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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

NOV 23 2004

FILE: [redacted] Office: VERMONT 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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

We note that the petitioner simultaneously submitted an appeal and a motion to reconsider. There is no provision in the statute or regulations for a petitioner to simultaneously file both a motion and an appeal. By filing the appeal, the petitioner placed the matter under the jurisdiction of the AAO, which in turn has the authority to review Service Center decisions. Therefore, the appeal supersedes the motion. In the interest of thoroughness, we will consider counsel's arguments on motion to be part of the appeal.

The petitioner is a synagogue. 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 rabbi. The director determined that the petitioner had not established (1) that the beneficiary had the requisite two years of continuous work experience as a rabbi immediately preceding the filing date of the petition; (2) that it had made a qualifying job offer to the beneficiary; or (3) the petitioner's tax-exempt status as a religious organization.

On appeal, counsel asserts that the director overlooked important documents in the record.

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;
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> (ii) seeks to enter the United States--
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> > (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,
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> > (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
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> > (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
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> (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 first issue concerns the beneficiary's past experience. 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 March 14, 2002. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a rabbi throughout the two years immediately prior to that date.

Rabbi Philip Brody, then president of the petitioning synagogue, describes the beneficiary's experience:

> During the past two years, he served as the Rabbi and as a religious teacher at the Yeshiva of Flatbush. His duties at Yeshiva of Flatbush included: teaching Talmud on a highly advanced level to students; lectures on Jewish Ethics; Bible studies and various other advanced lectures on Talmudic studies. Furthermore, during the last year, he served at our Congregation as the Rabbi. His duties entailed leading the prayers; giving various sermons, lectures, conducting religious weddings, and , conducting funerals, and various other rabbinical duties.

The petitioner states that the beneficiary entered the United States on February 15, 2001, but this was not his first entry. The beneficiary's passport shows that he entered and departed the United States several times since April 11, 1999. The petitioner's articles of incorporation and other organizing documents, executed in June 2000, bear the beneficiary's signature. These documents show that the petitioning entity was not incorporated until after the two-year qualifying period had already begun. Thus, the beneficiary's work for the petitioner, however well documented, cannot suffice to establish the beneficiary's eligibility.

The initial submission contained no documentary evidence of the beneficiary's past work. Therefore, the director instructed the petitioner to submit such evidence. In response, Rabbi apparently Rabbi replacement as president of the petitioning synagogue, repeats and expands upon Rabbi earlier statements. Beyond an essentially verbatim repetition of Rabbi Brody's assertion, above, Rabbi states that the beneficiary "was employed at Yeshiva Rambam where he had the same duties as at Yeshiva of Flatbush."

Rabbi repeats the claim that "during the past two years, [the beneficiary] served at our Congregation as the Rabbi." He provides a more detailed description of the beneficiary's duties at the synagogue:

(a) From Sunday – Friday, he would be present in the Synagogue from 7:00 – 11:00 a.m. where he would perform morning prayer services and give lectures, learning and study programs with the congregants on the Talmud and various other subjects.
(b) From 11:00 a.m. – 4:00 p.m. he would be available at the synagogue's office to meet with congregants and other members of the community for counseling; meditation or disputes between congregants; discuss and provide answers to Jewish legal questions and prepared for lectures. He would also have available time to conduct his own personal affairs and Rabbinical functions for congregants or other members of the community who would retain his services for a fee to conduct bar-mitzvahs, weddings, funerals, circumcisions, etc.
(c) From 6:00 p.m. – 10:00 he would be present in the Synagogue to perform afternoon and evening services and give several lectures to the congregants. Furthermore, in the evenings he would similarly conduct weddings, prepare boys for their bar mitzvahs for which he would receive payment by the family that retained his services.
(d) On the Sabbath, he would attend and perform prayer services on Friday evening and on Saturday morning, afternoon and evening. He further gave several sermons, lectures during the course of the Sabbath.

(e) On Jewish holidays he would attend and perform prayer services, reading from the Torah and provide and prepare the congregants with lectures on how to properly celebrate the holidays, [and] provide pre-holiday classes to educate the congregants about the holidays.

The above duties listed by Rabbi are said to occupy the beneficiary almost without interruption from 7:00 a.m. to 10:00 p.m. six days a week, in addition to Sabbath observances all day on Saturdays. Given this schedule, it is not clear when the beneficiary was available to teach religious studies at Yeshiva of Flatbush. The petitioner did not submit anything from Yeshiva of Flatbush or to confirm or describe the beneficiary's work at either school.

Also, the beneficiary's passport documents very frequent international travel beginning in the 1990s. The petitioner's listing of the beneficiary's duties does not indicate that the position requires such travel, and there is no evidence to show that the beneficiary's travels to at least three different continents is directly related to his work.

The director denied the petition, stating that it cannot suffice for the petitioner merely to claim that the beneficiary has worked as a rabbi throughout the qualifying period. On appeal, counsel cites "statements from several leading community Rabbis which attest to the status of [the beneficiary] as a highly respected and established Rabbi of the Petitioner herein for the past three years." These letters, initially submitted without comment in response to the director's earlier request for evidence, show that three Rabbis, who are acquainted with the beneficiary, acknowledge that the beneficiary is a rabbi. These brief statements cannot suffice to establish that the beneficiary worked continuously as a rabbi throughout the 2000-2002 qualifying period, which, in turn, began before the petitioning synagogue was incorporated. Even if the petitioner is, at present, a rabbi, this does not prove or imply that the beneficiary continuously performed the duties of a rabbi throughout the qualifying period.

