U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a Jewish private 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, 8 U.S.C. § 1153(b)(4), to perform services as a teacher of religion and Hebrew. The director determined that the petitioner had not established that it qualifies as a tax-exempt religious organization.

On appeal, the petitioner submits additional information about the school and about the nature of the petitioner's tax exemption.

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).

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 (IRC),

which pertains to churches, but rather under section 170(b)(1)(A)(ii) of the IRC, which pertains to schools. The director denied the petition because the director determined that the petitioner is tax exempt as an educational institution rather than a religious organization. The director asserted that only entities classified as churches under section 170(b)(1)(A)(i) of the IRC can qualify as religious organizations.

On appeal, the petitioner submits a letter from a revenue agent at the IRS. states "[t]o be classified as a religious organization rather than an educational organization, you must be a seminary or other 'purely' religious school, primarily teaching religious subjects, usually with the purpose of training students for the ministry." The petitioning school is not a seminary, but rather a high school, which primarily serves the secular purpose of providing secondary education, including instruction in a number of secular subjects.

Counsel cites tter as proof that classification under section 170(b)(1)(A)(ii) of the IRC was the only classification open to the petitioner. The letter, however, is ambiguous in its implications. In the letter, an employee of the IRS has stated that a parochial school such as the petitioner cannot "be classified as a religious organization." Therefore, we can interpret the letter to mean that the petitioner is *not* "exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 *as it relates to religious organizations*" (emphasis added). By this reading of the letter, the petitioner has failed to meet the plainly stated regulatory standard.

In any case, the significance of tter is greatly diminished by the following disclaimer which closes that letter: "The above is an opinion based on the facts presented in your fax of July 14, 2003, and as such is not legally binding on the Internal Revenue Service." At best, the letter represents a non-binding advisory opinion, and as such, it does not settle (one way or the other) the question of whether the IRS considered the petitioner's religious orientation as a major factor when determining the petitioner's tax-exempt status.

In a supplement to the appellate brief, counsel has cited, and submitted a copy of, a recent memorandum from an official of Citizenship and Immigration Services, written in response to a string of Service Center decisions which declared that only churches can qualify as "religious organizations." *See* Memorandum from 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), hereafter "Yates Memorandum."

The Yates Memorandum states, in pertinent part:

> Qualifying as a religious organization "church" under section 170(b)(1)(A)(i) of the IRC is only one method of determining if the petitioner is a qualifying organization. Other organizations classified under section 170(b)(1)(A) of the IRC may qualify if it can be established that this classification is due to religious factors and that they are organized for religious purposes and operate under the principles of a particular faith, rather than solely for educational, charitable, scientific and other 501(c)(3) qualifying purposes.

Counsel states "the wording of the memorandum is not as explicit as we believe appropriate," but the memorandum does contain an explicit list of the "minimum" documentation necessary to establish that the tax exemption derives from the entity's religious character. In instances where the exemption letter from the IRS does not clearly indicate the basis for the exemption, the Yates Memorandum requires the following documentation to establish "the religious nature and purpose of the organization":

(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.

Counsel cites that the petitioner has submitted materials described in item (4) of the above list, to demonstrate the religious character of the petitioning school. The Yates Memorandum, however, did not state that the petitioner must provide one item from the list. Rather, *all* the listed documents, "at a minimum," are necessary to establish that the entity has represented itself to the IRS as being primarily a religious organization, in instances where the religious nature of the exemption is not readily apparent from the IRS exemption letter.

The petitioner has not submitted Form 1023, despite having voluntarily submitted a memorandum that states that the petitioner should submit Form 1023. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). We also note that, according to the exemption letter issued to the petitioner, exempt organizations are required to make their exemption applications available for public inspection. Because the petitioner is demonstrably aware of the Yates Memorandum (having submitted a copy through counsel), it would serve no useful purpose to now remand the matter to the director, for the purpose of advising the petitioner about the Yates Memorandum. Having taken active steps to ensure the inclusion of the Yates Memorandum into the record, the petitioner cannot now reasonably expect the AAO to ignore the requirements spelled out therein. Although the memorandum is not officially binding on the AAO, it is nevertheless fully consistent with a reasonable interpretation of the regulations (which, in turn, *are* binding). The documents listed in the memorandum are, taken together, "such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations." 8 C.F.R. § 204.5(m)(3)(i)(B). The AAO therefore concurs with, and endorses, the valuable guidance contained within the Yates Memorandum.

The petitioner submits ample documentation regarding the religious activities undertaken at the petitioning school. We do not dispute that such activities take place. At issue here is not whether religious observances and instruction are part of the petitioner's school day. Rather, what must be established – and, thus far, has not been established – is the extent to which the petitioner emphasized its religious (rather than educational) character *to the IRS* when the petitioner applied for tax exemption.

The petitioner is correct in arguing that the director relied on an impermissibly narrow interpretation of the IRC. That being said, however, the petitioner bears the burden of establishing that its tax-exempt status derives principally from its religious activities, rather than solely or primarily from its educational work. The petitioner, having submitted a list of the documents required to meet this burden, has withheld critical documents from that list, submitting instead a non-binding opinion letter from the IRS, which, on its face, indicates that the petitioner's exemption is *not* based on the IRC "as it relates to religious organizations."

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 appeal will be dismissed.

ORDER: The appeal is dismissed.