

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

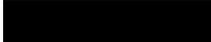
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

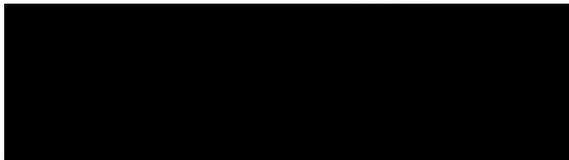


FILE:  Office: VERMONT SERVICE CENTER Date: **APR 05 2005**
EAC 01 172 50022

IN RE: Petitioner: 
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:



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, Vermont Service Center. On May 20, 2003, the director reopened the petition following petitioner's motion to reconsider, and again denied the petition. On November 20, 2003, the director reopened the petition based on the petitioner's second motion to reconsider, and again denied the petition. The matter 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).

The director originally denied the petition on September 24, 2002, finding that: (1) the beneficiary did not have the requisite two years experience as an assistant imam prior to filing the petition (2) the petitioner failed to establish that the position offered to the beneficiary qualifies as a religious occupation (3) the petitioner failed to establish its tax-exempt status and (4) the petitioner failed to establish its ability to pay the beneficiary.

In his decision on the petitioner's first motion to reconsider dated May 20, 2003, the director found the petitioner had satisfactorily established its ability to pay and that the beneficiary's position qualifies as a religious occupation. However, the director found insufficient evidence to establish the beneficiary's two years of qualifying work experience. The director did not make any finding related to the petitioner's tax-exempt status.

The petitioner filed a second motion to reconsider on June 6, 2003. In a decision dated November 20, 2003, the director reopened the petition and again denied the petition based on the finding that the petitioner failed to establish the beneficiary's qualifying employment during the requisite two-year period. Again, the director did not make any determination as to the petitioner's tax-exempt status.

The petitioner, through counsel, filed a timely appeal with copies of documents previously submitted.

The first issue to be determined on appeal is whether the petitioner has established that the beneficiary has the requisite two years experience as an assistant imam.

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) 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 April 23, 2001. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of an assistant imam throughout the two years immediately prior to that date, April 23, 1999 through April 23, 2001.

The Form I-360 indicates the beneficiary entered the United States on May 25, 1989 as a B-2 nonimmigrant with authorization to remain in the United States until November 24, 1989. The record contains no evidence that the beneficiary received an extension or changed to another nonimmigrant classification. Therefore, although the beneficiary was in the United States during the qualifying period, it appears that any work performed by the beneficiary during this time was performed without employment authorization and in direct contravention of U.S. immigration laws.

In a letter submitted with the original filing, Nihat Albardak, President of the petitioning Islamic center, states that the petitioner is “in desperate need of an experienced religious teacher to provide lectures and sermons to our children and adult classes, volunteered [sic] to translate religious scriptures, texts, scrolls and prepare the deceased for ritual burial in accord[ance] with Islamic law and custom.” Mr. Albardak further indicates that the beneficiary has served at the petitioner’s center “during the past six years.” The petitioner submitted no documentary evidence to establish the beneficiary’s work during the requisite period. 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).

Accordingly, the director requested additional details and documentation regarding the beneficiary’s work during the qualifying period, including “evidence that establishes that the beneficiary has the continuous two years full-time experience in the religious vocation, professional religious work, or other religious work” The director indicated that such evidence should include a “detailed listing of the beneficiary’s duties, the commencement and termination dates of employment, and the time spent per week by the beneficiary performing those duties” and that the statement must “be dated and signed by an official of the religious organization and shall describe the official’s position in the organization.”

In response, Kemal Taskenat and Nihat Albardak, Vice President and President, respectively, of the petitioning center assert that the beneficiary has served as the assistant Iman at the petitioner’s center since March 1995. Additionally, they assert that the “Center would subsidize [the beneficiary’s] living expenses by paying the rent for his apartment. [The beneficiary] and his family would eat meals prepared for the needy students at the Center and [the beneficiary] received needs for the Sabbath from charitable organizations.” The representatives of the petitioning center further indicate that in the future the beneficiary’s salary “will be paid from the general expenses fund of the organization’s petition on behalf of [the beneficiary].” The

of [the beneficiary].” The petitioner, however, failed to provide any documentary evidence to support these assertions. As noted previously, the petitioner’s unsupported statements do not meet the burden of proof in this proceeding. *Matter of Treasure Craft* at 190.

In the decision on the petitioner’s first motion to reconsider, the director affirmed his original decision finding that the petitioner failed to “persuasively demonstrate that the beneficiary possesses two-years of religious work experience” prior to the date of filing. The director noted the absence of wage statements or timekeeping records for the beneficiary during the requisite period, as well as the fact that the petitioner’s tax returns do not reflect the beneficiary is a paid employee of the petitioning center.

