identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 0 6 2005

WAC 02 027 55862

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. On further review, the director determined that the petitioner was not eligible for the visa preference classification. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke the approval of the preference visa petition and his reasons therefore, and subsequently exercised his discretion to revoke the approval of the petition on March 4, 2004. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 Hebrew and Jewish studies teacher. The director determined that the petitioner had not established that it qualified as a bona fide nonprofit religious organization. The director also determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition.

On appeal, counsel submits a letter and additional documentation.

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department of Homeland Security, "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. *Id.*

The first issue in this proceeding is whether the petitioner has established that the beneficiary had been continuously engaged in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition.

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).

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 years 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."

The regulation at 8 C.F.R. § 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

(ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:

(A) 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 October 23, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as a Hebrew and Jewish studies teacher throughout the two-year period immediately preceding that date.

In its letter accompanying the petition, the petitioner stated that the beneficiary began working for the petitioning organization in August 1998 while in a J-1 (Exchange Visitor) status, and continued in a R-1, nonimmigrant religious worker status beginning in April 2001. In its September 27, 2001 letter, the petitioner stated that the beneficiary was sponsored in her J-1 status by the Jewish Education Service in North America, Inc. to teach Jewish studies and "general American education." According to the petitioner, in her position at the petitioning organization, the beneficiary "primarily teaches the Hebrew language . . . She also teaches Judaic studies, including Jewish history, customs and rituals, the history of Israel, and Jewish family education."

The petitioner further stated that the beneficiary "currently" works as a "Hebrew teacher at the Hebrew Academy of San Francisco, as a High School Teacher at the Temple Beth Jacob, as a Hebrew and Judaic studies teacher at Congregation Sherith Israel's Religious School, and as a Hebrew and Judaic Studies teacher at Congregation Rodef Shalom." The petitioner submitted no evidence of the beneficiary's employment with these organizations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner submitted a copy of the Form W-2, Wage and Tax Statement, which it issued to the beneficiary in 2001, indicating that it paid her approximately $25,753. The petitioner also submitted a copy of a contract between the beneficiary and the petitioning organization for a "service period" from August 22, 2001 to June 14, 2002. The petitioner submitted no documentary evidence of the beneficiary's employment in 1999 or 2000. *See id.*

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." See H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Comm. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 1963).

The term "continuously" also is discussed in a 1980 decision where 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).

In line with these past decisions and the intent of Congress, it is clear, therefore that to be continuously carrying on the religious work means to do so on a full-time basis. That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is not paid, the assumption is that he/she is engaged in other, secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who in accordance with their vocation live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and generally salaried. To hold otherwise would be contrary to the intent of Congress.

On appeal, the petitioner submits copies of the beneficiary's 1999, 2000 and 2001 Forms W-2 from the petitioner, the Temple Beth Jacob, Congregation Rodef Sholom, Congregation Sherith, and the Hebrew Academy. The petitioner, however, submitted no evidence of the nature of the work performed by the beneficiary at the other organizations. We note that the statement on the Form IAP, Certificate of Eligibility for Exchange Visitor (J-1) Status, indicates that the beneficiary came to the United States under a program "to provide teaching opportunities in the various fields of instruction" and that the petitioner stated that the beneficiary's duties included teaching "general American education." It is not immediately obvious from the evidence, therefore, that the beneficiary's teaching duties at organizations other than the petitioner involved religious instruction.

The evidence does not establish that the beneficiary was continuously employed as a religious instructor for two full years prior to the filing of the visa petition.

The other issue under consideration concerns the petitioner's status as a tax-exempt organization. The regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

> (3) *Initial evidence.* Unless otherwise specified, each petition for a religious worker must be accompanied by:
>
> (i) Evidence that the organization qualifies as a nonprofit organization in the form of either:
>
> (A) Documentation showing that it is exempt from taxation in accordance with § 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 § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organization.

To meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(A), a copy of a letter of recognition of tax exemption issued by the Internal Revenue Service (IRS) is required. In the alternative, to meet the requirements of 8

C.F.R. § 204.5(m)(3)(i)(B), a petitioner may submit such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code (IRC) of 1986 as it relates to religious organizations. This documentation includes, at a minimum, a completed IRS Form 1023, the Schedule A supplement, if applicable, and a copy of the organizing instrument of the organization that contains a proper dissolution clause and which specifies the purposes of the organization.

With the petition, the petitioner submitted a copy of a "Statement by Domestic Nonprofit Corporation" filed by the petitioner with the state of California. In response to the director's request for evidence (RFE) dated April 8, 2002, the petitioner submitted a copy of an April 5, 1991 letter from the IRS, notifying the petitioner that the IRS had granted it an exemption in 1964 under section 501(c)(3) as an organization described in section 170(b)(1)(A)(ii) of the IRC. This establishes that the petitioner received tax-exempt status as a school. The director revoked approval of the petition because the director determined that the petitioner is tax exempt as an educational institution rather than a religious organization.

Clearly, an organization that qualifies for tax exemption as a school 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.

In a memorandum dated December 17, 2003, Mr. William R. Yates, Associate Director of Operations for Citizenship and Immigration Services (CIS), clarified the documentary evidence needed as an alternate method of proving tax-exempt status as a religious organization where the exemption letter from the IRS does not clearly state the basis for the exemption. This evidence includes

(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 he appropriate dissolution clause required by the IRS and that specifies the purposes of the organization, and
(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)(ii) rather than section 170(b)(1)(A)(i) of the Internal Revenue Code. This finding is not permissible, for the reasons stated in Mr. Yates' memorandum. The director did not 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. This deficiency is not fatal to the director's decision, however, because (as explained above) we have affirmed the other stated grounds for denial, which clearer evidence of qualifying tax-exempt status would not overcome. 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.