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

U.S. Citizenship and Immigration Services

C1

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 17 2004

IN RE: Petitioner: [redacted]
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:

[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

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

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, 8 U.S.C. § 1153(b)(4), to perform services as an imam. The director determined that the petitioner had not established (1) that the beneficiary had the required two years of experience in the position, (2) that the beneficiary's work qualifies as a religious vocation or occupation, (3) the petitioner's ability to pay the beneficiary's salary, (4) that the petitioner is a qualifying tax-exempt religious organization, or (5) that the beneficiary entered the U.S. for the purpose of engaging in a religious occupation.

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;
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> (ii) seeks to enter the United States--
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> > (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, 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
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> (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) 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." 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate 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 2, 2001. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of an imam throughout the two years immediately prior to that date.

In a joint letter, several officials of the petitioning entity state that the beneficiary "has been serving as our Imam since November 1996." In another joint letter, the same officials state that the beneficiary "has volunteered his time on a full-time basis for over the past 4 years as an Imam." The petitioner indicates that the beneficiary "was not monetarily paid" because he lacked legal employment authorization. Counsel asserts that the petitioner "does not differentiate between paid and unpaid workers. It is not uncommon for some of the most important roles within an organization to be filled by unpaid workers. . . . The duties of an unpaid

Imam are exactly the same as the duties of a paid Imam." This information does not readily suggest that mosques traditionally employ paid imams, rather than relying on unpaid volunteers who must derive their living from some other source.

The director requested "a detailed description of the beneficiary's prior work experience," as well as documentation including tax records. In response, the petitioner has submitted copies of previously submitted materials. There is no explanation as to how the beneficiary has been able to secure such basic needs as food and lodging since 1996; the petitioner does not claim to have provided those necessities to the beneficiary.

The director denied the petition, in part because unpaid volunteer work is not engagement in an occupation. On appeal, counsel cites "case law issued by the Administrative Appeals Unit (precedent)." The cases cited are not published precedent decisions; the cited decisions, like most appellate decisions, are unpublished and have no force as "precedent" or "case law."

Counsel states that numerous newly-submitted affidavits "indicat[e] that the beneficiary has been the Imam" at the petitioning mosque. We note that most of the "affidavits" are not subscribed and sworn; they merely have blank spaces for the notary's attestation and the date of attestation. Thus, these "affidavits" are in fact unsworn statements. Even the few that are properly sworn are of negligible value. The affidavits (all "form" documents with information written into blank spaces) contain the statement "I know [the beneficiary] performs the functions of Imam," and indicate how long each of the declarants has known the beneficiary, but they do not state that the beneficiary served as an imam in the past. Stating that one knows a person who is now an imam does not demonstrate or imply that the person has been an imam for the entire time that one has known that person. Therefore, the affidavits have negligible probative value with regard to the beneficiary's work during the 1999-2001 qualifying period.

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." H.R. Rpt. 101-723, at 75 (Sept. 19, 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 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 some religious vocations 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 salaried. To hold otherwise would be contrary to the intent of Congress.

The record remains entirely silent as to how the beneficiary supported himself during his many years in the United States, despite the director's request for evidence to that effect. The petitioner asserts that it paid the beneficiary no salary, and the petitioner has never claimed to have provided food or lodging to the beneficiary. Absent any credible, documented explanation of the beneficiary's circumstances, it is difficult to conclude that the beneficiary dedicated himself solely to providing unremunerated services to the petitioner throughout the two-year qualifying period. Case law, cited above, permits the inference that an unpaid individual must work elsewhere to earn a living; the burden is on the petitioner to establish otherwise.

The next issue is whether the petitioner seeks to employ the beneficiary in a qualifying vocation or occupation. The regulation at 8 C.F.R. § 204.5(m)(2) offers the following pertinent definitions:

> *Minister* means an individual duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion. In all cases, there must be a reasonable connection between the activities performed and the religious calling of the minister. The term does not include a lay preacher not authorized to perform such duties.
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> *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.
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> *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.

While the determination of an individual's status or duties within a religious organization is not under the purview of Citizenship and Immigration Services (CIS), the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests within CIS. Authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States. *Matter of Hall*, 18 I&N, Dec. 203 (BIA 1982); *Matter of Rhee*, 16 I&N Dec. 607 (BIA 1978).

The petitioner submits a copy of a 1995 certificate from an imam training program, and indicates that this certificate establishes that the beneficiary is a fully-qualified imam. The petitioner's statements indicate that the petitioner seeks to classify the beneficiary's occupation as that of a minister, rather than as a religious occupation.

The constitution of the petitioning entity offers the following description at Article V, Section III:

1. The Imam or the religious head of the [mosque] will be appointed by the GAC [Governing Administrative Council] and will be responsible for the religious affairs of [the mosque].
2. The Imam will aid in the educational efforts of [the mosque] and will act as its spokesman on all religious matters.
3. The Imam will report to GAC.

