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U.S. Citizenship and Immigration Services

[redacted]

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JAN 25 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 093 52088

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, 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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.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 an agency for Jewish educational institutions. 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 the coordinator of the Diller Teen Fellows program. The director determined that the petitioner had failed to establish that it is a qualifying tax-exempt religious organization, or that the beneficiary's position qualifies as a religious occupation.

Turning first to the issue of the petitioner's tax exemption, the 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.

Prior to the denial of the petition, the petitioner had submitted a determination letter from the Internal Revenue Service (IRS), indicating that 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)(ii) of the Code, which pertains to educational organizations.

On appeal, the petitioner asserts that the IRS' initial designation of the petitioner under section 170(b)(1)(A)(ii) of the Code was in error. [redacted] executive director of the petitioning entity, states: "[w]e asked IRS to correct this mistaken characterization; they have done so in a new determination letter." The petitioner submits a new determination letter from the IRS, indicating that the petitioner "is an organization described in sections 509(a)(1) and 170(b)(1)(A)(i)" of the Code. The letter is dated October 28, 2003, four weeks after the denial of the petition and only days before the deadline for filing the appeal. This document did not exist at the time of filing, or at the time of the director's decision.

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 a petition must be amenable to approval based on the circumstances that obtain on the filing date of the visa petition. Thus, the burden of proof is on the petitioner to establish that its tax-exempt classification *at the time of filing* derived primarily from its religious character. If the petitioner made changes to its activities, organizational structure, or other basic elements in order to qualify for reclassification in 2003, then we cannot accept that the reclassification is retroactive to the filing date.

The new IRS determination letter does not refer to any "mistaken characterization," nor does the new letter contain any explanation for the new classification. Furthermore, the letter does not indicate that the new classification is retroactive. The petitioner's unsubstantiated claim is not sufficient to establish that the initial

determination was erroneous. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Because the petitioner has not established the circumstances that led IRS to reclassify the petitioner after the petition was denied, the new IRS determination letter is not *prima facie* evidence of eligibility as of the petition's filing date.

That being said, we acknowledge that the director relied on an impermissibly strict standard when finding that an entity must be classified as a 170(b)(1)(A)(i) church to be considered a religious organization. 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 which 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. That being said, it is important to note that item (2), Schedule A of Form 1023, is only required "if applicable." If the director cannot show that Schedule A is applicable in a given instance, then the petitioner's failure to submit Schedule A is not grounds for denial of the petition.

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.

The director must provide the petitioner with an opportunity to submit either (1) the materials outlined in Mr. Yates' memorandum, or (2) primary documentation from the IRS, demonstrating an official finding that the petitioner's initial classification as a 170(b)(1)(A)(ii) educational organization was erroneous, and acknowledging that the petitioner should have been classified as a 170(b)(1)(A)(i) church all along. If the petitioner can prove its claim of IRS error, then submission of the Form 1023 and other documents will not be necessary.

The other basis for the denial concerns the nature of the beneficiary's position with the petitioner. 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.

The director determined that the beneficiary's position is not a religious occupation because the petitioner has not shown that the position requires specialized religious training.

After careful and prolonged consideration of this issue, the AAO finds that the "training" issue has received a disproportionate amount of weight in adjudications of special immigrant religious worker petitions. Obviously, when a given position clearly requires specific training, 8 C.F.R. § 204.5(m)(3)(ii)(D) requires the petitioner to show that the alien possesses that training; but the issue of training should not be a primary factor when considering the question of whether that position relates to a traditional religious function. Of greater importance is evidence showing that churches or other entities within a given denomination routinely employ paid, full-time workers in comparable positions, and that those positions do not embody fundamentally secular tasks, indistinguishable from positions with secular employers.

states:

> The Diller Teen Fellows . . . is a Jewish educational program for 20 Jewish eleventh grade high school students who have exhibited leadership skills and a commitment to community service in the Jewish community. Among the foci of the year-long program is the religious identity of American Jews and how this compares to the Jewish identity of Israeli Jews. Topics addressed also include modalities of leadership and examples of Jewish leaders in past eras, how Jewish values impact life in the community and how to transform vision into action.
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> The title of the position we wish to offer on a permanent basis [is] Diller Teen Fellows Coordinator. The duties of the Coordinator include:
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> - Coordination and implementation of recruitment, including interaction with Jewish community leaders, rabbis and religious school principals.
> - Interviews, selection, and notification including coordination of interview process, assembly of and staffing of Selection Committee.
> - Ongoing curriculum development for the year-long Diller program, including workshops, retreats and Summer Seminar with focus on key religious ideas – answering questions of what Judaism says and does in the realm of ethics and moral character.
> - Support planning of itinerary and Jewish religious educational content of *mifgash* (meeting with Israeli teens) on collaboration with the Mifgash coordinator.
> - Creation and administration of a program budget.
> - Planning, implementation of a curriculum and coordination with families; working with families in specific programs.
> - Publicity in the local Jewish community.
> - Planning and implementation of the Final Celebration.

- Follow-up and programming with alumni including planning of alumni reunion in December.
- Maintenance of the local program on the Diller Teen Fellows website and all database information.

The director instructed the petitioner to submit evidence to "explain how the duties of the position relate to a traditional religious function." In response, Robert Sherman states:

> Within our Diller Teen Fellows program . . . youth plan and participate in Shabbat services. . . . The Diller teens engage in study of the Bible, learning and fulfilling the *Mitzvoth* (Commandments) and working for *Tikkun Olam* (repairing the world). In addition, the Diller Teen Fellows take part in communal, artistic and cultural events, following Rabbi Mordechai Kaplan's vision of Judaism in which he suggested that the experience of being a Jew includes not only religion narrowly defined, but Jewish culture as well."

The petitioner submits excerpts from *Why Be Jewish?*, by Barry W. Holtz and Steven Bayne, indicating that Judaism has social and cultural facets, in addition to its religious aspect, and that education is an important factor in retaining individuals born into the faith. While we take note of this material, it does not represent official Jewish doctrine. Furthermore, if a given activity is not clearly religious on its face, the petitioner does not help its case by arguing that Judaism encompasses non-religious aspects. Activities with a social or cultural focus are not traditional religious functions, and such activities essentially treat Judaism as an ethnicity (akin to, say, Greek or Hmong) rather than as a religion.

The petitioner has submitted substantial materials regarding the Diller Teen Fellows program. Some of these materials emphasize the religious aspect of Judaism (such as prayer, scripture studies, and Sabbath observances), whereas other materials place a substantial emphasis on *social* aspects of the "Jewish community," for instance referring to the Diller Teen Fellows program as a "leadership" program.

Considering the above factors, a new finding is necessary which focuses on the nature of the beneficiary's work, rather than on the specific training required. The director should also give the petitioner an opportunity to explain precisely which "traditional religious function" the beneficiary's work relates to.

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.