



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: [Redacted]
EAC 03 117 52024

Office: VERMONT SERVICE CENTER

DEC 21 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]

PUBLIC COPY

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

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a synagogue. 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 cantor. The director determined that the petitioner failed to establish: (1) that the position offered is a qualifying religious occupation; (2) that the beneficiary has the required two years of continuous experience as a cantor immediately preceding the petition's filing date; (3) its ability to pay the beneficiary's compensation; or (4) that it is a qualifying tax-exempt religious organization.

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 first issue is whether the petitioner seeks to employ the beneficiary in a qualifying occupation. 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.

A job offer letter from [REDACTED] then president of the petitioning congregation, contains the following description of the beneficiary's position as cantor:

You shall serve as one of the clergy staff of our congregation in conjunction with, but not limited to, worship, life cycle events (including involvement in our Bar/Bat Mitzvah Program and Confirmation Program), liturgical and educational matters. . . .

As music director, you shall be directly responsible for the music of the congregation. . . . Your involvement in the religious school will include at least one (1) session per month for each of the following groups: K-3, 4, 5 and 6.

The director requested additional evidence to show that the petitioner has worked, and will work, full-time in a position that relates to a traditional religious function. The director stated "[t]he beneficiary's duties appear to be very similar to ones normally performed by volunteer laypersons in many congregations." The director also requested "evidence that the beneficiary is qualified to do the above-mentioned traditional religious work."

In response to the director's notice, the petitioner has submitted a detailed schedule, showing such duties as tutoring, "T'filah for Religious School," and sabbath services. The petitioner submits a copy of a diploma from the [redacted] Institute of Religion, awarding the beneficiary the title of Cantor on May 21, 2000. On August 22, 2001, the beneficiary registered a "Statement of Ordained Clergy" with the city clerk of New York, giving May 21, 2000 as the date of his ordination.

The director denied the petition, having determined that the petitioner failed to show that the position of cantor is a qualifying religious occupation. On appeal, counsel notes that the regulation at 8 C.F.R. § 204.5(m)(2) indicates that cantors work in a religious occupation. The petitioner submits background materials on appeal, demonstrating that the beneficiary performs the usual functions of a cantor; he did not merely assume the title for immigration purposes. The materials submitted on appeal further demonstrate that a cantor performs a traditional religious function in Judaism. We therefore withdraw the director's finding that the petitioner has not shown that the beneficiary's position is a religious occupation.

The next issue concerns the beneficiary's past experience. 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 February 25, 2003. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a cantor throughout the two years immediately prior to that date.

According to documents submitted with the initial filing, the beneficiary's R-1 nonimmigrant religious worker visa authorized him to work for the petitioner beginning on July 1, 2002. The petitioner's initial submission does not indicate where the beneficiary was working between February 2001 and June 2002. The petitioner, on the I-360 petition form, indicates that the beneficiary has been in the United States since July 1996, but a partial copy of the beneficiary's passport in the record shows that the beneficiary most recently entered the United States on January 7, 2003.

The director requested further details regarding the beneficiary's activities throughout the 2001-2003 qualifying period. In response, the petitioner submits documents showing that it first employed the beneficiary on July 1, 2000, and that the job offer effective July 1, 2002 was an extension of the beneficiary's original contract.

The petitioner submits copies of tax documents intended to establish the beneficiary's past employment. The director, reviewing these documents, noted that the beneficiary had left blank the line marked "occupation"

on his tax returns, and that the copies are unsigned, with no evidence of submission to the IRS. The beneficiary's tax documents, however, also include Form 4361, an application form that is only "for Use by Ministers, Members of Religious Orders and Christian Science Practitioners." The beneficiary checked the box marked "Ordained minister, priest, rabbi." Markings on this form indicate that the beneficiary submitted the form on April 12, 2001; the IRS received it on April 17, 2001; and an IRS approved the application on September 7, 2001. This documents that the beneficiary represented himself to the IRS as a member of the clergy in April 2001, in the early months of the qualifying period. Furthermore, the petitioner has submitted copies of Form W-2 Wage and Tax Statements that it issued to the beneficiary, showing that the petitioner paid the beneficiary \$71,604.21 in 2001 and \$75,645.83 in 2002.

