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U.S. Citizenship  
and Immigration  
Services

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MAR 28 2005



FILE:



WAC 03 174 54084

Office: CALIFORNIA SERVICE CENTER

Date:

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.

*Mari Johnson*

for Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

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 Buddhist nun. The director denied the petition, determining that the petitioner failed to establish its tax-exempt status as a religious organization.

The sole issue to be determined in this proceeding is whether the petitioner is considered a qualifying tax-exempt religious organization. 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 (CIS) that 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 [the Code] 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 [IRS] 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 IRS submitted with the instant petition, the petitioner's tax-exempt status derives from classification not under section 170(b)(1)(A)(i) of 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) "refers to charities 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." The director then denied the petition stating the petitioner was granted tax exemption under a section that does "not [relate] to religious organizations."

Upon review, we find the director failed to give full consideration to the petitioner's classification under section 170(b)(1)(A)(vi). As noted by the director, section 170(b)(1)(A)(iv) pertains to publicly supported organizations as described in section 170(c)(2) of the Code, "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes," or for other specified purposes. Clearly, this section is applicable to both religious organizations and to secular organizations. Thus, although the director correctly noted 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, the fact that a petitioner is granted tax-exemption based upon section 170(b)(1)(A)(vi) does not automatically render the petitioner ineligible for approval under 8 C.F.R. § 204.5(m)(3)(i).

In this proceeding 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. However, the director failed to afford the petitioner an opportunity to establish its religious character prior to denying the petition based on the finding that the petitioner was ineligible based upon tax exemption under section 170(b)(1)(A)(vi).

Specifically, the director should have requested evidence as 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.

On appeal, the petitioner submits evidence from the IRS that reflects the IRS modified the petitioner's tax-exempt status and determined the petitioner is qualified for tax-exemption under section 170(b)(1)(A)(i). In most instances, the AAO does not accept evidence which has been established after the date of filing as a petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In this instance, however, the issue is not whether the petitioner was tax-exempt at the time of filing because the evidence shows the petitioner was tax-exempt. Instead, the issue is whether the petitioner's tax-exemption was based upon its religious character. We find the fact that the IRS was able to reclassify the petitioner's exempt status as an organization described in 170(b)(1)(A)(i) is sufficient evidence that the petitioner's original classification under 170(b)(1)(A)(iv) derived from its religious character rather than its status as a publicly supported charitable or educational institution.

Accordingly, the petitioner has overcome the petitioner's sole ground for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has sustained that burden.

**ORDER:** The denial of the petition is withdrawn. The appeal is sustained and the petition is approved