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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 01 2005
WAC 02 041 50833

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 Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a seminary. At the time of filing, it sought 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 dean of students and director of the Institute of Global Theology . The director determined that the petitioner had not established that it qualifies as a tax-exempt religious organization, or that the beneficiary had the requisite two years of continuous work experience in the position sought immediately preceding the filing date of the petition.

On appeal, the petitioner submits copies of various documents, most of them previously submitted, and a brief from counsel.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

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 Revenue 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).

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 an April 13, 1988 letter from the Internal Revenue Service (IRS), 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 institutions.

The director issued a notice of intent to revoke, predicated in part on the petitioner's classification under section 170(b)(1)(A)(ii) of the Code. In response, counsel claims that the petitioner "would qualify as a religious organization under subsection 170(b)(1)(A)(i)" on the basis of various documents that establish the religious nature of the petitioner's activities. For instance, an IRS letter dated April 8, 1942, indicates that the petitioning seminary is "organized and operated exclusively for religious purposes." The letter refers to the original determination letter issued in 1938, but that determination letter is not in the record.

In the notice of revocation, the director stated that "the petitioner is not tax-exempt as a religious organization and is ineligible for special immigrant classification of any alien employees under this category," because the IRS classified the petitioner as a school under section 170(b)(1)(A)(ii) of the Code, rather than as a church under section 170(b)(1)(A)(i) of the Code. The director dismissed the IRS letter "from 60 years ago," indicating that the more recent designation in the 1988 letter supersedes the findings in the 1942 letter. The director concluded that "the petitioner is not considered a bona fide religious organization as defined under 8 C.F.R. § 204.5(m)."

The director's assertion that only a section 170(b)(1)(A)(i) "church" qualifies as a religious organization is unduly restrictive. Other tax-exempt organizations can be religious in nature, although the burden of proof is

on the petitioner to establish that its classification derives primarily from its religious character, rather than from other factors.

The Code and its implementing regulations do not specifically define "religious organization," but we note that IRS 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.

In this instance, the petitioner has submitted a letter from the IRS, indicating that the petitioner is "organized and operated exclusively for religious purposes." We grant that this determination was made under an older version of the Code, rather than the 1986 version specified in the regulations, but the 1988 IRS letter does not inherently contradict or supersede the 1942 letter. Rather, the 1988 letter appears to take the petitioner's existing and undisturbed status, and associate it with one of the classifications that did not exist in 1942, in order to demonstrate how the petitioner's classification fits in with current tax law. There is nothing to show that the IRS has retracted its former determination regarding the petitioner's "religious purposes."

For the above reasons, we withdraw the director's finding that the petitioning organization lacks qualifying tax-exempt status. There remains, however, another factor that prevents the reinstatement of the approval of the petition. 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 November 9, 2001. 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.

In a letter accompanying the initial filing, Rev. [redacted] president of the petitioning seminary, discusses the positions offered to the beneficiary and the beneficiary's qualifications:

> As Director of the Institute of Global Theology, [the beneficiary] will architect the new program, organize support for the program among churches in the U.S. and in other countries and plan educational events for pastors and pastoral students in the U.S. and worldwide. In addition, the Director will administer funds raised for the Institute for Global Theology.
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> As Dean of Students, [the beneficiary] will provide on campus pastoral support and care to students and their families, will recruit pastoral students nationwide for [the petitioner], and will aid students in planning their specific theological program.
>
> Finally, as with all members of our faculty, [the beneficiary] will also serve as a speaker and preacher on behalf of [the petitioner] and the Institute for [redacted] . . .
>
> [The beneficiary] was ordained a Baptist minister in 1988, after completing his theological training at the Baptist Theological College of South Africa. Upon graduation and ordination, [the beneficiary] pastured [sic] the Ennerdale Baptist Church. . . .

