U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 01 2004

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:

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.

Marie Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is an Islamic center. 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 an imam. The director determined that the petitioner had not established (1) that the beneficiary had the requisite two years of continuous work experience as an imam immediately preceding the filing date of the petition; (2) that it had made a qualifying job offer to the beneficiary; (3) its ability to pay the beneficiary's proffered wage; or (4) its status as a qualifying tax-exempt religious organization.

On appeal, counsel states that a brief will be forthcoming within 30 days. To date, over 14 months later, the record contains no further submission. We will consider the record to be complete as it now stands.

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--
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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
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> > (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 Revenue 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 September 10, 2002. 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 the initial submission, Shafi A. Bezar, M.D., chairman of the petitioning entity, states that the beneficiary was appointed as "Religious Minister Imam/Clergyman and Teacher of Islamic Studies" on July 31, 2001.

The beneficiary entered the United States on December 4, 2001, and again on April 5, 2002, indicating that the beneficiary has not been continuously present in the United States since July 31, 2001. The assertion that the beneficiary's "date of appointment" is July 31, 2001, is not evidence that the beneficiary was actually in the United States on that date.

The director requested additional evidence and information, including evidence to establish the required continuous experience during the two-year qualifying period. While the petitioner responded to this request, nothing in the petitioner's submission addressed the issue of the beneficiary's past experience.

The director denied the petition, noting the absence of evidence of continuous past employment and stating "[i]t appears that the beneficiary's offered position [is] only a supplement to his earnings obtained elsewhere."

On appeal, the petitioner submits copies of canceled checks, showing that the petitioner has generally paid the beneficiary $2,000 per month. The earliest check is dated July 3, 2002, only two months before the petition's filing date. Regarding the beneficiary's work overseas, the petitioner submits a copy of a May 10, 2001 letter from an administrator of [redacted] in Pakistan, indicating that the beneficiary "has been the director of our Islamic Institute since 1996." An undated letter indicates that the beneficiary has been "a Lecturer in our University (JAMIA-TUS-SALIHAT) . . . for the last Three years."

Counsel asserts that "sufficient evidence has already been submitted to establish eligibility," but counsel fails to explain how this claim is consistent with the petitioner's failure to submit evidence regarding the beneficiary's past work. Indeed, counsel, on appeal, does not even acknowledge the director's finding regarding the lack of evidence in that regard. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. Given the petitioner's failure to submit this evidence previously, the AAO is under no obligation to consider this evidence. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Even then, the letters quoted above do not establish the beneficiary's continuous employment in the occupation or vocation in which the petitioner seeks to employ the beneficiary.

The term "continuously" has been interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948). The evidence submitted on appeal tends to support the director's assertion that the beneficiary engaged in outside, secular employment during the qualifying period. Mir Javed Rahman, chairman of the Jang Group of Newspapers and editor in chief of the Weekly Akhbar-e-Jehan, states in a May 9, 2001 letter that the beneficiary "is associated with the Weekly Akhbar-e-Jehan, Karachi (Jang Group) and drawing a remuneration/salary of Rs.7,500/- . . . per month." This letter indicates that the beneficiary was a salaried employee of a weekly newspaper as late as May 2001, and possibly later (the editor does not state that the beneficiary has left the position).

Based on the above, we affirm the director's determination that the petitioner has not established that the beneficiary continuously engaged in the occupation or vocation sought throughout the 2000-2002 qualifying period.

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.

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.

In a statement accompanying the initial submission, offered the following description of the position offered to the beneficiary: "Religious Minister Imam/Clergyman and Teacher of Islamic Studies. All type of Muslims Religious work according to need of the Mosque Community such as Funeral services/marriage ceremony, Friday prayers, Eid prayers, congregational prayers." asserted that these duties would occupy "40-45 Hours" per week.

After the director requested further information regarding the nature of the work, essentially repeated the above description, adding that the beneficiary would be responsible for "dars-e-Quran Hadith narrations to children as well as adults. new statement indicates that the beneficiary would work 38 hours per week. did not explain the slight reduction in hours compared with the initial description, above.

In a separate, unsigned document, the petitioner lists the beneficiary's job title as "Director, Religious Affairs" and offers a more detailed description:

1. Conduct all activities connected with Islamic and regular education of Muslim children, including curriculum, syllabus, and all other activities of imparting Islamic education, spiritual and mental development of youth and young adults.
2. Work on propagation of religion, including arranging of lectures, seminars and operate library, suggest and purchase useful books and publish religious periodical and journals. Undertake to start classes of adults for teaching tafseer-e-Quran and Hadith and imparting knowledge how to interact with other religious faiths.
3. Conduct Ibadat including salat-e-taravih, tehajjud, obligatory and option prayers, including Friday and Eidain prayers. Will work in unison with other Islamic scholars and khateebs to promote and project the cause of Islam.
4. Any other duties specified by the Board of Trustees from time to time.

The description of the beneficiary's duties as "director, religious affairs" is not entirely consistent with the earlier descriptions of his duties as imam and instructor.

