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

[redacted]

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9 3 2004

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.

Mari Johnson

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 cultural center. 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 Buddhist monk. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a monk immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established that it its federal tax exemption stems from its status as a religious organization.

On appeal, counsel discusses the section of the Internal Revenue Code (the Code, or IRC) under which the Internal Revenue Service (IRS) has classified the petitioning entity.

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).

[redacted] identified as the petitioner's "Head of Temple," states that the workers at the facility "live a monastic communal life," and that the workers "view their purpose in ministering to the community and teaching Buddhism to be a noble one." Mr[redacted] asserts that the petitioner "will provide the basic needs for the Monk. . . . He will not receive a salary." Mr.[redacted] states that the petitioner "was established . . . to serve the Buddhist and non-Buddhist community in the Lexington [area]. . . . The cultural center is dedicated to enlightening the community at large, interested individuals, and Buddhist member[s] by instruction, ceremony, performance arts, and cultural activities."

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 membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on August 20, 2002. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a Buddhist monk throughout the two years immediately prior to that date.

states that the beneficiary "is an able and experienced monk from Cambodia. He was ordained on ----------, at the ---------- Temple in Cambodia and worked at various temples." Judging from the dashes in the original letter, evidently does not know when or where the beneficiary was ordained, or else the letter was prepared by a third party for Khon Park's signature, and the necessary information was never added. Elsewhere in etter, a computer-printed name has been deleted and replaced with the beneficiary's handwritten name. Evidently, this letter has been modified, either from a letter prepared for another alien (hence the handwritten substitution), or from a standardized "form" letter.

The record contains no documentation that confirms or mentions the beneficiary's "ordination." A translated certificate indicates that the beneficiary "successfully completed the requirements for Buddhist Primary Certificate . . . and ranking as Moha Pathoeum Vechea" on February 20, 1997. The petitioner does not explain the significance of this certificate. Another certificate, from the Cambodian Institute for Development and Human Rights, indicates that the beneficiary "Has Satisfactorily Completed a Course in General Accounting" on April 5, 1999.

The director instructed the petitioner to provide "a detailed description of the beneficiary's prior work experience for the immediate past two years including job title," as well as other evidence. The petitioner responded to this notice and submitted various documents, but the petitioner's response did not include any information about the beneficiary's work history. The beneficiary's ordination certificate from 1995 is not *prima facie* evidence that the beneficiary has been continuously engaged as a Buddhist monk since that time; it tells us nothing about the beneficiary's activities following the certificate's issuance.

In the same request for evidence, the director asked "[h]ow many other Religious Worker . . . petitions have you sponsored?" In response, the petitioner stated "Petitioner has not sponsored any religious worker or Monk." Records show, however, that the petitioner filed a nonimmigrant religious worker petition, receipt number SRC 98 207 50457, in 1998. Furthermore, the petitioner filed another religious worker petition, receipt number SRC 02 251 50334, the same day that it filed the petition discussed here.

The director's denial decision contains a lengthy discussion of the two-year experience requirement and the evidence expected to meet that requirement. The director also noted the prior request for evidence to establish such experience. On appeal, counsel states "[t]he beneficiaries [sic] in this case are properly ordained Buddhist monks," but does not address the two-year experience issue.

has, in very general terms, claimed that the beneficiary possesses the necessary experience, but Mr. speaks as an official of the petitioning entity in North Carolina. The beneficiary was outside the United States at the time of filing, and there is no claim that the beneficiary has ever worked in the United States. It is not clear what standing Mr. has in order credibly to attest to the beneficiary's past work outside the United States. Despite a specific request for detailed information about the beneficiary's work history, the petitioner has asserted only that the beneficiary became a monk in "----------". Counsel does not acknowledge this issue on appeal. Therefore, the petitioner has not demonstrated that the beneficiary meets the two-year experience requirement.

The other issue concerns the petitioner's tax-exempt status. Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 204.5(m)(3)(i) require 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.

A February 23, 1998 letter to the petitioner from the Internal Revenue Service (IRS) states, in pertinent part:

> [W]e have determined you are exempt from federal income tax . . . as an organization described in section 501(c)(3).
>
> We have further determined that you are not a private foundation within the meaning of section 509(a) of the Code, because you are an organization described in section 509(a)(2).

