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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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Handwritten initials or mark

FILE: EAC 03 227 52458 Office: VERMONT SERVICE CENTER

Date: **MAR 11 2005**

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:

SELF-REPRESENTED

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.

Handwritten signature of Robert P. Wiemann

S Robert P. Wiemann, Director
Administrative Appeals Office

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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.

The petitioner seeks classification of 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 employ the beneficiary as a rabbi. The director denied the petition on June 29, 2004, determining that the petitioner failed to establish its tax-exempt status as a 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 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 issue to be determined is whether the petitioner has the appropriate tax exemption. The regulation at 8 C.F.R. § 204.5(m)(2) defines a "bona fide nonprofit religious organization in the United States" as an organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations, or one that has never sought such exemption but establishes to the satisfaction of Citizenship and Immigration Services it would be eligible if it had applied for tax-exempt status.

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.

According to the documentation from the Internal Revenue Service, the petitioner's tax-exempt status derives from 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)(vi) of the Code. In his decision, the director noted that section 170(b)(1)(a)(vi) of the Code refers "to charities that receive a substantial part of their support in the form of contributions from publicly supported organizations, from a government unit, or from the general public," and therefore, do not need to be operated exclusively for religious purposes. The director then denied the petition, stating that because the petitioner's tax exemption was based upon section 170(b)(1)(A)(vi) of the Code and not section 170(b)(1)(a)(i), the petitioner cannot be considered a tax-exempt religious organization.

We find the director failed to give full consideration to the petitioner's classification under section 170(b)(1)(A)(vi). Although the director correctly notes that an organization that qualifies for tax-exemption as a publicly supported organization under section 170(b)(1)(A)(vi) of the Code can be either religious or non-religious, such a fact does not automatically render the petitioner ineligible for approval under 8 C.F.R. § 204.5(m)(3)(i).

While the burden of proof is on the petitioner to establish its classification under section 170(b)(1)(A)(vi) of the Code derives primarily from its religious character, rather than its status as a publicly supported charitable and/or educational institution, the director did not give the petitioner the opportunity to establish such a fact. Accordingly, we must remand the case to the director in order to request evidence that the petitioner's classification by the Internal Revenue Service derives primarily from its religious character, rather than its status as a publicly supported charitable and/or educational institution. The necessary documentation is described in a memorandum from [REDACTED] 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. That being said, it is important to note that item (2), Schedule A of Form 1023, is only required "if applicable." If the director cannot show that Schedule A is applicable in a given instance, then the petitioner's failure to submit Schedule A is not grounds for denial of the petition.

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.

As the director relied on a flawed and impermissible interpretation of the regulations, the director must 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.

Beyond the decision of the director, we do not find the record contains sufficient evidence to establish the beneficiary's two years of continuous experience as a rabbi. 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that "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." The petition was filed on August 1, 2003. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a rabbi throughout the two years immediately prior to that date. Part-time work, or work interrupted by secular employment, is not continuous. See *Matter of B*, 3 I&N Dec. 162 (CO 1948), and *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

The Form I-94, Arrival and Departure Record, indicates that the beneficiary entered the United States on April 24, 2002 as a B-2 nonimmigrant with authorization to remain in the United States until October 23, 2002. Subsequently, the beneficiary received approval to remain in the United States as an R-1 nonimmigrant from October 24, 2002 through October 13, 2005. Accordingly, as the beneficiary was outside of the United States for nearly nine months out of the requisite two-year period, his experience in the United States cannot suffice to meet the experience and denominational membership requirements.

In a letter submitted with the original filing, Rabbi [REDACTED] Executive Director of the petitioning institution, provides no description of the beneficiary's work experience during the qualifying period. On September 10, 2003, the director instructed the petitioner to submit additional documentary evidence to establish the nature and extent of the beneficiary's religious work during the two-year qualifying period.

In response to the director's request for evidence, [REDACTED] states that the beneficiary has been "working in R-1 status since 10/24/02 [until the] present time and has qualifying experience and training from abroad to do the work as a Religious Instructor and he has worked for a period of two years immediately prior to the filing of this petition." Although the record reflects the petitioner successfully petitioned for an R-1 nonimmigrant visa on the beneficiary's behalf, there is no documentary evidence such as paystubs or tax returns to show the beneficiary was employed with the petitioner since October 2002. 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).

As it relates to the beneficiary's work experience prior to coming to the United States, the record contains a translated document in which [REDACTED] in his capacity as "manager" of an unnamed institution, states that the beneficiary was a teacher "from April 98 to January 03." The translation does not identify the school at which the beneficiary was employed and does not indicate where the school was located. Further, the translator has not certified the translation as complete and accurate, or certified that he or she is competent to translate from the foreign language into English. See 8 C.F.R. § 103.2(b)(3).

More importantly, the translation contradicts the evidence contained in the record. Specifically, the translation indicates that the beneficiary worked in Israel from April 1998 through January 2003, which conflicts with the petitioner's claim that the beneficiary began working for its institution in October 2002. 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).

In light of this discussion, the director should afford the petitioner an opportunity to submit evidence which establishes the beneficiary's continuous, full-time experience during the requisite two-year period. 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.

In reviewing an immigrant visa petition, Citizenship and Immigration Services (CIS) must consider the extent of the documentation furnished and the credibility of that documentation as a whole. The petitioner bears the burden of proof in an employment-based visa petition to establish that it will employ the alien in the manner stated. *See Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966); *Matter of Semerjian*, 11 I&N Dec. 751 (Reg. Comm. 1966).

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.