> In 1994, [the beneficiary] was appointed as the General Secretary of the Baptist Convention of South Africa. . . . He served as General Secretary until his entry into the United States in 1999.
>
> In August 1999, [the beneficiary] entered the U.S. on an F-1 student visa and began his Masters in Theology. [The beneficiary] entered into this master's program in order to continue and expand his theological calling. While in the program, [the beneficiary] continued to perform his duties as a minister of religion. He graduated from [the petitioning seminary] this month and is currently in F-1 practical training working in our Seminary.

In a separate letter, Rev. [redacted], general secretary of the Baptist Convention of South Africa, affirms that the beneficiary "was appointed the General Secretary of the Baptist Convention of South Africa from December 1994 until June 1999. . . . He also served as the committee member of the Baptist Convention College from 1995 – 1999." Rev. [redacted] verifies the beneficiary's position as "the full time pastor" of Ennerdale Baptist Church from 1988 to 1994.

Subsequent to the approval of the petition, the beneficiary applied for adjustment to lawful permanent resident status. As part of that application, the beneficiary completed Form G-325A, Biographic Information. On this form, under "occupation," the beneficiary indicated "master's program" from August 1999 to May 2001, and "pastor" at the petitioning seminary from May 2001 until the date of the form (July 2002). In a July 2002 letter, Rev. [redacted] stated that the beneficiary is director of the petitioner's Institute of [redacted] and "also serves as a pastor at our seminary and as a speaker and preacher." There was no mention of a position as dean of students. A Form W-2 Wage and Tax Statement shows that the petitioner paid the beneficiary $17,500.08 in 2001, roughly half of the proffered wage of $35,000 per year. This is consistent with the beneficiary's own assertion that his *employment* (as opposed to studies) at the petitioning seminary began on July 1, 2001, halfway through the calendar year.

Other materials in the record indicate that, as early as late 2002, the beneficiary had assumed a new position as director of the petitioner's [redacted] Network. In a letter dated September 5, 2003, Rev. [redacted] describes this newly-claimed position, but offers no indication that the beneficiary was still the petitioner's dean of students or the director of the Institute of Global Theology. The duties of the newly-claimed position do not appear to closely match those of the previously-described positions. Given the multiple modifications in the beneficiary's job description, it is not entirely clear in what occupation the petitioner actually seeks to employ the beneficiary.

The director issued a notice of intent to revoke, stating "it appears that the beneficiary has not been performing the duties on a full-time basis as a Dean of Students and Director of the Institute for [redacted] for the two-year period immediately preceding the filing of the petition." In response, counsel contends "[t]he regulations do not require a religious professional to have been performing for two years that exact professional vocation for which [he] now seeks immigrant benefits. In other words, the regulations require only that the religious professional have been engaged in professional religious work for the two years prior to the filing of the immigrant visa petition."

We do not share counsel's interpretation of the regulations. 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. An alien who seeks to work in occupation A has not been carrying on "such work" if employed in occupation B for the past two years. We believe that the two-year experience requirement becomes meaningless if interpreted to allow an alien into a specific occupation in which that alien has no experience whatsoever.

Counsel asserts that, from 1994 to 1999, the beneficiary occupied a "position . . . equivalent to that of a Bishop in many other denominations." Without addressing the merits of counsel's arguments regarding the beneficiary's work in South Africa, the statute and regulations clearly limit consideration to the two years immediately preceding the November 2001 filing date. The qualifying period did not begin until November 1999, several months after the beneficiary left South Africa, and therefore his activities in that country lie outside the scope of our consideration here.

Counsel asserts that "[s]ince 1988, [the beneficiary] has served continuously as a pastor." It is true that the beneficiary was ordained as a minister in 1988, but it does not follow that the beneficiary has continuously performed the duties of ordained clergy since that time. The standard is not whether the beneficiary was ordained more than two years before the filing date, but whether he was carrying on the vocation of a minister throughout the qualifying period.