Section 509(a) of the Code reads, in pertinent part:

> For purposes of this title, the term "private foundation" means a domestic or foreign organization described in section 501(c)(3) other than -
> **(1)** an organization described in section 170(b)(1)(A) (other than in clauses (vii) and (viii));
> **(2)** an organization which -
> **(A)** normally receives more than one-third of its support in each taxable year from any combination of -
> **(i)** gifts, grants, contributions, or membership fees, and
> **(ii)** gross receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in an activity which is not an unrelated trade or business . . . , and
> **(B)** normally receives not more than one-third of its support in each taxable year from the sum of -
> **(i)** gross investment income (as defined in subsection (e)) and
> **(ii)** the excess (if any) of the amount of the unrelated business taxable income (as defined in section 512) over the amount of the tax imposed by section 511.

Section 170(b)(1)(A) of the Code lists various entities which may receive tax-deductible contributions. Section 170(b)(1)(A)(i) of the Code refers to "a church or a convention or association of churches." Here, the petitioner is not classified under section 509(a)(1) as an organization described in section 170(b)(1)(A) of the Code. Rather, it is classified under section 509(a)(2) of the Code.

The director denied the petition, in part because the petitioner is not classified as a church under section 170(b)(1)(A)(i) of the Code.

Counsel states that the director cited "a nonexistent portion of the Internal Revenue Code" on page 6 of the decision. At one point on that page, the director states "the petitioner is an organization described in sections 509(c)(2) [sic]" of the Code; there is no such section. In context, the director clearly meant section 509(a)(2) rather than 509(c)(2), as counsel appears to acknowledge on appeal. Elsewhere in the decision, the director correctly identified the section in question. The "nonexistent section" appears to be merely a typographical error, which, while careless, did not prejudice the outcome of the decision; the director did not concoct a fictitious section of law to justify an arbitrary denial. We note that, in the appellate brief, counsel claims to cite section 509(a)(1)(A)(i) of the Code, but the cited section is, in fact, section 170(b)(1)(A)(i) of the Code. If we were to find that the director's mis-citation of a section of the Code somehow diminishes the force of the director's findings, then we would have to do the same with counsel's similar error.

Counsel's subsequent appellate brief is devoted, more or less entirely, to a discussion of section 509(a)(2) of the Code, which, counsel asserts, "simply relates to whether or not a 501(c)(3) organization is a prohibited private foundation and not to the fundamental issue of whether or not the Petitioner is tax exempt as a religious organization."

CIS policy regarding determinations of tax exemptions has been clarified 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). Mr. Yates states:

> 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 education, charitable, scientific and other 501(c)(3) qualifying purposes.

In this instance, as noted above, the petitioner is not an organization classified under section 170(b)(1)(A) of the Code. In the same memorandum, Mr. [redacted] indicates that entities claiming group tax exemptions must "establish that the group is an organization as described in section 509(a)(1) of the IRC." Here, the petitioning entity is described in section 509(a)(2) of the Code. Counsel asserts that this distinction is trivial, because the distinction concerns sources of financial support. Nevertheless, the issue of sources of funding is a central consideration when the IRS makes a determination regarding tax-exempt status.

Counsel asserts that "[s]ection 509 has absolutely nothing to do with whether or not Petitioner is a 'religious organization,' or 'church.'" It is true that, by itself, the text of section 509 of the Code does not mention religion at all. But the regulations do not merely require that the petitioner have a 501(c)(3) exemption; the petitioner must be exempt under that section "as it relates to religious organizations." This latter clause is meaningless unless it is construed as a limitation on *what kind* of 501(c)(3) tax-exempt organization is eligible for consideration.

Qualifying religious organizations are typically classified under section 509(a)(1) of the Code, which, in turn, references section 170(b)(1)(A) of the Code. This latter section contains several explicit references to religion, and thus it relates to religious organizations. In contrast, the petitioner's 501(c)(3) designation rests *solely* on its classification under section 509(a)(2) of the Code, which does not mention religion or cross-reference another section that does. Counsel does not explain how the petitioner can be tax-exempt under section 501(c)(3) of the Code "as it relates to religious organizations," when the petitioner is classified under

a provision which, counsel stipulates, "has absolutely nothing to do" with the religious nature of the organization.

