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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: EAC 02 282 52919 Office: VERMONT SERVICE CENTER Date: MAR 03 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.

Marie 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

The petitioner is a private university. 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 religious education program coordinator.

The director determined that the beneficiary's position does not qualify as a religious occupation within the meaning of the regulations. The director further determined that the beneficiary had not been engaged in a full-time salaried position for the two years immediately preceding the date of filing of the petition. Finally, the director determined the petitioner failed to establish the beneficiary will not be solely dependent on supplemental employment or solicitation of funds for support.

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).

The regulation at 8 C.F.R. § 204.5(m)(1) echoes the above statutory language, and states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file an I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two year period immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States." The regulation 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

September 11, 2002. Therefore, the petitioner must establish that the beneficiary was continuously working as a religious education program coordinator in the petitioner's denomination throughout the two years immediately prior to that date, from September 11, 2000 through September 11, 2002. The record reflects that the beneficiary was notified of her approval as an R-1 nonimmigrant on December 30, 1999 and granted authorization to remain in the United States from December 30, 1999 through September 20, 2002. The record further reflects that the beneficiary made multiple entries into the United States during this time, specifically, April 29, 2000, December 14, 2001, and January 22, 2002. Thus, the record reflects the beneficiary was in the United States during the requisite period.

In a letter submitted with the petition at the time of filing, the petitioner indicates that "for the past three years [the beneficiary] had performed the duties of the same position of Religious Education Program Coordinator under her R-1 status for [t]he Vishwa Hindu Parishad [VHPA] of America, the renowned organization teaching Hinduism to the Indian ethnic and the general U.S. public."

The petitioner also describes the duties of the beneficiary's proposed position:

> We are pleased that [the beneficiary] has acceded to our request to join us to oversee, plan and coordinate wide-ranging, multi-media religious education programming for which she is uniquely qualified. She will also be engaged in planning and conducting Religious education work and study programs for after school youth education for our university throughout the United States. She will be involved in evaluating and will be instrumental in selecting Religious program instructors according to specific criteria which she will develop with the university's President. She will be paid $500 per week."

[redacted] General Secretary of VHPA, submits a letter dated August 28, 2002, describing the beneficiary's previous duties and pay. [redacted] states:

> Since March 2000 [the beneficiary] is currently employed by [VHPA] in the capacity of Hindu Educational Program Coordinator on R-1 visa authorization. Her salary is $400 per week.
>
> * * *
>
> An exceptional example of [the beneficiary's] activities on our behalf includes an extensive Compact Disc the Heritage Series that she has established on behalf of VHPA. She developed the concept and produced this CD, complete with musical interpretations and poetic renderings of Hindu religious concepts and religious texts in a contemporary idiom. Its instruction includes daily Hindu prayers, along with explanations of their meaning tailored especially for the understanding of Hindu children and youth growing up in the United States.

Evidence contained in the record, including the beneficiary's W-2 Wage and Tax statements, tax returns, and payroll records, supports [redacted] claim that the beneficiary received $400 per week from VHPA.

The director requested further evidence of the beneficiary's full-time employment with VHPA, including a detailed listing of the beneficiary's duties, and evidence that the beneficiary's position that the petitioner's denomination recognizes the beneficiary's occupation as a religious occupation.

In response, the petitioner submitted documentation, including a new description of the beneficiary's proposed duties. Braham Aggarwal, Chairman of the petitioning university, states:

> [The beneficiary] will be engaged in ongoing research and analysis of the most effective syllabi for Hindu Religious study, coordinating diverse elements of the educational preparation of the various departments and teachers and modifying methodologies to most effectively impart our exclusively Hindu religious subject matter. As part of her duties she will also develop programs for Hindu temples throughout the United States, coordinating the promotion of Hinduism through our university's planned devotional religious outreach and its musical programs in recorded and long distance learning.
>
> [The beneficiary] will coordinate the preparation of multimedia and audiovisual presentation regarding Hindu Godheads of the Temple, customs pertaining to the worship of Hindu deities and the traditional stories of Vedic literature to engage interest of the Hindu and general public in increasing their knowledge of the Hindu religion she will be engaged in the research of the subject matter, preparing the agenda for its presentation and its teaching, discussing the final output with faculty members and in-house and outside media developers. She will oversee the planning of religious musical events which include selection of the most appropriate devotional music to impart the substance [as] well as [sic] the related academic religious subjects to be discussed between Religious songs.