In denying the petition, the director stated "[t]he evidence of record is not persuasive the W-2 Forms and Federal Income Tax Returns confirm that the beneficiary was paid a salary for the past two years. . . . The record contains insufficient documentary evidence that the beneficiary was paid any wages by the petitioning organization during the two years immediately preceding the filing date of the petition." The director did not explain why the Forms W-2 are not presumptive evidence of payment of such wages. The director did not specify any information or evidence that leads to the conclusion that the Forms W-2 are fraudulent or otherwise not credible. In the absence of evidence to cast doubt on the credibility of the Forms W-2, we must presume that the petitioner paid the beneficiary as claimed. The rate of pay, relatively high for a religious worker, is certainly consistent with full-time employment.

The evidence of record appears to be credible and consistent with regard to the beneficiary's past work for the petitioner. Therefore, we withdraw the director's conclusion regarding the beneficiary's experience during the two-year qualifying period.

The next issue concerns the petitioner's ability to pay the beneficiary's proffered wage. The wage is set to increase over time. As of the filing date, the beneficiary's compensation (including benefits) was set at \$77,500 per year. The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

states that the beneficiary's full compensation "is included in our 2002/2003 Budget," and that the petitioner "has sufficient funds to meet its payment obligation."

Pursuant to the above regulation, an officer's attestation of ability to pay is acceptable only when the prospective employer employs 100 or more workers. The petitioner has not shown that it employs 100 or more workers, and therefore the regulations require further documentation.

The petitioner submits a copy of its 2002-2003 budget, indicating that it anticipates its expenses to equal its income. There is no specific line item marked "cantor," but the line marked "clergy" indicates an amount more than three times the beneficiary's proffered wage. As noted above, the petitioner's job offer letter indicates that the beneficiary "shall serve as one of the clergy staff of our congregation."

The director requested "additional evidence to establish the ability of the religious organization to pay the offered wage as of the filing date." The director also requested evidence that it has paid its workers during the previous two years. As noted above, the petitioner has submitted Forms W-2 demonstrating that the petitioner paid the beneficiary over \$70,000 in 2001 and over \$75,000 in 2002. Absent evidence that would challenge the authenticity of the Forms W-2, the documents are strong evidence that the petitioner actually paid the beneficiary, and therefore the petitioner must have been able to do so. 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 William R. Yates, Associate Director of Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 4, 2004).

We note that the beneficiary received slightly less than \$77,500 in 2002, but documents in the record show that the beneficiary's salary is increased in July of each year. Therefore, he would have earned a lower rate during the first half of 2002. The available evidence is entirely consistent with a finding that the petitioner has paid, and thus must have been able to pay, the beneficiary's compensation, and we withdraw the director's finding in this regard.

Having withdrawn three of the director's findings, there remains only the issue of 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 initial submission demonstrates that the petitioner is listed in the directory of the Union of American Hebrew Congregations. The petitioner also submits a copy of an Exempt Organization Certification, indicating that the petitioner is exempt from New York State sales and use tax. This document pertains to *state* rather than *federal* tax exemption, and thus does not satisfy the requirements set forth at 8 C.F.R. § 204.5(m)(3)(i). The petitioner's affiliation with the Union of American Hebrew Congregations is not *prima facie* evidence of exemption unless the petitioner can show that the Union is an umbrella organization with a group exemption that expressly covers entities listed in its directory.

