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Washington, DC 20529



U.S. Citizenship  
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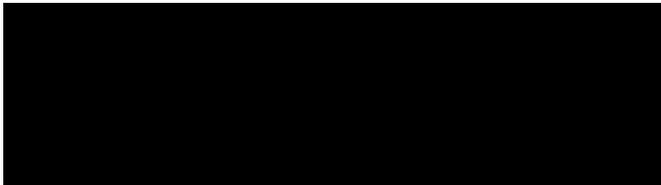
Office: TEXAS SERVICE CENTER Date:

JUN 29 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: 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, Texas Service Center. Counsel filed a Form EOIR-29, Notice of Appeal to the Board of Immigration Appeals of Decision of an INS Officer. Pursuant to 8 C.F.R. § 204.5(n)(2), jurisdiction for an appeal of the denial of an employment based visa petition lies with the Associate Commissioner of Examinations (the Administrative Appeals Office ((AAO)). The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.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 Judaic studies teacher. The director determined that the petitioner had not established that it qualified as a bona fide nonprofit religious organization.

On appeal, counsel submits a brief.

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 single issue presented on appeal is whether the petitioner established that it qualified as a bona fide nonprofit religious organization.

The regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

(3) *Initial evidence.* Unless otherwise specified, each petition for a religious worker must be accompanied by:

(i) Evidence that the organization qualifies as a nonprofit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with § 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 § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organization.

The petitioner submitted a copy of an August 21, 1973 letter from the Internal Revenue Service (IRS), granting the petitioner tax-exemption under section 501(c)(3) of the Internal Revenue Code (IRC) as an organization described under section 170(b)(1)(A)(ii) of the IRC. The petitioner also submitted a copy of brochures about the school and excerpts from its website.

To meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(A), a copy of a letter of recognition of tax exemption issued by the IRS) is required. In the alternative, to meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B), a petitioner may submit such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the IRC as it relates to religious organizations. This documentation includes, at a minimum, a completed IRS Form 1023, the Schedule A supplement, if applicable, and a copy of the organizing instrument of the organization, which contains a proper dissolution clause and which specifies the purposes of the organization.

In a Notice of Intent to Deny dated September 24, 2003 and in her decision, the director advised the petitioner:

Both the statute and the implementing regulation rely on the IRS determination of tax exempt status in defining a qualifying religious organization. 8 C.F.R. 204.5(m)(3)(i)(B) relies on IRC section 501(c)(3) "as it relates to religious organizations." There are several classes of nonprofit organizations eligible for tax exemption under section 501(c)(3) of the Internal Revenue Code. Only organizations classified, or classifiable, as a "church" pursuant to sections 509(a)(1) and 170(b)(1)(A)(i) of the IRC are considered as relating to religious organizations for the purpose of special immigrant religious worker classification. The term "church" is the term used in Part III, #9 on the IRS Form 1023.

While the IRS will grant tax-exempt status to organizations operated for religious purposes under section 170(b)(1)(A)(ii), clause (ii) covers not only organizations operated for religious purposes about also schools. This section refers to entities that receive a substantial part of their support in the form of contributions from publicly supported organizations, from a governmental unit, or from the general public. An organization granted tax-exempt status under section 170(b)(1)(A)(ii) of the IRC need not be operated exclusively for religious purposes. To satisfy 8 C.F.R. 204.5(m)(3)(i), the petitioner must establish that its tax exemption is based on its status as a religious organization, not just a publicly supported organization. Cf. section 170(b)(1)(A)(i) IRC. Therefore, its tax exemption may not be based on section 170(b)(1)(A)(ii) of the IRC.

We withdraw this determination by the director.

An organization that qualifies for tax exemption as a publicly supported organization under section 170(b)(1)(A)(ii) of the IRC 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)(ii) derives primarily from its religious character, rather than from its status as a publicly supported charitable and/or educational institution.

Because the IRS determination letter that classifies an entity under section 170(b)(1)(A)(ii) of the IRC cannot, by itself, establish that the entity is a religious organization, that determination letter cannot satisfy 8 C.F.R. § 204.5(m)(3)(i)(A). The other option, at that point, is to comply with 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting the documentation that the IRS would require to determine that the entity is a religious organization.

The organization can establish this by submitting documentation that 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 Operation for CIS, *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, and
- (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. 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 denied the petition because the IRS classified the petitioner under section 170(b)(1)(A)(ii) rather than section 170(b)(1)(A)(i) of the IRC. 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.

On remand, the director should give the petitioner an opportunity to establish the religious nature of the organization pursuant to 8 C.F.R. § 204.5(m)(3)(i)(B), as outlined in the Yates Memorandum.

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 AAO for review.