the use of musical instrument in the Islamic religious festivity, Muslim wedding, and other Muslim celebrations.

The petitioner further attested that the beneficiary "has served as the Preparer of the deceased in this Community, and as a main player of musical instrument for the Organization's affiliate, Islamic Academy of Alabama."

The petitioner submitted a copy of the *Authentic Step By Step Illustrated Janazah Guide* by [redacted].[1] This document describes in detail the process of dealing with death in the Muslim religion, including the washing of the dead and the funeral.

In response to the director's request for evidence (RFE) dated August 6, 2002, the petitioner expanded upon the duties that the beneficiary had been performing with the petitioner. In its letter of November 4, 2002, the petitioner stated that the beneficiary "is carrying on the religious occupation of tending to Muslim burials . . . being responsible for teaching and performing traditional Islamic music and preparing the mosque for daily prayers and taking care that the mosque is properly arranged in a reverent manner at all times." The petitioner further states that the beneficiary "resides on the campus at the Birmingham Islamic Society," and that his only compensation is room and board.

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[1] The petitioner provides no further identification of [redacted]

The petitioner submitted a statement from Heath Bowen, manager of Johns-Ridout's Funeral and Cremation Services in Birmingham, who states that "[w]henever a family from the [petitioner] uses our funeral home for a deceased family member, [the beneficiary] is the religious minister who conducts the prayers and ceremonial washing and preparing of the deceased person for Muslim burial," and that the beneficiary has been performing these services since April or May 1999 president of Al-Farooq Masjid of Atlanta, also states that the beneficiary performs these services when a family of a deceased member of the petitioner uses its cemetery.

The petitioner also submitted a certification from who states he is a funeral director in Agadir but does not specify the organization with which he is associated. states that the beneficiary "returned to the service as a full time employee and compensated religious employee of the service in the middle of 1998 until May 24, 1999. He is fully qualified to be employed by the religious service which is responsible for prayers, mummification and ceremonial washing of the Muslim deceased."

The chief of the Homewood Police Department, C.F. Trucks, states that he is "acquainted" with the beneficiary and that the beneficiary is "responsible for preparing the mosque for daily prayers and taking care that the mosque is properly arranged in a reverent manner at all times." The chief also states, that due to the neighborhood:

> [I]t is advisable for the [petitioner] to have a person present at their facilities even during the night and at time when classes and prayer services are not being conducted to deter unauthorized persons from coming onto the property . . . Having the beneficiary reside on the premises . . . adds to the security of the [] property in addition to the religious role that he serves there."

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." See H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Comm. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 1963).

The term "continuously" also is discussed in a 1980 decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

In line with these past decisions and the intent of Congress, it is clear, therefore that to be continuously carrying on the religious work means to do so on a full-time basis. That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is not paid, the assumption is that he/she is engaged in other, secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who in accordance with their vocation live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and generally salaried. To hold otherwise would be contrary to the intent of Congress.

The petitioner states that the position it is offering the beneficiary basically encompasses three roles: that of a "burial minister," a musician/teacher, and caretaker. The petitioner provides no evidence of the beneficiary's services as a musician/teacher or as a caretaker of the mosque. Chief Trucks does not state the basis of his knowledge that the beneficiary is "responsible for preparing the mosque for daily prayers and taking care that the mosque is properly arranged in a reverent manner at all times." The beneficiary's duties as a musician/teacher and caretaker are discussed further below.

The petitioner presented no evidence to establish the frequency of the petitioning organization's needs for the beneficiary's services as a "burial minister." Neither [redacted] state how often families of the petitioner use their services. The petitioner states that the beneficiary must be available to perform these services 24 hours per day. Nonetheless, the petitioner has not established that it compensated the beneficiary for the exclusivity of being available 24 hours daily or that the position of "burial minister" is the primary focus of the compensation it provided for the services performed by the beneficiary.