In the second motion to reconsider, counsel for the petitioner acknowledges that the beneficiary did not receive a salary from the petitioner but instead received benefits such as “free room and board, meals, utilities and other benefits that accrue from his service to the congregation, such as direct support (such as food and clothing) from members of the congregation (which is customary in the Islamic religion.” In fact, counsel claims, “none of the officials and administrators of the organization were monetarily compensated.” Instead counsel alleges:

[T]he salary of the primary imam . . . is provided and funded by the Religious Affairs Foundation under the auspices of the Turkish government . . . To date, the petitioning organization has not paid a salary to any of its officers, employees, and/or volunteers.

Counsel further states that, “only upon approval of the petition that the beneficiary will be paid the proffered wage” and argues that “the fact [the beneficiary] has not previously received a salary should not be a bar to the fact that he has performed the duties of assistant Imam at the petitioning organization.” It is unclear why the beneficiary is not currently compensated by the Religious Affairs Foundation or why in the future he will be paid from the general fund. Counsel does not provide any evidence to establish either that the primary imam’s salary is funded through the Religious Affairs Foundation or that the beneficiary has been provided “free room and board, meals, utilities and other benefits.” 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).

As it relates to the time the beneficiary spent performing the duties of an assistant imam, counsel states:

[The beneficiary’s] duties and the time spent performing those duties is appropriate for the occupation. While the duties detailed in the letter previously submitted on October 23, 2002 indicate that the various duties performed by [the beneficiary] approximate 25 hours, this should be considered a bare minimum and should not be indicative of a typical week. If need be, [the beneficiary] may be summoned to perform religious duties in excess of such hours, dependent upon the needs of the congregation of the petitioner organization. Such hours are appropriate for the occupation.

In the director’s decision on the petitioner’s second motion to reconsider, the director noted the “total absence of any type of contemporaneously recorded evidence related to the support and employment of the beneficiary . . .” The director further noted, “statements of support from interested parties have been shown in previous [CIS] decisions to be inadequate in verifying claimed work experience.”

On appeal, counsel resubmits previously submitted affidavits and states that the director “failed to consider the affidavits” from the petitioning organization and from the Turkish Consul General who have “repeatedly affirmed that the beneficiary has been involved with the Center in an official capacity in excess of six (6) years.” Counsel further argues that the regulations do not require “that the beneficiary receive compensation for services performed nor is there any mention of a requirement of accounting proofs of such payment, let alone tax forms, payment stubs or the like.”

We are not persuaded by counsel’s argument. 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. 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 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 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. Com. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Com 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 salaried. To hold otherwise would be contrary to the intent of Congress. Thus, the burden of proof remains on the petitioner to establish that the beneficiary’s claimed work took place continuously and that the beneficiary was remunerated in the manner claimed.

In this instance, the petitioner has failed to provide evidence that the beneficiary received remuneration for his services in the form of rent or other compensation. Further, counsel’s statement that although the beneficiary’s duties comprise “approximate[ly] 25 hours” per week, his duties “should be considered a bare minimum and should not be indicative of a typical week [because] if need be, [the beneficiary] may be summoned to perform religious duties in excess of such hours, dependent upon the needs of the congregation of the

petitioner organization” represents an additional impediment to a finding that the beneficiary worked *continuously* in the capacity claimed. Based on the information in the record, the petitioner has submitted insufficient evidence to establish that the beneficiary has the requisite two years of qualifying experience as an assistant imam.

The remaining issue is whether the petitioner is considered a qualifying tax-exempt religious 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
- (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.

In his original decision, the director found the petitioner failed to properly document its tax-exempt status because the letter issued to the petitioner from the Internal Revenue Service regarding the petitioner’s tax-exempt status was addressed to the petitioner’s attorney. In his November 20, 2003 decision, the director failed to address this issue. Accordingly, we will address this issue in this decision.

Concurrent with the petitioner’s first motion to reconsider, counsel submitted a letter from Peter J. Kelley affirming the fact that he was retained by the petitioner for the purpose of obtaining tax-exemption for the petitioner as a religious organization. Mr. Kelley states:

I prepared the application and received a power of attorney from the religious organization for the purpose of filing and processing the application. My office prepared all of the required documents and all of the correspondence was forwarded to my office. At the time of the application, my offices were located at [REDACTED]

The approval letter was forwarded to my office, at which time I forwarded said correspondence to the office of the American Turkish Eyup Sultan Islamic Center at their offices at [REDACTED]

We find Mr. Kelley’s letter sufficiently overcomes the director’s stated ground for denial as it relates to the petitioner’s tax-exempt status.

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 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.