The director instructed the petitioner to submit evidence of the required federal income tax exemption. In response, the petitioner has submitted additional evidence regarding its *state* tax exemption. [REDACTED]'s successor as president of the petitioning congregation, states "[t]he Temple has Automatic Tax-Exempt Status by meeting requirements of IRC Section 501(c)(3) and is not required to apply for and obtain recognition of tax-exempt status from the IRS."

The director denied the petition, in part based on the absence of required documentation of the petitioner's tax-exempt status. On appeal, counsel repeats the argument that churches are automatically exempt. The petitioner submits a letter from an accountant, who asserts that, were the petitioner to file IRS Form 1023, Application for Recognition of Exemption, the application would be approved and the IRS would issue the petitioner a recognition letter.

The petitioner submits excerpts from IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*. The petitioner has highlighted a passage on page 3 of that document, indicating "[c]hurches that meet the requirements of IRC section 501(c)(3) are automatically considered tax exempt and are not required to apply for and obtain recognition of tax-exempt status from the IRS." The next paragraph, however, goes on to recommend that churches apply anyway, "because such recognition assures church leaders, members, and contributors that the church is recognized as exempt." Similarly, the instructions included with Form 1023 state that churches "may choose to file Form 1023 in order to receive a determination letter that recognizes their section 501(c)(3) status," because such status "provides certain incidental benefits such as . . . public recognition of tax-exempt status." Indeed, this very proceeding demonstrates one advantage of obtaining a recognition letter.

The petitioner's implicit argument is, apparently, that the petitioner is a "church"; churches are automatically tax-exempt; and, therefore, the petitioner must be presumed to be tax-exempt even if there is no documentation to establish this. This argument, however, fails upon examination of the relevant regulation at 8 C.F.R. § 204.5(m)(3)(i). That regulation specifically requires *documentation* showing that the employer is tax-exempt (i.e., an IRS recognition letter), or else *documentation* (including a completed Form 1023) that the IRS *would* require from the employer, should it choose to apply for such recognition. The regulatory requirement, therefore, is not satisfied by the general statement that the IRS does not require churches to file Form 1023. Otherwise, the above regulation would be completely redundant.

The reason for this is clear. By submitting evidence of IRS recognition (or the documentation necessary to secure that recognition), the petitioner establishes that it is, in fact, what it purports to be (i.e., a tax-exempt religious organization). By simply noting that churches do not need to file Form 1023, the petitioner leaves open the question of whether it is, in fact, a *bona fide* church. The question is not whether churches qualify for exemption, but whether this particular petitioning entity qualifies for exemption as a church.

We stress that there has been no definitive finding that the petitioner is *not* a tax-exempt religious organization. Rather, the petitioner has not met its burden of proof to show that it *is* such an entity. (There is a difference between a negative finding and the absence of a positive finding). Because this is a question of evidence, no amount of argument or background materials can take the place of that evidence, and the assertion that the petitioner is a "church" for tax purposes is not *evidence* that meets the requirements set forth in the regulations.

That being said, the director did not clearly indicate exactly what documentation is required. The petitioner admits that it has never applied for IRS recognition as a tax-exempt church, and therefore the petitioner cannot meet 8 C.F.R. § 204.5(m)(3)(i)(A). Therefore, the petitioner must meet 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting 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 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 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. 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.

We acknowledge the petitioner's arguments on appeal, but there is no indication that the evidentiary requirements listed at 8 C.F.R. § 204.5(m)(3)(i) are optional or discretionary, and there is no provision to allow the approval of a petition without the evidence there described. While the director should have given the petitioner a clearer idea of what evidence was required, and why, this error by the director is not a valid basis for waiving the requirement entirely. While it appears to be far more likely than not that the petitioner is, in fact, a qualifying tax-exempt entity, the petitioner must still meet the evidentiary requirements set forth in the regulations. The director must, therefore, provide the petitioner with an opportunity to submit the materials listed in [REDACTED] memorandum, and thereby comply with 8 C.F.R. § 204.5(m)(3)(i).

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 director's decision is withdrawn. 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.