Counsel cites a May 8, 1992 letter from [redacted] then Acting Associate Commissioner for Adjudications of what was then the Immigration and Naturalization Service, indicating that "[c]ontinued study by a priest will be considered as carrying on the vocation of a minister of religion if it can be demonstrated that such study is consistent with the priest's ministerial vocation and provided that the priest continues to perform the duties of a minister of religion." Letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

Furthermore, the letter refers to a minister who has been, and will continue, to act in the specific capacity of a "priest." The letter does not state or imply that, once an individual has been ordained, every religious activity undertaken by that individual is inherent to, or consistent with, the vocation of a minister. The job offered to the beneficiary is not principally a pastoral position in which the beneficiary would undertake the usual duties of ordained clergy. Rather, the beneficiary's main duties would be as an official of a theological seminary. While one could make a very strong case that such duties constitute a religious occupation, they are not congruent with the duties of a minister. Rev. [redacted] initial job offer letter stated "we extend an offer of employment to [the beneficiary] for the dual position of Dean of Students and Director of the Institute of [redacted] In addition, the beneficiary will serve as a pastor at our seminary." This wording suggests that pastoral duties are ancillary, rather than central, to the position as originally described. The petitioner asserts that ordination is a necessary qualification for the position, but it does not follow that the position is essentially that of a pastor. Furthermore, 8 C.F.R. § 204.5(m)(1) indicates that, if an alien seeks to enter the United States in order to work as a minister, then that alien "must be coming to the United States *solely* for the purpose of carrying on the vocation of a minister" (emphasis added). Here, the beneficiary seeks to work as a minister and as an administrative official of a seminary.

The same original job offer letter indicates that the beneficiary "continued to perform his duties as a minister of religion" while he was pursuing his studies, but there is no indication that the beneficiary did so on a full-

time, compensated basis. Part-time, uncompensated duties do not constitute carrying on the vocation of a minister. *See Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980). The beneficiary himself, on Form G-325A, did not indicate that he was a pastor before May 2001. Rather, he indicated that he was a student until May 2001, and a pastor after that date.

In the notice of revocation, the director stated:

> [T]he evidence in the petition [shows] that the beneficiary was a student in [the petitioning] seminary since his entry in the United States in August 1999 until he received his Master of Divinity in May 2001. The G-325 Biographic form submitted with the [beneficiary's] adjustment of status packet notes that he has been employed with the petitioner as a Pastor since he received his Master's degree in May 2001.
>
> Based on this information, it appears that the beneficiary has not been performing the duties on a full-time basis as a Dean of Students and Director of the Institute of [redacted] for the two-year period immediately preceding the filing of the petition. . . .
>
> The beneficiary cannot be both a student and a Dean of Students at the same time, along with the other titles given him at the time, Director of the Institute of [redacted] and "pastor at our seminary."

On appeal, counsel repeats numerous arguments first put forth in response to the notice of intent to revoke, already discussed above. For instance, counsel asserts that the director interpreted the regulations too narrowly, and that the petition should be approved because the beneficiary has been a "religious professional" since 1994 and a "pastor" since 1988. Counsel, however, offers no support for the claim that the beneficiary need not have performed the duties of the job offered during the two-year qualifying period. The record shows that the beneficiary was not a dean of students or director of the Institute of [redacted] during the qualifying period, nor was he performing comparable duties under some other title.

The petitioner has not overcome this ground for revocation, and therefore the revocation stands. We stress that this is not a permanent barrier to eligibility; it will not be an impediment at such time as the beneficiary has been performing essentially the same duties for two years, and the petitioner seeks to engage the beneficiary in those *same* duties in the future. (Considering that the petitioner apparently employed the beneficiary as dean of students and director of the Institute of [redacted] for less than a year and a half before giving him a new title with new responsibilities, it does not appear from the record that the beneficiary's work in the position described in 2001 would form a solid foundation for a future petition.)

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.