Although the petitioner provides a detailed description of the beneficiary's proposed duties, the petitioner fails to provide any further evidence regarding the work performed by the beneficiary during her employment with VHPA. Thus, the petitioner's claim that the beneficiary has "on-point experience of over two (2) years with the [VHPA] (under R-1 status) in the same duties which she will perform for us" is not supported by the evidence in the record. The only description of the beneficiary's duties with VHPA indicates that the beneficiary developed a CD, "with musical interpretations and poetic renderings of Hindu religious concepts and religious texts." This single duty bears little resemblance to any of the duties of the proffered position. As noted by the petitioner, the "coordination of multimedia . . . presentation" is only one of the many duties of the beneficiary's proposed position.

The director denied the petitioner finding that the petitioner failed to establish that during the requisite two-year period the beneficiary worked full-time in the same position as being offered by the petitioner.

On appeal, counsel for the petitioner argues:

> The I-360 Petitioner shares precisely the same advanced Hindu religious educational purposes with the R-1 Petitioner . . . What is submitted to be substantial evidence was submitted proving that the [b]eneficiary is one of the world's leading disseminators of Hinduism, recognized at this level by the most expert arbiters of the field including the Indian national television network which chose her above all other Hindu religious educators in India . . . to do so for a program which was viewed, each day, by over one hundred million people.

We are not persuaded by counsel's argument. The issue in this case is not whether the petitioner and the beneficiary's previous employer share "precisely the same advanced Hindu religious educational purposes," but whether the beneficiary worked full time for the previous employer during the requisite period, and whether during the requisite period, the beneficiary worked in the same position as the one offered by the petitioner. The fact that

the beneficiary has "great popularity in presenting these religious devotional messages and traditional religious songs," is one of the "foremost figures in this field in India," and that she is "the daughter of the world renowned Hindu Religious Singer," does not have any bearing on whether the duties performed were the same as those in the position offered by the petitioner.

On appeal, the petitioner states:

> We are aware of the religious work which [the beneficiary] performed on behalf of [VHPA]. This included an extensive Compact Disc (CD) entitled "Heritage Series," which convinced us of her importance to us . . . .
>
> During her R-1 period, she traveled to India on behalf of [VHPA], making appearances on religious TV programs and at public religious gatherings in Temples and outdoors. The religious importance of these activities is highlighted by their having been televised disseminating her message and promoting the work of [VHPA], worldwide.

The regulations at 8 C.F.R. §§ 204.5(m)(1) and (3)(ii)(A) require that the beneficiary must have carried on *the* vocation or occupation, rather than *a* vocation or occupation, indicating that the work performed during the qualifying period should be substantially similar to the intended future religious work. The underlying statute, at section 101(a)(27)(C)(iii), requires that the alien "has been carrying on such . . . work" throughout the qualifying period. Despite the fact that the beneficiary's proposed position carries the same title as her previous position with VHPA, she cannot be considered to be carrying on "such work" if her duties for the preceding two years were not the same as the duties proposed by the petitioner.

We find little correlation between the beneficiary's proposed duties which include: research and analysis of effective syllabi for Hindu Religious study, coordination of elements of educational preparation of various departments and teachers, modifying methodologies to impart Hindu religious subject matter, development of programs for Hindu temples throughout the United States, coordination of the promotion of Hinduism through planned devotional religious outreach and musical programs in recorded and long distance learning, coordination of the preparation of multimedia and audiovisual presentation, preparation of the agenda for presentation and teaching, discussion of the final output with faculty members, in-house and outside media developers, and the oversight of the planning of religious musical events and selection of appropriate devotional music, and the beneficiary's previous duties which involved the development of a CD and making appearances on television and at public religious gatherings.