The Internal Revenue Code itself contains no definitions of "church" or "religious organization." We must therefore look elsewhere to learn how the IRS defines these terms. IRS Publication 1828 states, on page 2: "[r]eligious organizations that are not churches typically include . . . entities whose principal purpose is the study or advancement of religion." Mr memorandum includes "a list of the documents that may be submitted to properly establish the status of a non-profit religious organization." In instances when the IRS determination letter does not clearly show that the entity's principal purpose is the study or advancement of religion, the memorandum lists "[d]ocumentation which establishes 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.

The petitioner has submitted a copy of its articles of incorporation, thus satisfying item (3) on the above list, but the other items are not present in the record. The articles of incorporation indicate that the petitioner is incorporated for the following purposes:

a) To provide both educational and religious services to the Cambodian population in Lexington, North Carolina, and the surrounding areas.
b) To educate the Cambodian children in Cambodian alphabet and culture.
c) To find a way to encourage the Cambodians to learn English as a second language.
d) To assist the Cambodian families in finding the legal help when needed.

The above purposes, as stated, include religion, but several secular purposes as well. The emphasis appears to be on serving Cambodian-Americans, rather than on the advancement or practice of religion. states that the beneficiary's "duties at our temple is to teach and preach not only Buddhism [and] perform Buddhist ceremonies, but also to [teach] the Khmer Cultur[e] and tradition[s] to Khmer families, especially the Khmer youth . . . in order to rebuil[d] and restore our Khmer community['s] dignity." Mr adds that the petitioner "seeks to educate the community at large in Buddhism and Southeastern Asian culture through dance performances, festivals and presentations."

As noted above, the IRS defines a "religious organization" as an entity "whose *principal purpose* is the study or advancement of religion" (emphasis added). From the descriptions provided, the petitioner appears to be primarily dedicated not to Buddhism, but to Cambodian Hmong culture, of which Buddhism is one of many components.

The petitioner submits a copy of its Form 990 EZ, Return of Organization Exempt from Income Tax (Short Form) for 2002. On Part III of this form, the petitioner indicated that its "primary exempt purpose" is "Buddhist Teaching & Worship." On Part IV, Schedule A, of this return, the petitioner checked a box to indicate "[t]he organization is not a private foundation because it is . . . [a] church, convention, or association of churches. Section 170(b)(1)(A)(i)." Counsel seems to assert that these annotations are definitive evidence of the religious nature of the petitioning entity. But the petitioner's own claims on Form 990-EZ are not

binding on the IRS. The petitioner's assertion that it is a 170(b)(1)(A)(i) church is not, by any means, evidence that the IRS agrees with that description.

Part IV of the Schedule A form is entitled "Reason for Non-Private Foundation Status," and the form instructs the entity to "check only ONE applicable box." As noted above, the petitioner checked a box in Part IV indicating that is a section 170(b)(1)(A)(i) church. There is another box, which the petitioner did not check, for section 509(a)(2) organizations. The final determination as to the reason for this status lies with the IRS, and not with the petitioner. The IRS declares its decision in the determination letter furnished to the tax-exempt entity. The petitioner does not change its true classification simply by misrepresenting it on a form.

The IRS could have identified the petitioner as a 170(b)(1)(A)(i) church in its determination letter (as it has done for countless churches in other letters), but the IRS did not do so. Furthermore, the Form 990-EZ submitted on appeal was prepared on May 13, 2003, after the August 2002 filing date and after the March 2003 request for evidence regarding the petitioner's tax-exempt status. Thus, even if the petitioner could change its own tax-exempt classification via Schedule A of Form 990-EZ, the document cannot establish a qualifying tax exemption as of the petition's filing date. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which require that petitions for employment-based immigrant classification must be amenable to approval as of the filing date of the petition.

While the director relied at times upon flawed reasoning, we concur with the fundamental finding that the petitioner has failed to establish that its tax exemption derives from a primarily religious purpose. Counsel has offered no substantive rebuttal to the director's finding.

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.