A joint letter from various officials of the petitioning entity contains the following description of the beneficiary's work:

> In the Muslim religion, an Imam is the religious head of the organization. An Imam is our "Priest."
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> He is trained in interpreting Islamic teachings, understands the teaching of THE HOLY QURAN and the HADEETH and has also memorized most of the Quran and Hadeeth by heart, allowing him to be able to preach to the members. . . .
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> An Imam's primary responsibility is to lead prayers. We need an Imam on a full-time basis to lead the five daily prayers and also to conduct the Friday prayer and speech. . . .
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> [The beneficiary's] primary responsibility will include conducting religious worship and performing other spiritual functions associated with the beliefs and practices of the religious faith or denomination as authorized and providing spiritual and moral guidance and assistance to members. He will lead 5 daily prayers, each one hour long or longer and also a Friday prayer which he must prepare for. In addition he will also interpret and preach the doctrines of Islam and will oversee the religious programs. He will read the Quran during worship services or other observances. He will write speeches and write articles for publication. He will also instruct those who seek conversation in the Islamic faith. He will counsel those in spiritual need, and comfort the bereaved.

The director requested additional evidence to clarify the nature of the petitioner's work, but the petitioner's response consists of copies of previously submitted materials. The director, in the notice of denial, stated "[t]he petitioner has failed to establish that the beneficiary is authorized to perform sacerdotal rites and traditions as well as evidence that the beneficiary will be solely carrying on the vocation of a minister."

On appeal, the petitioner submits another jointly signed letter, listing the many types of prayers which Muslims must recite, and repeating the earlier list of the beneficiary's other duties.

The petitioner does not establish that its religious denomination typically or traditionally employs and compensates individuals who perform the functions of an imam, as opposed to utilizing the services of unpaid volunteers from the congregation. (Persuasive evidence to this effect would need to derive from an authoritative source, rather than the petitioner's own claims.) The petitioner has earlier stated that many imams are unpaid, and it claims to have availed itself of the beneficiary's unpaid services for several years prior to the filing date. These assertions, taken at face value, do not readily suggest that the position of imam is generally regarded as a compensated and exclusive position, rather than a duty undertaken by a knowledgeable member of the congregation who derives a living from other means (and thus is not *solely* performing the duties of an imam).

Another ground for denial concerns the petitioner's ability to pay the beneficiary's wage. The regulation at 8 C.F.R. § 204.5(g)(2) 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 its intent to pay the beneficiary $30,000 per year. The initial filing included no financial documentation of any kind, apart from documentation regarding the petitioner's purchase of a $153,000 parcel of land and its plans to build a $1 million facility on that land. These financial commitments do not imply that sufficient funds remain to pay the beneficiary's salary; they show only that very substantial sums of money are now committed to the building project, and cannot be paid to the beneficiary instead. Counsel, in an introductory letter, states that the petitioner "is also willing to provide financial statements," but no such documentation accompanied the submission.

The director instructed the petitioner to submit additional financial documentation. The petitioner responded by submitting further paperwork concerning the land purchase. In denying the petition, the director found that "the petitioner did not submit evidence to substantiate the ability to pay."

On appeal, the petitioner submits still more evidence about its purchase of land, using funds that it no longer possesses. The petitioner also submits a copy of a bank statement, showing a substantial balance of over $100,000 as of March 30, 2003. This document does not establish the petitioner's financial position as of the May 2001 filing date, as required by the regulations.

The above-cited regulation at 8 C.F.R. § 204.5(g)(2) 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. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The next issue under consideration concerns federal tax exemption. 8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization qualifies as a non-profit organization in the form of either:

> (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 (in appropriate cases, evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or
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> (B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

The petitioner's initial submission contained none of the above documentation. The director instructed the petitioner to "[s]ubmit a copy of the IRS's 501(c)(3) certification for the petitioning organization or evidence that the petitioning organization is under an umbrella of a parent organization with IRS's certification." The petitioner's response to that notice does not address this request.

The director denied the petition, in part because the petitioner failed to submit documentation of its tax exempt status, despite the director's specific request for such documentation. On appeal, counsel states that the director "overlooked previously submitted evidence regarding the mosque's 501(c)(3) status." Counsel does not identify this purported evidence. We note that counsel's cover letter, accompanying the response to the request for information, includes a list of attached documents. The list does not include any evidence of tax exemption.

On appeal, counsel notes that the petitioner's previously submitted articles of incorporation refer to the entity as tax exempt under section 501(c)(3) of the Internal Revenue Code. This documentation may be the "previously submitted evidence" to which counsel refers. The petitioner's own claim to that effect is not evidence that the Internal Revenue Service has, in fact, recognized the petitioner as a tax exempt religious organization.

The record is devoid of evidence that the Internal Revenue Service has recognized the petitioner as a tax exempt religious organization, and the record does not contain the secondary evidence required, in the alternative, by 8 C.F.R. § 204.5(m)(3)(i)(B). Because the record is devoid of this required evidence, this deficiency alone is sufficient to warrant denial of the petition and dismissal of the appeal.

The final issue raised in the director's decision concerns the beneficiary's entry into the United States. Section 101(a)(27)(C)(ii) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii), requires that the alien seeking classification "seeks to enter the United States" for the purpose of pursuing a religious vocation or religious occupation. In this instance, the beneficiary did not enter the United States as an R-1 nonimmigrant religious worker. Thus, the director concluded, the beneficiary did not enter the United States solely for the purpose of working in a religious occupation or vocation.

This finding is not defensible. The AAO interprets the language of the statute, when it refers to "entry" into the United States, to refer to the alien's intended *future* entry *as an immigrant*, either by crossing the border with an immigrant visa, or by adjusting status within the United States. This is consistent with the phrase "*seeks* to enter," which describes the entry as a future act. We therefore withdraw the director's finding in this regard.

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.