On appeal, counsel argues that Citizenship and Immigration Services (CIS) discriminates against Islamic religions by requiring that Islamic special immigrant religious workers "undergo an ordination or vows ceremony as is done in Christian religions to be considered to be engaged in a 'religious vocation' . . . but also must have been paid a regular salary in money (rather than in-kind support in the form of room and board such as Catholic monks, nuns and priests are allowed to receive)." This argument is completely without merit, as the petitioner has presented no evidence that the proffered position, which the beneficiary has been occupying, qualifies as a minister or as a religious vocation under 8 C.F.R. § 204.5(m)(2) within the petitioner's denomination. Although [redacted] states that "Islamic Law has [a] special requirement that only [a] qualified minister prepares the body for burials and oversees the burial process according to Islamic laws," the petitioner presented no evidence to corroborate this. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, the [redacted] Guide submitted as evidence by the petitioner contains no requirement that only a "qualified" minister may attend the deceased

Muslim. Moreover, the petitioner has not proved that the beneficiary has been or will be solely carrying on the vocation of a minister as required by section 101(a)(27)(C)(ii)(I) of the Act.

Despite counsel's arguments on appeal, the petitioner has presented no evidence that that beneficiary has been serving in a position recognized by the Islamic religion as that of a minister, or that it is traditional within the Muslim religion for persons in such positions to live in an unsalaried environment, compensated for their services with only in-kind payment of room and board. Further, the petitioner's proposal to pay the beneficiary a "modest salary" upon approval of the visa petition undermines counsel's argument.

Counsel argues on appeal that the beneficiary is engaged in the secondary religious vocation of ensuring the proper reverence of the mosque at all times and to assist in the daily prayers. The petitioner does not explain the duties associated with ensuring the "reverent manner of the mosque," nor does it state that the beneficiary's duties include assisting in daily prayers. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

According to 8 C.F.R. § 204.5(m)(1), the alien must be coming to the United States at the request of the religious organization to work in a religious occupation.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a "religious occupation" and the regulation states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The list reveals that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as cantor, missionary, or religious instructor are examples of qualifying religious occupations. Persons in such positions would reasonably be expected to perform services directly related to the creed and practice of the religion. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature. The lists of qualifying and nonqualifying occupations derive from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

CIS therefore interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

The petitioner has not established that the beneficiary's services as a musician/teacher is defined and recognized by its governing body or that it is traditionally a permanent, full-time, salaried position with the petitioner's denomination.

The petitioner has also failed to establish that the beneficiary's duties in "assuring the reverence of the mosque" are the duties of a religious occupation within the meaning of the regulation. The beneficiary's duties in preparing the mosque for daily prayers and ensuring that the mosque is properly arranged in a reverent manner indicate that this position consists of activities which might normally be expected of an active member of a religious

congregation rather than a position that would be filled by a salaried employee. The petitioner submits no evidence that this is a position that is recognized and defined by its governing body or that it is traditional, full-time, salaried position within its denomination. Further, the evidence provided indicates that the beneficiary's presence on the petitioner's property is to deter crime and is therefore secular in nature.

The petitioner has not established that the beneficiary's "secondary occupations" constitute religious occupations within the meaning of the statute and regulation.

The director also determined that the petitioner had not established that it had extended a valid job offer to the beneficiary as it had not established that the position offered full time employment.

The petitioner submitted no evidence of the beneficiary's proposed hours of work in either of the different aspects of the job offered, and has not established that the alien will not be dependent on supplemental income or the solicitation of funds of his support. As indicated above, the petitioner has not proved that the beneficiary will be solely carrying on the work of a minister. The petitioner has not extended a valid job offer as required by 8 C.F.R. § 204.5(m)(4).

Beyond the decision of the director, the petitioner has not established that it has the ability to pay the beneficiary a wage. This deficiency constitutes an additional ground for dismissal for dismissal of the appeal.

The regulation at 8 C.F.R. § 204.5(g)(2), which states in pertinent part:

> *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.

The petitioner states that it will pay the beneficiary a "modest salary" in addition to providing him with room and board. On appeal, counsel argues that this means the petitioner will pay the beneficiary the minimum wage as established by the Fair Labor Standards Act. As noted above, the assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N at 534; *Matter Of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

As evidence of its ability to pay a wage, the petitioner submitted copies of its Profit and Loss statements for 1999, 2000, 2001 and January through October of 2002.

The above-cited regulation states that evidence of ability to pay "shall be" in the form of tax returns, audited financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only in addition to, rather than in place of, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of evidence. Further, although the petitioner

showed a net income of over $111,000 for 2001, it had negative income of over $14,000 during the 11 months reported in 2002. The petitioner's evidence shows a positive income for 1999 followed by negative income for 2000. While the latter dates are beyond the timeframe set by regulation, the pattern is consistent with the evidence presented for the relevant dates, which fail to establish that the petitioner had the consistent ability to pay the beneficiary a wage from the date the visa petition was filed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.