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[Redacted]

FILE: [Redacted] WAC 03 122 53044

Office: CALIFORNIA SERVICE CENTER Date:

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.

*Mari Johnson*

*RP* Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the AAO's previous decision will be withdrawn, and the petition will be remanded for further action and consideration.

The petitioner is a school. 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 teacher of "Judaic studies" or "religious studies" (descriptions in the record vary). The director determined that the petitioner is not a qualifying tax-exempt religious organization, and that the position offered does not qualify as a religious occupation.

On October 14, 2003, the petitioner appealed the denial of the petition. The appeal included a cursory statement, and the assertion that a brief would be forthcoming within 30 days. As of July 9, 2004, the record did not contain any further submission, and the AAO summarily dismissed the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v). On motion, the petitioner demonstrates that a timely brief was submitted, but somehow it was not incorporated into the record prior to the summary dismissal. We therefore withdraw the summary dismissal and consider the appeal on its merits.

The first issue concerns the petitioner's tax-exempt status. 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.

The petitioner's recognition letter from the Internal Revenue Service, dated August 26, 1963, indicates that the petitioner's purpose is "Educational." This finding corresponds to 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)(ii) of the Code, which pertains to educational institutions. The director, in denying the petition, asserted that only a church, classified under section 170(b)(1)(A)(i) of the Code, qualifies as a religious organization for immigration purposes.

The Code and its implementing regulations do not specifically define "religious organization," but we note that Internal Revenue Service Publication 1828, *Tax Guide for Churches and Religious Organizations*, specifically states that the term "religious organizations" is *not* strictly limited to churches: "Religious organizations that are not churches typically include nondenominational ministries, interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion." *Id.* at 2. The proper test, therefore, is not whether the intending employer is a church *per se*, but rather an entity whose principal purpose is the study or advancement of religion. Counsel has noted that the above publication distinguishes between "churches" and "religious organizations."

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 memorandum specifically states that the above materials are, collectively, the “minimum” documentation that can establish “the religious nature and purpose of the organization.” Thus, for example, a petitioner cannot meet this burden by submitting only its articles of incorporation (as the petitioner has done in this instance). Also, obviously, it is not enough merely for the petitioner to *submit* the documents listed above. The *content* of those documents must establish the religious purpose of the organization.

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, the sole stated ground for denial, relies on a flawed and impermissible interpretation of the regulations. The director must, therefore, 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.

The next issue concerns the nature of the beneficiary’s position. The regulation at 8 C.F.R. § 204.5(m)(2) defines “religious occupation” as 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. The regulation reflects that positions whose duties are primarily administrative or secular in nature do not qualify.

██████████ the petitioner’s educational director, states that the beneficiary “has taught a wide array of Judaic Subjects to our pre-school aged children. Such subjects include Bible, Jewish Song and ██████████ observances.” A later statement, co-signed by Rabbi Stepen and counsel, contains the following, more detailed, description:

The position offered is that [of a] teacher of Religious Studies for . . . Early Education aged students (Classes of 20-25 per session), from Kindergarten, Pre-1A and 1<sup>st</sup> grade, including Bible Studies on the students’ Level, reading and writing Hebrew and language skills, basic laws and customs, song and dance related to Judaic Themes and holidays, holidays and ██████████ observance, and prayers in Judaic style and language.

The director, in denying the petition, quoted the above passage, but did not discuss the merits of the claim. Instead, the director concluded: “Teacher of Religious Studies, even when involving religious subject matter

is wholly a secular function. The petitioner is a school, rather than a religious organization,” and therefore the beneficiary’s position “even [in] a parochial school, is not considered a qualifying religious occupation.” On appeal, counsel argues that the director failed to consider the religious nature of the subject matter that the beneficiary teaches. Indeed, the director’s finding regarding the beneficiary’s occupation clearly rests on the conclusion regarding the petitioner’s tax-exempt status (which, in turn, we have withdrawn in this decision). We hereby withdraw the director’s finding that the beneficiary’s position is not a religious occupation.

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 March 7, 2003. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a religious studies teacher throughout the two years immediately prior to that date.

On the I-360 petition form, the petitioner indicated, under penalty of perjury, that the beneficiary has never worked in the United States without permission. The petitioner also indicated that the beneficiary’s current visa status is “B-2 overstay,” meaning that she arrived as a tourist and did not depart after her nonimmigrant visa expired. Such a status (or rather lack of status) does not permit employment, and therefore any employment undertaken in the United States under such conditions is unauthorized.

In a letter dated February 19, 2003, Rabbi Stepen states that the beneficiary “has been employed by us from December, 1998 until the present time.” Rabbi Stepen indicates that, in lieu of a cash salary, the beneficiary has received full tuition for two of her children. This tuition is worth roughly \$15,000 per year. Earlier correspondence, deriving from an earlier, denied petition, also indicates that the beneficiary has worked in exchange for her children’s tuition.

Counsel indicates that the beneficiary’s spouse has provided financial support. To establish this point, the petitioner submits a copy of the Form 1040 federal income tax return jointly filed by the beneficiary and her spouse in 2002. This document identifies the beneficiary’s spouse as a self-employed construction worker, and the beneficiary as “H/M,” an abbreviation for “homemaker.”

The director, in denying the petition, stated that unpaid volunteer work is not qualifying experience, and noted that the beneficiary has consistently referred to herself as a homemaker rather than a teacher on her tax returns. On appeal, counsel asserts that the beneficiary was not an unpaid volunteer, but rather received remuneration through tuition vouchers rather than cash. Religious work performed for non-cash compensation is employment for immigration purposes. *See Matter of Hall*, 18 I&N Dec. 203 (BIA 1982).

While the use of the term “H/M” for “homemaker” on the beneficiary’s tax returns does not support the conclusion that the beneficiary worked as a teacher, by itself it does not strongly contradict that claim either. A more fruitful avenue of inquiry would be for the director to request documentary evidence that the beneficiary did indeed work, and was indeed compensated, as claimed. Such documentation might include *contemporaneous* evidence of the tuition vouchers purportedly issued to the beneficiary’s children; class schedules showing that the beneficiary routinely worked a full day throughout each school year; and the like. The director should give the petitioner the opportunity to submit this documentation. If the petitioner is unable to document that the beneficiary worked during the time claimed, and to the extent claimed, then it would be appropriate to revisit this

issue in a new decision. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Beyond the decision of the director, we note that 8 C.F.R. § 204.5(g)(2) reads, 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 record contains no annual reports, federal tax returns or audited financial statements. For a non-profit organization, the appropriate analog for a federal tax return would be Form 990, Return of Organization Exempt from Income Tax. The director should allow the petitioner the opportunity to submit this required documentation. We note that 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.

While we have reversed one of the director’s stated grounds for denial, the tax exemption and experience issues remain unresolved, and the petitioner must still establish its ability to pay the beneficiary’s proffered salary. Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The AAO’s decision of July 9, 2004 is withdrawn, as is the director’s decision of September 17, 2003. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.