

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

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

C1



FILE: WAC 05 134 52734 Office: CALIFORNIA SERVICE CENTER Date: **NOV 15 2007**

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.

3 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter for further action and consideration. The director subsequently denied the petition for the second time and, pursuant to the AAO's instructions, certified the decision to the AAO for review. The director's decision will be affirmed and the petition will be denied.

The petitioner is identified as a mosque of the Shia Muslim denomination. 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 *aalim*, or head priest. The director denied the petition on several grounds, which the AAO subsequently overturned. The AAO remanded the matter to the director with instructions to obtain further evidence and information relating to the beneficiary's compensation and other sources of income (if any). The director again denied the petition and certified its decision to the AAO. The director concluded that the petitioner had not established the existence of a valid job offer, or that the beneficiary continuously performed the duties of an *aalim* during the two years immediately preceding the filing of the petition. The petitioner submitted a brief and additional evidence on certification.

The petitioner has overcome some of the issues raised in the most recent decision, but a thorough review of the available evidence shows that the petitioner has not sufficiently accounted for the beneficiary's activities and remuneration during the two-year statutory qualifying period. Furthermore, the petitioner failed to submit documentation that the petitioner was required to submit not only under Citizenship and Immigration Services (CIS) regulations, but also under federal tax law.

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 Revenue 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 has asserted that, as an *aalim*, the beneficiary qualifies for classification as a minister as 8 C.F.R. § 204.5(m)(2) defines that term. The regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to submit a letter from an authorized official of the religious organization in the United States seeking to employ the beneficiary, stating how the alien will be solely carrying on the vocation of a minister (including any terms of payment for services or other remuneration). Because the alien must be solely carrying on the vocation of a minister, outside employment of any kind is a disqualifying factor. See *Matter of Faith Assembly Church*, 19 I&N 391, 393 (Commr. 1986).

The petitioner must demonstrate that the beneficiary worked as an *aalim* solely and continuously throughout the two years immediately prior to the filing of the petition. Section 203(b)(4)(ii)(I), (iii) of the Act; 8 U.S.C. § 1153(b)(4)(ii)(I), (iii); 8 C.F.R. § 204.5(m)(1), (m)(3)(ii)(A). See *Matter of Faith Assembly Church*, 19 I&N Dec. at 393; *Matter of Varughese*, 17 I&N Dec. 399, 402 (BIA 1980). The petition in this proceeding was filed on April 11, 2005. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of an *aalim* from April 11, 2003 to April 11, 2005.

Prior decisions in this proceeding have raised issues relating to the beneficiary's compensation and tax records. New submissions have resolved some, but not all of these issues. Further appellate review of the record of proceeding on certification reveals further anomalies in the financial documents. Based on these anomalies, the AAO must withdraw its initial findings in the June 14, 2007 remand decision that "the petitioner has established monthly \$2,000 payments to the beneficiary." The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

We begin with a discussion of the beneficiary's compensation, as the petitioner has claimed that its pay records demonstrate the petitioner's continuous employment of the beneficiary during the relevant period.

██████████, President of the petitioner's Board of Directors, stated in his introductory letter dated April 2, 2005, that the petitioner "continues to pay [the beneficiary] \$2000.00 as his monthly salary. He has also been provided with a suitable accommodation, and health benefits have also been extended to him." It is noted that Sajjad Mir signed the completed Form I-360 on behalf of the petitioning organization, thereby certifying under penalty of perjury that "this petition and the evidence submitted with it are all true and correct." In later correspondence, ██████████, the petitioner's Treasurer and a member of its Board of Directors, stated that the beneficiary "is paid a fixed remuneration every month."

Upon review, the petitioner has submitted conflicting and incomplete evidence of the claimed wages. Although the petitioner claims to have paid the beneficiary approximately \$24,000 in wages during 2004, and the petitioner claims that his sole income in the United States has consisted of monthly \$2,000 checks from the petitioner, in fact approximately \$20,000 in wages during the 2-year qualifying period remain unaccounted for in the petitioner's own records.

The petitioner submitted copies of 23 checks payable to the beneficiary and one pay stub as evidence of "Payment to [the beneficiary] from [the petitioner]." The checks purport to show payments of \$2,000 per month from January 2003 through March 2005. There are no checks for October 2003, February 2004 or September 2004 (although there is a pay stub for September 2004). Most of the photocopied checks are marked as having been presented for payment. Specifically, the magnetic ink character recognition (MICR) information at the bottom of each check, which includes the account number and check number, should also reflect the dollar amount of the check once the check is processed. Eight of the checks, however, show no such markings:

Check #	Date	Check #	Date
██████████	4/1/04	██████████	6/3/04
██████████	8/1/04	██████████	10/1/04
██████████	11/1/04	██████████	12/1/04
██████████	1/4/05	██████████	3/17/05

The checks show the account numbers of two different accounts, the low-numbered checks (██████████) coming from one and the high-numbered checks (3979-5016) from the other. The petitioner has submitted copies of bank statements issued from January 1, 2004 to May 31, 2005, from July 30, 2005 to December 31, 2005, and from February 1, 2006 to December 29, 2006 for the account shown on the high-numbered checks. The record contains no bank statements issued during the qualifying period for the petitioner's other account, from which the low-numbered checks were purportedly drawn.