Further, it is noted that the petitioner submitted partial copies of the beneficiary's Form 1040 income tax return for the years 2000 and 2001, both of which relate to the qualifying period. Both tax returns reflect that the beneficiary requested a $1,000 Hope and Lifetime Learning Credit based on payment of tuition and related expenses for her own higher education. Accordingly, it is unclear to what extent the beneficiary has been in the United States as a religious worker, as her nonimmigrant visa classification permits, and to what extent she has been engaged in studies while a student within the United States. The fact that the beneficiary may have been a student during the qualifying period is significant in that the beneficiary's religious work was not her principal activity. In a 1980 decision, the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

As such, we cannot conclude that the beneficiary, throughout the two-year qualifying period, has been continuously performing, on a full-time basis, essentially the same duties that the petitioner intends for the beneficiary to perform in the United States.

The next is whether the beneficiary's position constitutes a qualifying religious occupation for the purpose of special immigrant classification.

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, fundraisers, or persons solely involved in the solicitation of donations.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a "religious occupation" and the regulation at 8 C.F.R. § 204.5(m)(2) states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The list reveals that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as cantor, missionary, or religious instructor are examples of qualifying religious occupations. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

Citizenship and Immigration Services therefore interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

The fact that a beneficiary is employed by a religious entity does not necessarily mean that one is employed in a religious occupation. Further, although the petitioner identifies the beneficiary's job title with that found in the regulation as a qualifying occupation, it is important to consider the actual duties of the position. A religious organization cannot secure benefits for an ineligible alien simply by referring to the alien's position with a title such as "Religious Instructor." In short, the beneficiary's job *duties*, rather than her title, will determine her eligibility. To hold otherwise would permit religious organizations to sidestep immigration law simply by giving qualifying job titles to all their employees.

On appeal, the petitioner states, "the position we have offered [the beneficiary] is as Religious Educational Program Coordinator, a category of "Religious Instructor" which was recognized by [CIS] as a religious position . . . ."

We are not persuaded by the petitioner's argument. First, although the regulation does provide a list of examples of those individuals considered to be working in religious occupations, the regulations do not provide for "categories" within those examples. Second, we do not find the occupation of a "religious instructor" shares the same duties as those described for the "religious educational program coordinator." Although the description of the beneficiary's duties reflects the beneficiary will be engaged in educational

preparation of various departments and teachers, and will be involved in evaluating and selecting Religious program instructors, such duties do not reflect that the beneficiary herself will be acting as an "instructor." We note again that when filing her income taxes for the years 2000 and 2001, the beneficiary described her occupation as "service." This claim indicates that the beneficiary did not view her work as religious in nature or involving instruction or education.

We, therefore, agree with the determination of the director and find that the proffered position does not qualify as a religious occupation.

The next issue is whether the petitioner has established that the beneficiary will not be reliant on supplemental employment. The regulation at 8 C.F.R. § 204.5(m)(4) states:

> *Job offer.* The letter from the authorized official of the religious organization in the United States must also state how the alien will be solely carrying on the vocation of minister (including any terms of payment for services or other remuneration), or how the alien will be paid or remunerated if the alien will work in a professional religious capacity or in other religious work. The documentation should clearly establish that the alien will not be solely dependent on supplemental employment or solicitation of funds for support.

In this instance, we do not find any evidence to support the director's determination that there is not a valid job offer. In the petitioner's original letter written in support of the petition, the petitioner indicates that the beneficiary "will be paid $500 per week for her services." There is no evidence in the record that contradicts this statement. We note that the copies of the petitioner's tax returns reflect that the petitioner has the ability to pay the beneficiary the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2). Accordingly, we withdraw the director's finding that there is not sufficient evidence to demonstrate the beneficiary will not be solely dependent on supplemental employment or solicitation of funds for support.

Beyond the decision of the director is the issue of the petitioner's 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
>
> (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, 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 schools.

Clearly, an organization that qualifies for tax exemption under section 170(b)(1)(A)(ii) 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)(ii) of the Code derives primarily from its religious character, rather than from its status as an educational institution.

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, however, none of the documentation has been submitted. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Although we do not dispute that religious activities take place at the petitioning institution, the 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. For this additional reason, the petition may not be approved.

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.