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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 02 262 51886

Office: VERMONT SERVICE CENTER

Date: APR 06 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:



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, 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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.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 residential community, operating group homes to assist the mentally handicapped to live with a greater degree of independence. 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 community co-worker and religious special educator. The director determined that the petitioner is not a qualifying tax-exempt religious organization.

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 documentation from the Internal Revenue Service (IRS), 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, which 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. This section refers in part to religious organizations, but to many types of secular organization as well.

Clearly, 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 burden of proof is on the petitioner to establish that its classification under section 170(b)(1)(A)(vi) of the Code derives primarily from its religious character, rather than from its status as a publicly-supported charitable and/or educational institution.

The Code and its implementing regulations do not specifically define "religious organization," but IRS regulations indicate that the terms "religious organization" and "church" are not synonymous; for instance, 26 C.F.R. § 1.511-2(a)(3)(i) acknowledges the existence of "religious organizations" that are "not themselves churches." IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*, also 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.

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. That being said, it is important to note that item (2), Schedule A of Form 1023, is only required “if applicable.” If Schedule A is not applicable in a given instance, then the petitioner’s failure to submit Schedule A is not grounds for denial of that 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. With regard to “[b]rochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization,” the petitioner’s letterhead identifies a web site, <http://www.triformcamphill.org>, which may yield some information about the extent to which the petitioner emphasizes its religious nature in a context other than a religious worker petition.

We note that the crucial issue is not the petitioner describes itself to immigration authorities now, after the date of filing this visa petition, but rather how the petitioner presented itself to the IRS when it first applied for its tax exemption circa 1978. Therefore, ideally, the petitioner should submit a copy of its *original* Form 1023 and any other information that the IRS relied upon when it rendered its decision, along with any materials already submitted to the IRS in support of a request for an amended or changed classification. The regulation at 8 C.F.R. § 103.2(b)(2)(i) states:

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

In this instance, the “required evidence” in question is the evidence upon which the IRS based its determination. New documents, executed for the purpose of furthering the present petition and appeal, would necessarily carry substantially less weight than the original materials submitted to the IRS, because 21st-century documents obviously did not factor in the IRS’ determinations of 1978 and 1982.

On appeal, counsel cites a December 3, 2003 letter from the Assistant United States Attorney (AUSA) of the Eastern District of Pennsylvania to the Clerk of the United States Court of Appeals for the Third Circuit, pertaining to litigation involving another Camphill community (*Camphill Soltane v. U.S. Department of Justice*, Court of Appeals No. 03-1626). The AUSA refers to the then-imminent issuance of Mr. Yates' memorandum, discussed above, and states:

In light of this change to the agency's interpretation of its regulations, CIS is withdrawing the argument set forth in Section IV of its appellate brief that the Camphill Soltane had not qualified for the special immigration visa because it does not qualify as a "church" under the applicable Internal Revenue Code provision. . . .

In the Camphill Soltane case, the community's tax status was only one of four grounds for denial. Counsel notes that those other three grounds were not cited in the present decision. Therefore, counsel argues, the AUSA has withdrawn the only ground for denial and "the petition must be granted." We reject this interpretation of the letter. Counsel fails to take into account the following passage from the AUSA's letter:

[E]ven if the court reversed the agency's decision with regard to the other three factors [unrelated to Camphill Soltane's tax status], such a conclusion would necessarily result in a remand to the agency for a determination as to whether Camphill Soltane met the definition of a bona fide religious organization under the new interpretation of the regulations. The agency only determined that Camphill Soltane was not a "church"; now that being a "church" under Section 170(b)(1)(A)(i) of the Internal Revenue Code is not the only way to satisfy the bona fide religious organization requirement, the agency would have to review evidence and make a factual determination regarding this factor.

The above passage makes it unambiguously clear that the AUSA did *not* stipulate that Camphill Soltane qualifies as a "religious organization" for tax purposes. Rather, the AUSA plainly stated that the nature of Camphill Soltane's tax-exempt status remained an open question, "necessarily" requiring "a remand to the agency for a determination" on that question. Given that counsel quotes from the AUSA's letter, and attaches a copy of that letter to the appeal brief, it is obvious that counsel knows, or should have known, that the AUSA never conceded or stipulated that Camphill Soltane received its tax-exempt status primarily on religious grounds, rather than for other reasons (such as its educational and rehabilitative efforts).

Furthermore, the petitioner in the present matter is not Camphill Soltane, but a separate corporate entity. The AUSA made no general statements about other Camphill communities, much less any blanket stipulation that would cover Camphill communities, like the petitioner, that were not involved with the litigation in question.

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 IRS 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.

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.