The bank statements in the record show that check ██████████ was processed in April 2005, but there is no evidence that checks ██████████ or ██████████ were ever presented for payment. The bank statements show that other checks issued at the same time were presented for payment. Furthermore, the record shows that the petitioner wrote check ██████████ (said to be for the beneficiary's rent) on January 1, 2005, a full month after the date on check ██████████ even though ██████████ comes later in the check sequence. Checks ██████████ and ██████████ do not appear in the petitioner's bank statements until mid-February 2005.

The above evidence leaves numerous gaps in the beneficiary's claimed remuneration during the qualifying period. The record confirms completed pay transactions for only four non-consecutive months in 2004. Approximately \$20,000 in wages remain unaccounted for in the petitioner's bank statements. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. Accordingly, the unprocessed checks and the bank statements provided by the petitioner do not establish that the beneficiary was continuously employed as an *aalim* during the two-year qualifying period.

A related issue concerns the degree of the petitioner's compliance with requests for evidence that the director issued pursuant to 8 C.F.R. § 103.2(b)(8).

In a request for evidence (RFE) dated December 11, 2006, the director instructed the petitioner to submit a copy of its Internal Revenue Service (IRS) Form 1023 *Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*. This form contains material information regarding the petitioner's finances, functions, organizational structure, tax-exempt purposes, and other areas of interest. In a response dated December 16, 2006, [REDACTED] stated: "We were not able to find a copy of [the petitioner's] application (Form 1023)." For organizations that filed Form 1023 after July 15, 1987, failure to retain a copy of Form 1023, or to make the form available for inspection upon request, is a violation of section 6104(d) of the Internal Revenue Code. In fact, the May 15, 2001 IRS letter provided by the petitioner as evidence of its tax exempt status contains the following statement:

You are required to make available for public inspection your exemption application, any supporting documents, and your exemption letter. Copies of these documents are also required to be provided to any individual upon written or in person request without charge other than reasonable fees for documents or in postage.

Clearly, the petitioner was aware that it was required, under federal law, to keep the Form 1023 available for future inspection. The petitioner had no legal basis for its failure to make the Form 1023 available for CIS review. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Even if there were no other grounds to consider, this basis alone would prevent the approval of the petition. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The issues of the petitioner's ability to document the beneficiary's prior employment, and the petitioner's compliance with requests for evidence, coincide when we consider the petitioner's response to an RFE for tax records to support the petitioner's and the beneficiary's claims. The director requested copies of the beneficiary's IRS Forms W-2 for 2004 and 2005. The petitioner's response did not include these documents, or any explanation for their absence. The petitioner submitted copies of the beneficiary's state and federal income tax returns for 2002 through 2005. Line 12 of the California Resident Income Tax Return is designated for "wages from your Form(s) W-2, box 16." On the returns for 2003 and 2004, the beneficiary entered the figure "20,000." The beneficiary claimed that amount under "Wages, salaries, tips, etc." on his 2003 and 2004 federal income tax returns, and \$24,000 on his 2005 return.

On July 2, 2007, the director issued another request for evidence (RFE), instructing the petitioner to submit "copies of the previously requested beneficiary's W-2s from 2003 to 2005." In an undated message, transmitted by facsimile on July 16, 2007, [REDACTED] stated: "We did not file W-2 forms with IRS for [the beneficiary] because IRS regulations permit clergymen to file as self-employed." Counsel stated: "According to IRS regulations, clergy may elect to file their income taxes as 'self-employed' rather than as employees. The religious organization employing them is not required to file W-2 forms on behalf of their salaried clergy and none were filed by [the petitioner] on [the beneficiary's] behalf." Neither counsel nor the petitioner identified the IRS regulations containing said provision. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534

n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner submitted a copy of page 8 from IRS Publication 517, *Social Security and Other Information for Members of the Clergy and Religious Workers*. The petitioner had circled a section headed “Exclusion of Rental Allowance and Fair Rental Value of a Parsonage.” This information establishes that the value of the beneficiary’s housing would be excluded from his income tax, but not from his self-employment tax. This would explain an apparent discrepancy between the beneficiary’s wages and his “net profit,” but it does not resolve the issues relating to reporting of wages. IRS Publication 517 does not indicate that churches and other religious organizations are exempt from reporting the income of clergy. Another section of that publication, headed “Figuring Net Earnings From Self-Employment for SE Tax,” specifically and repeatedly mentions information reported on Form W-2. The exemption of clergy from specific *withholding* requirements does not amount to a wholesale exemption from *reporting* requirements.

Neither the petitioner nor counsel cited any IRS regulation that wholly exempts members of the clergy from income reporting requirements. IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*, states: “A church should report compensation paid to a minister on Form W-2, *Wage and Tax Statement*, if the minister is an employee, or on IRS Form 1099-MISC, *Miscellaneous Income*, if the minister is an independent contractor” (p. 15). No third option is provided. The petitioner has not provided copies of Forms 1099-MISC issued to the beneficiary, nor is there any evidence that the petitioner has issued Forms 1099-MISC to the beneficiary. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Gaps in the petitioner’s evidence, coupled with unsubstantiated claims of immunity from reporting requirements, preclude a finding that the petitioner has met its burden of proof by a preponderance of the evidence. Accordingly, the AAO will affirm the director’s certified decision to deny the petition.

ORDER: The director’s decision of July 25, 2007 is affirmed and the petition is denied.