

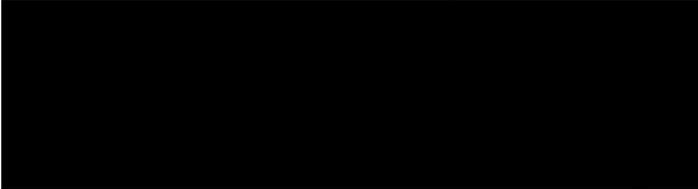
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U.S. Citizenship  
and Immigration  
Services



FEB 17 2005

FILE:



WAC 03 171 54282

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:

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:



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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.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 a school. 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 instructor. The director determined that the petitioner is not a qualifying tax-exempt religious organization, and that the position offered does not qualify as a religious occupation.

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.

The petitioner's recognition letter from the Internal Revenue Service, dated April 13, 1965, indicates that the petitioner's purpose is "Educational." This finding corresponds to 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 institutions. The director, in denying the petition, asserted that only a church, classified under section 170(b)(1)(A)(i) of the Code, qualifies as a religious organization for immigration purposes.

The Code and its implementing regulations do not specifically define "religious organization," but 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. 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, prior to denying the petition, made no effort to ascertain whether the petitioner’s federal tax exemption derives from its religious character. 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 relies on a flawed and impermissible interpretation of the regulations. The director must, therefore, provide the petitioner with an opportunity to submit the materials outlined in that memorandum, and thereby demonstrate that its tax-exempt status derives primarily from its religious character.

The remaining issue concerns the nature of the beneficiary’s position. 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 regulation reflects that positions whose duties are primarily administrative or secular in nature do not qualify.

Rabbi Simcha Weiser of the petitioning entity describes the duties of a religious instructor:

[T]each religious subjects (ritual, holidays, Jewish ethics, and Hebrew for prayer and study), full-time at elementary grade levels . . . In addition to designing her own lessons and materials to teach her students about Jewish holidays, ethics, laws, customs, beliefs, and religious practices, [the beneficiary] also will follow a structured Hebrew language curriculum developed for English-speaking children. [The beneficiary] will work with her students to achieve skilled and rapid reading of Hebrew script, with emphasis on reading comprehension and use of the language for understanding the Hebrew of the *Torah* (Bible) and the *Siddur* (prayer book).

Following a request for further information, [redacted] stated that the beneficiary’s work as a religious instructor “requires that she place particular emphasis on the proper observance of Jewish rituals and customs. She instructs the children in the proper attitudes during prayer and leads discussion of ethical behavior according to the teachings of the Torah, and the many learned rabbis who have interpreted its meaning over more than 5,000 years.”

The director, in denying the petition, stated: “the beneficiary’s duties, even when involving religious subjects, is a wholly a secular function.” The director further found that beneficiary’s position is not a qualifying religious occupation because the position does not require any “specific training and education.”

On appeal, counsel argues that the director erred in finding that a religious worker employed in a religious

occupation must meet particular educational requirements. We agree with counsel's argument and find that though the beneficiary must be qualified in her occupation, the regulation requires no specific religious training or theological education.

Counsel further argues that the director failed to take into account the substantial amount of evidence that highlights the religious nature of the beneficiary's work. Upon consideration, we find the petitioner's claims and evidence to be credible and persuasive in this regard. The teaching of Hebrew to Jews at a Jewish school can be differentiated from the teaching of French or Spanish to students at a public school. The context of the beneficiary's work appears to be central to Jewish identity, rather than general enrichment. We, therefore, withdraw the director's finding that the beneficiary's position is not a religious occupation.

Beyond the decision of the director, we note that 8 C.F.R. § 204.5(g)(2) reads, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The record contains no annual reports or *audited* financial statements. The cover letters that accompany the petitioner's financial statements indicate that the statements are "limited to presenting . . . information that is the representation of management," and that the accountant has "not audited or reviewed the accompanying financial statements . . . ." As the petitioner's accountant clearly indicates that the statements were "not audited or reviewed," they do meet the requirements of 8 C.F.R. § 204.5(g)(2).

The petitioner has also submitted a copy of a quarterly tax return, showing wages paid to workers, but this is not the type of "tax return" contemplated in the regulations. For a non-profit organization, the appropriate document would be Form 990, Return of Organization Exempt from Income Tax. On remand, the director should allow the petitioner the opportunity to submit this required documentation. We note that the above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be" in the form of tax returns, audited financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only *in addition to*, rather than *in place of*, the types of documentation required by the regulation. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

While we have reversed one of the director's stated grounds for denial, the tax exemption issue remains unresolved and the petitioner must still establish its ability to pay the beneficiary's proffered salary. 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.