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

U.S. Citizenship and Immigration Services

C1

[redacted]

FILE: [redacted] WAC 03 124 53068 Office: CALIFORNIA SERVICE CENTER Date: JAN 04 2005

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

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California 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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.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 Buddhist meditation 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 missionary. 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) submitted with the initial filing, 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 IRS determination letter mentioned above is dated September 17, 2001. The letter assigns an "initial determination" rather than a "final determination." The letter indicates that the "Advance Ruling Period" will end on March 31, 2005, and that, prior to that date, the initial determination is not final and is, therefore, subject to change.

We note that Internal Revenue Service Publication 1828, *Tax Guide for Churches and Religious Organizations*, 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 that 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. 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.

On August 6, 2003, prior to denying the petition, the director requested additional evidence regarding, among other things, the petitioner's tax-exempt status. In response, the petitioner submitted a copy of its IRS Form 1023, dated June 27, 2001. On this form, the petitioner indicated that its purpose was the promotion of Buddhist meditation, through seminars, retreats, and other activities.

The petitioner's Form 1023 also includes Schedule A, a schedule applicable only to churches. On this schedule, the petitioner repeatedly stresses Buddhism and Buddhist meditation, and lists no other purpose for the organization. Schedule A includes references to dates after June 27, 2001, indicating that the petitioner prepared Schedule A at a later date than the original Form 1023. The version in the record is a faxed copy with a date stamp of June 22, 2003.

Also in response to the director's request for evidence, the petitioner submitted a new letter from the IRS, dated September 5, 2003. That letter indicates that, on June 18, 2003, the petitioner had requested reclassification as a church under section 170(b)(1)(A)(i) of the Code. The letter indicates "[w]e have granted your request and modified your foundation status." It appears that the Schedule A, mentioned above, was prepared in conjunction with the petitioner's June 18, 2003 request for reclassification.

The director denied the petition on October 24, 2003. In the denial notice, the director did not mention or acknowledge the September 5, 2003 letter from the IRS, which reclassified the petitioner as a church. The director simply denied the petition because the Internal Revenue Service 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, even without taking into consideration the reclassification of the petitioning entity.

On appeal, counsel asserts that an IRS official "confirmed via telephone" that the 2003 reclassification of the petitioner under section 170(b)(1)(A)(i) of the Code is retroactive to 2001. Counsel provides the name and telephone number of the IRS official said to have provided this information, but the petitioner submits no evidence from the IRS to corroborate this assertion.

The available evidence appears to be favorable to the petitioner. While the petitioner did not request the reclassification until after the filing date, a retroactive reclassification would extend back to before the filing date. Also, because the 2001 ruling was inherently preliminary and thus subject to change, it is quite plausible that the reclassification could be seen as retroactive.

Nevertheless, to persuasively establish its version of events, the petitioner must submit the following evidence:

- A true copy of its June 18, 2003 letter to the IRS, requesting reclassification;
- Copies of all supporting documents submitted with that June 18, 2003 letter; and
- Written confirmation directly from the IRS that the reclassification is retroactive.

The above evidence, if submitted, will establish the petitioner's version of events, and demonstrate that the petitioner did not deliberately change its methods of operation specifically in order to qualify for reclassification. If the reclassification was based on changed circumstances, then it cannot be said to be retroactive to a time before those changes were effected.

The director must, therefore, issue a new decision that takes the petitioner's reclassification into account. The director must provide the petitioner with an opportunity to submit the materials discussed above.

Beyond the director's decision, we note another factor that bears on the issue of the beneficiary's eligibility. 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 March 10, 2003. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of the proffered position throughout the two years immediately prior to that date.

A letter from Tiffany Wang, director of the petitioning entity, does not clearly indicate whether or not the beneficiary has already worked for the petitioner. [redacted] general statement that the beneficiary "has been a full time missionary since [1993]" is not evidence of qualifying work.

The beneficiary entered the United States under an R-1 nonimmigrant religious worker visa, which identified her sponsor as "the Buddhist Institute of Fa Yun Monastery" in Vadito, New Mexico. The record contains nothing from that entity to confirm the dates, nature, or extent of the beneficiary's work there.

In the initial submission, counsel identified "Exhibit H" as "Certification of Employment from Dakinava Buddhist Nunnery for [the beneficiary] evidencing she has more than 2 years work experience as religious worker." The document marked "Exhibit H," using a variant but recognizable transliteration of the beneficiary's name, refers to the beneficiary "being employed as the TEACHER OF DISCIPLINE on the [redacted] in Dakinava Nunnery and on the Dual Ordination of Bhiksuni Precepts Handing Down Ceremony in Nan Pu To Monastery." The document's issue date is November 10, 1999.

There is no explanation as to how the beneficiary's work as a "teacher of discipline" is essentially identical to her proposed work as a "missionary." Also, a document from 1999 cannot establish the beneficiary's activities after March 2001.

In response to a request for further evidence, the petitioner has submitted an unsigned, unattributed document, indicating that the beneficiary "has been under R-1 status of Buddhist Institute of Fa Yun Monastery since May 1997 to present." There is no indication that the unidentified author of this statement is an official of Fa Furthermore, the assertion that the beneficiary has worked fo since 1997 appears to conflict with the certificate that seems to place the beneficiary at Nunnery in 1999.

The petitioner indicates that the beneficiary first worked in the United States in the late 1990s, but the record indicates that the beneficiary last entered the United States on March 25, 2002, less than a year before the filing date. If the beneficiary's March 25, 2002 entry followed a substantial absence, then it is difficult to conclude that she had been working *continuously* for a United States religious organization from March 2001 onward. The petitioner must provide a complete account of the beneficiary's activities during the qualifying period, along with first-hand documentation from every employer during that time.

For the above reasons, the record contains insufficient evidence to establish the beneficiary's continuous religious work from March 2001 to March 2003. The director should provide the petitioner with the opportunity to provide more specific information from identifiable and verifiable sources, along with whatever relevant contemporaneous documentation may exist from the period in question.

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.