

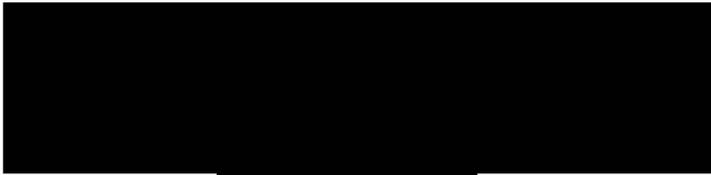
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U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **MAR 19 2008**
EAC 05 182 51819

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]

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.

A handwritten signature in cursive script that reads "Mari Plunson".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) remanded the matter for a new decision. The director again denied the petition, and certified the matter to the AAO for review. The AAO will affirm the denial of the petition.

The petitioner is a religious school and theological seminary. 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 Torah lecturer at Cheder Lubavitch, a division of the petitioning entity. Cheder Lubavitch educates students up to the eighth grade level. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a religious teacher immediately preceding the filing date of the petition. The director also found that the beneficiary's concurrent work for two different religious denominations called into question the qualifying nature of the beneficiary's work.

On certification, the petitioner submits letters and copies of tax documents.

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 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 experience in the religious vocation, professional religious work, or other religious work. The

petition was filed on June 6, 2005. Therefore, the petitioner must establish that the beneficiary continuously performed the duties of a religious teacher throughout the two years immediately prior to that date.

The beneficiary first entered the United States in May 2004, during the qualifying period. Subsequent to the remand order, the petitioner has submitted Israeli tax documents showing that she received payment for work she performed prior to her entry into the United States. At issue here is the beneficiary's subsequent work in the United States.

In a letter accompanying the initial submission, [REDACTED] of the petitioning institution stated:

[The beneficiary] is currently employed with our organization as a Secondary School Teacher (religious studies) under the exchange program through Jewish Education Service of North America. . . .

From May 2004 until September 2004 [the beneficiary] worked with our administrator to prepare lesson plans, designed lectures to match our teaching requirements and set up her classroom in contemplation of the school year [that] commenced in September 2004.

From September 2004 until the present time, she has been teaching a full Jewish religious curriculum as a secondary school teacher.

An accompanying job offer letter from the petitioner to the beneficiary, dated January 25, 2005, indicated that the beneficiary's "rate of compensation shall be \$22,300/year, payable bi-weekly." The stated rate of payment amounts to \$857.69 every two weeks.

In a subsequent letter, dated November 17, 2005, [REDACTED] stated that the petitioner had employed the beneficiary from "May 2004 through the present time," and that the beneficiary's "annual salary is \$18,427.50." [REDACTED] did not explain the significant reduction from the "\$22,300/year" stated in the January 2005 job offer letter.

On June 11, 2007, following the AAO's remand order, the director issued a request for evidence (RFE) instructing the petitioner to submit additional evidence of continuous qualifying employment, including "the beneficiary's Federal Income Tax returns, including all schedules and Forms W-2 and/or Forms 1099, for the [years] 2004 and 2005."

In response, the petitioner submitted copies of its own internal "Payee Reports" indicating that the petitioner paid the beneficiary \$440 for part of May 2004 and \$1,755 per month for June 2004, the September 2004-June 2005 school year, and the September 2005-June 2006 school year. This amounts to an annual salary of \$17,550 per full year, which is somewhat lower than the \$18,427.50 figure quoted earlier and significantly less than the original figure of \$22,300 per year. Also, the "Payee Reports" indicate monthly payments, whereas the job offer letter specified bi-weekly payments. This evidence, on its face, indicates that the petitioner has failed to comply with the terms of its own written job offer.

The “payee reports” are both dated July 17, 2007 and are, therefore, not contemporaneous documentary evidence of employment or compensation in 2004-2005. The petitioner did not provide copies of the tax documents that the director had specifically requested. On this basis alone, the petition may not be approved. 8 C.F.R. § 103.2(b)(14). The petitioner did not explain this omission or even acknowledge that the director had requested the tax documents.

The director denied the petition on December 11, 2007, citing, in part, the petitioner’s failure to address the director’s specific request for copies of the beneficiary’s tax documents. The director added: “While the [petitioner’s] letter dated January 25, 2005 states the beneficiary’s rate of compensation shall be \$22,300/year, payable bi-weekly[,] the record does not include evidence of such compensation.”