As noted above, the record contains no documentation about the beneficiary that actually originates from the qualifying period except for his passport, which shows numerous international departures and re-entries over the past several years. The record contains nothing from the two Yeshivas where the beneficiary is said to have worked. The petitioner has not explained the absence of such evidence, nor has the petitioner explained how the beneficiary could have taught at those institutions if he was working 14-hour days at the petitioning synagogue every day of the week. The petitioner has, thus, made two mutually contradictory and equally unsubstantiated claims regarding the beneficiary's past work. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

The next issue is whether the petitioner seeks to employ the beneficiary in a qualifying position. The regulation at 8 C.F.R. § 204.5(m)(2) defines a "minister" as an individual duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion. In all cases, there must be a reasonable connection between the activities performed and the religious calling of the minister. The term does not include a lay preacher not authorized to perform such duties.

Rabbi Brody describes the duties of the position:

> The position's duties of our Rabbi are those usually performed by an Orthodox Rabbi. They include: conducting religious prayers and services; providing spiritual guidance to congregants; delivering sermons; consoling the bereaved; conducting weddings and Mitzvah ceremonies; delivering numerous lectures; conducting study groups and symposiums for our congregants and the community at large.

The petitioner has submitted a translated copy of a certificate of ordination, issued by the Chief Rabbinate of Israel. The translation bears the Hebrew calendar date of Shevat 1, 5739, which corresponds to January 29, 1979. Another translation, of a document issued by the Rabbi Lipshitz College of Religious Education, Jerusalem, states that the beneficiary "is awarded a certificate of ordination as a Rabbi of the Jewish religion." This certificate is dated August 13, 1986, and the Hebrew original shows the numerals "13/8/86." It is not clear why it was necessary to ordain the beneficiary as a rabbi in 1986 if he had already been ordained by the Chief Rabbinate of Israel seven years before.

Following a request for further evidence about the beneficiary's work, Rabbi states that the beneficiary "has obtained Rabbinical ordination . . . since 1968," a date that precedes both of the certificates of ordination submitted previously. The beneficiary was only 18 years old in 1968, and thus his rabbinical studies would have to have commenced at an even younger age. Rabbi Muschel also provides a list of the beneficiary's duties, reproduced elsewhere in this decision.

The director denied the petition, stating that the petitioner has not established that the position offered constitutes qualifying religious work. We cannot agree with this finding. The position, as described, is consistent with that of a minister of religion in general, and that of a rabbi in particular. While the record contains several elements of concern, the description of the proffered position is not one of them. Some of the director's findings relate to the regulatory definition of a religious occupation, but this definition is not applicable to ministers such as rabbis. Concerns about the authenticity or credibility of the job offer should not be confused with misgivings about the nature of the position *as described*. In doubtful cases, the director can request additional evidence to show that the alien's duties will, in fact, conform to the description provided by the intending employer.

The final issue raised by the director concerns tax exemption. 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
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> (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.

The petitioner's initial submission contained a copy of the petitioner's articles of incorporation, but this document, by itself, is not sufficient to establish the beneficiary's tax-exempt status. Accordingly, the director instructed the petitioner to submit the evidence required by the above regulations. In response, the petitioner submitted another copy of its articles of incorporation, but nothing else to establish its tax-exempt status.

The director, in denying the petition, noted the petitioner's failure to submit the required documentation despite a direct request for that evidence. On appeal, counsel states "the Certificate of Incorporation of the Petitioner establishes that the Petitioner is tax-exempt pursuant to section 501(c)(3) of the Code." Counsel asserts that this certificate "had been previously submitted three times to the Service," beginning with the initial filing. The director made it clear that the certificate was not sufficient evidence, by requesting further documentation. The director quoted the relevant regulation, which does not indicate or imply that a certificate of incorporation is proof of tax-exempt status.

That document establishes the petitioner's *intent* to qualify as a 501(c)(3) exempt organization, but an organization cannot simply declare itself to be tax-exempt. 8 C.F.R. § 204.5(m)(3)(i)(A) calls for documentation from the Internal Revenue Service, establishing recognition of tax-exempt status. The petitioner has not submitted such a letter. Failing that, 8 C.F.R. § 204.5(m)(3)(i)(B) requires such evidence as is required by the Internal Revenue Service to establish eligibility for 501(c)(3) exemption. This evidence is listed 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), which states that the petitioner must submit, at a minimum:

(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's articles of incorporation and certificate of incorporation satisfy number (3) on this list, but by themselves they cannot suffice to establish that the petitioner has, or qualifies for, the necessary tax exemption. We note that, by law, a tax-exempt organization must make its Form 1023 available for public inspection.

Based on the above, we affirm the director's findings regarding the beneficiary's past experience and the petitioner's tax-exempt status. On appeal, counsel has argued that the director's decision "is patently without any legal or factual basis," but counsel's subsequent assertions do not bear this out. 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.