The director, in denying the petition, stated that the petitioner failed to show "that the offered position is a qualifying religious vocation or occupation, since those duties identified indicate that this position consist[s] of activities normally expected of an active member of a religious congregation rather than a position that would be filled by a salaried employee who completed training in preparation for a career in religious work." The grounds for the director's finding are not clear from the record. The duties ascribed to the beneficiary include conducting religious services, weddings and funerals.

On appeal, the petitioner submits evidence showing the beneficiary's extensive academic work in Islamic Studies and related subject. The beneficiary also has experience lecturing on the Hadith and other Islamic religious subjects, and he has acted as the director of an "Islamic Institute." These documents establish the beneficiary's extensive training and past work, but they do not directly address the job offer at issue in the decision.

The grounds for denial enumerated in the director's decision do not appear to be sufficient, by themselves, to warrant a finding of ineligibility (although this has no effect on other, unrelated grounds for denial). That being said, the petitioner has provided inconsistent descriptions of the position offered to the beneficiary, and it is not entirely clear whether the petitioner seeks to classify the beneficiary as a minister, or as a worker in a religious occupation. The two terms, as defined at 8 C.F.R. § 204.5(m)(2), are mutually exclusive rather than overlapping shades on a continuous spectrum of religious duties.

While the record contains insufficient information to allow a definitive finding of eligibility on this ground, we do not agree with the director that the beneficiary's duties, as described, appear to be those normally delegated to a volunteer from the congregation.

The next issue concerns the petitioner's ability to pay the beneficiary's proffered salary of $30,000 per year. 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's initial submission included no evidence of the petitioner's ability to pay the beneficiary's wage. The director instructed the petitioner to submit financial documentation to establish current assets, current liabilities, net income, and other pertinent information. In response, the petitioner has submitted a copy of a bank statement and a "Financial Report" dated July 3, 2002. The record does not reveal the identity of the person who prepared the report, and the document itself is not identified as an audited financial statement. Therefore, the director did not consider this report to be sufficient evidence of ability to pay.

On appeal, as discussed elsewhere in this decision, the petitioner submits copies of paychecks issued to the beneficiary from July 2002 onward. These paychecks, therefore, cover the petition's September 2002 filing date. A memorandum from an official of Citizenship and Immigration Services (CIS) states: "CIS adjudicators should make a positive ability to pay determination . . . [when t]he record contains credible verifiable evidence that the petitioner . . . has paid or currently is paying the proffered wage." Memorandum from [redacted] Associate Director of Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 4, 2004).

The paychecks, however, do not establish that the petitioner has paid the proffered wage of $30,000 per year. This annual wage equates to $2,500 per month. The paychecks submitted show only $2,000 per month, substantially less than the proffered wage. Furthermore, the check from September 2002 is for only $1,000. The check is marked "bonus," implying that this amount is in addition to the beneficiary's regular wage, but the petitioner has submitted no accompanying $2,000 check from September 2002. Thus, the petitioner's

own evidence does not show that the beneficiary has ever received the full proffered wage, and in September 2002, the month the petition was filed, the petitioner has only established that the beneficiary received 40% of that wage.

The petitioner has, for the reasons stated above, failed to establish that it has paid, or that it has been able to pay, the beneficiary's proffered wage of $2,500 per month ($30,000 per year).

The final issue under consideration concerns the petitioner's status as a tax-exempt organization. The regulation at 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.

According to documentation from the Internal Revenue Service, the petitioner's tax-exempt status derives from classification not under section 170(b)(1)(A)(i) of the Internal Revenue Code of 1986 (the Code), which pertains to churches, but rather under section 170(b)(1)(A)(vi) of the Code, which pertains to publicly-supported organizations as described in section 170(c)(2) of the Code, "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes," or for other specified purposes.

Clearly, an organization that qualifies for tax exemption as a publicly-supported organization under section 170(b)(1)(A)(vi) of the Code can be either religious or non-religious. The burden of proof is on the petitioner to establish that its classification under section 170(b)(1)(A)(vi) of the Code derives primarily from its religious character, rather than from its status as a publicly-supported charitable and/or educational institution.

The organization can establish this by submitting documentation which establishes the religious nature and purpose of the organization, such as brochures or other literature describing the religious purpose and nature of the activities of the organization. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operations, *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003):

> (1) A properly completed IRS Form 1023;
> (2) A properly completed Schedule A supplement, if applicable;
> (3) A copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization;
> (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

The above list is consistent with the regulatory requirement at 8 C.F.R. § 204.5(m)(3)(i)(B), cited above.

The director, prior to denying the petition, made no effort to ascertain whether the petitioner's federal tax exemption derives from its religious character. The director simply denied the petition because the Internal Revenue Service classified the petitioner under section 170(b)(1)(A)(vi) rather than section 170(b)(1)(A)(i) of the Internal Revenue Code. This finding is not permissible, for the reasons stated in Mr. Yates' memorandum. The director did not provide the petitioner with an opportunity to submit the materials outlined in that memorandum, and thereby demonstrate that its tax-exempt status derives primarily from its religious character. This deficiency is not fatal to the director's decision, however, because (as explained above) we have affirmed other stated grounds for denial, which clearer evidence of qualifying tax-exempt status would not overcome.

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.