In response to the notice of certification, the petitioner submits photocopies of handwritten Internal Revenue Service Form 1099-MISC Miscellaneous Income statements, reporting that the petitioner paid the beneficiary “Other income” in the amounts of \$7,020 in 2004 and \$17,550 in 2005. The petitioner fails to explain why these documents were not submitted in response to the RFE. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it in response to a certified denial. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).¹

We affirm the director’s finding that the petitioner failed to provide the requested tax documents in response to the director’s direct and specific request for those documents, and therefore failed to provide sufficient evidence of continuous employment during the qualifying period. The subsequent untimely submission of these documents does not and cannot change this correct finding by the director. Even if the untimely submission of the Forms 1099-MISC was acceptable, the record still does not contain copies of the beneficiary’s federal income tax returns, which the director had also requested (and which may have shed light on possible outside employment that could affect the continuity of the beneficiary’s claimed employment with the petitioner). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The remaining two issues are interrelated. One issue concerns the beneficiary’s membership in the petitioner’s religious denomination. 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate that the beneficiary belonged to the prospective employer’s religious denomination throughout the two years immediately prior to the filing of the petition. 8 C.F.R. § 204.5(m)(2) defines “religious denomination” as “a religious group or community of believers having some form of ecclesiastical government, a creed or statement of faith, some form of worship, a formal or informal code of doctrine and discipline, religious

¹ Even if the AAO were to give full consideration to the untimely-submitted Forms 1099-MISC, such consideration would not be favorable to the petitioner. The 2004 Form 1099-MISC contradicts the “Payee Report.” The Form 1099-MISC shows \$7,020, equal to four months’ payment at the \$1,755 monthly rate stated on the “Payee Report.” The “Payee Report,” however, indicated that the beneficiary was paid for *five* full months, and part of a sixth, in 2004; the six 2004 payments listed on the “Payee Report” total \$9,215. This contradiction raises grave questions of credibility.

services and ceremonies, established places of religious worship, religious congregations, or comparable indicia of a bona fide religious denomination.”

The other 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. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

Citizenship and Immigration Services interprets the term “traditional religious function” to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

Throughout the proceeding, the petitioner has indicated that it is an Orthodox Jewish organization that requires its workers to be Orthodox Jews as well. In a December 6, 2005 letter, counsel stated: “a religious teaching position requires that the beneficiary have been raised in an Orthodox Jewish community.” In so stating, counsel acknowledged that the petitioner recognizes a distinction between Orthodox Judaism and other Jewish denominations.

The record reflects the petitioner’s involvement with a different Jewish denomination during the two-year qualifying period. The AAO, in its remand order, stated:

Judaism is not a religious denomination in itself; rather, it comprises several denominations with distinct practices and doctrines, such as Reform, Conservative, Reconstructionist, and Orthodox. **The last group, itself, contains several distinguishable groups.** The Chabad Lubavitch movement, which includes the petitioning entity, finds its origins in the Hasidic branch of Orthodox Judaism, as shown in Internet printouts submitted by the petitioner. . . .

In a March 14, 2005 letter, [REDACTED] Educational Director of the Jewish Learning Center at [REDACTED] h, Montclair, New Jersey, states that the beneficiary “has been working at Congregation Shomrei Emunah teaching Hebrew and Tefillah for the past seven months.” The letter contains no further details regarding the terms of this work. The letterhead of this letter describes [REDACTED] as “A Conservative Synagogue serving Montclair, Glen Ridge, Nutley and Neighboring Communities since 1905.”

If the beneficiary was in fact a paid employee of [REDACTED] during late 2004 and early 2005 (and possibly after that), then she was simultaneously working for a Conservative synagogue and for the Hasidic petitioning organization. The AAO believes that this issue

bears further inquiry. If the beneficiary was employed by two different denominations at once, she was not in the continuous employ of either; and if either position did not require the services of a worker of a particular denomination, then it is not clear how the position could be said to amount to a traditional religious function of that denomination.

In the June 2007 RFE, the director cited the AAO's observations and instructed the petitioner to provide evidence of the beneficiary's continuous membership in the petitioner's denomination. In response, [REDACTED], Director of the petitioning entity, stated:

Regarding your question about beneficiary simultaneously working for a Conservative synagogue and for the Hasidic petitioning organization, please be advised that while the two surely have differences in doctrine, there is much by way of religious discipline, services and ceremonies that they share. This includes Hebrew language, customs and festivals, Jewish history, Tefillah and Torah (Bible) study.

There are orthodox Jewish members of my family and some of my personal close friends, who teach, or have taught in conservative and reform Jewish schools. This is no contradiction to their observance or philosophy, rather, in the Chabad Lubavitch movement in particular, we are very supportive of religious observance study and practice for all streams of Judaism, and members of the Hasidic movement consider it a primary responsibility to teach and advance religious study and practice among all Jewish denominations.

The director, in denying the petition, stated: "The petitioner's response indicates the beneficiary's current position does not require the services of a worker of a particular denomination. Therefore the evidence presented by the petitioner reveals the position does not amount to a traditional religious function of the denomination."

In response to the certified decision, [REDACTED] states:

While there may be distinctions in practice among groups and individuals, Chabad Lubavitch does not recognize denominations within Judaism, but views all Jews as members of one faith. The religious services provided by the Chabad Lubavitcher teachers, both at the Chabad and Conservative schools, are one and the same. They require belief and knowledge in the essentials of the Jewish faith, which is shared by all Jewish "denominations."

The petitioner submits a letter from [REDACTED] of Congregation B'nai Israel, a Conservative Jewish congregation in Elizabeth, New Jersey. [REDACTED] states:

In the American Jewish educational world, knowledge of texts and tradition is a priority for hiring qualified teachers. Individual religious schools look for this knowledge regardless of movement affiliation. As long as a teacher does not speak against the fundamental principles of the movement to which the school is affiliated there is no conflict in hiring more observant teachers in liberal schools.

It is common for Conservative schools to hire teachers who are more observant. Indeed our religious school has had more than one teacher from Chabad. Thus, it is common to have an Orthodox teacher teach in a Conservative or Reform Temple, while still conveying and maintaining the same level of Judaism, its faith, and its spiritual relevance.

did not indicate that it is common for Conservative or Reform teachers to teach at Chabad or other Orthodox temples. While the petitioner and other Chabad organizations may allow Chabad adherents to teach at non-Chabad congregations, there is no evidence that this is a two-way arrangement – *i.e.*, that the petitioner employs, or would consider employing, rabbis or instructors rooted in the Conservative, Reform or Reconstructionist traditions. The available information seems to suggest that Chabad, and thus the petitioner, are more ecumenical in their view of where Chabad members may teach than in their view of who may teach at Chabad institutions, but this does not mean that the beneficiary's work for the petitioner does not qualify as a religious occupation.

Given the available information, it appears that Chabad institutions, including the petitioner, require the services of Orthodox Jews as instructors. The record indicates that the beneficiary is, and has been, an Orthodox Jew, qualified to teach at the petitioner's school. The available evidence supports the finding that the beneficiary's position at the petitioning entity qualifies as a religious occupation, tied to a particular denomination of Judaism.

If it had been the Conservative congregation at Shomrei Emunah that had filed a petition on the beneficiary's behalf, the situation would be more problematic, as the beneficiary appears never to have belonged to the Conservative Jewish denomination, and the regulations offer little indication that cross-denominational employment amounts to a traditional religious function within a particular denomination, as the regulations contemplate the relevant terms. Rather, the structure of the existing statute and regulations indicates that the classification is intended for an alien employed within the same denomination to which the alien belongs.

The AAO had raised the denominational issue because prior evidence seemed to suggest that the beneficiary may have belonged to some denomination other than that of the petitioner for at least part of the qualifying period. Alternatively, the AAO was concerned that the beneficiary's position with the petitioner may not have been tied to membership in any particular denomination, which would have run counter to the denominational membership requirements in the statute and regulations. The petitioner having resolved these issues, the AAO withdraws the director's findings pertaining thereto. The AAO affirms, however, the denial of the petition, owing to the evidentiary deficiencies cited previously.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the denial of the petition will be affirmed.

ORDER: The director's decision of December 11, 2007 is affirmed.