

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

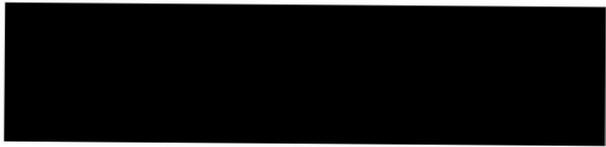
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

C1

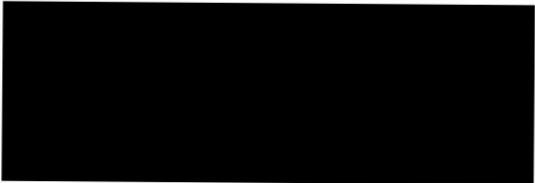


FILE: WAC 06 262 50376 Office: CALIFORNIA SERVICE CENTER Date: **AUG 04 2008**

IN RE: Petitioner: [Redacted]
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:



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, Chief
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 (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner is a synagogue. 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 director of religious activities and Jewish education.

The director determined that the petitioner had not established that the position offered is a qualifying religious vocation or occupation.

On appeal, counsel puts forth a brief arguing that the director mischaracterized the facts, ignored evidence in the record and misapplied the law in her decision to deny 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 issue raised in the director's decision in these proceedings is whether the petitioner established that the position qualifies as that of a religious worker.

The regulation at 8 C.F.R. § 204.5(m)(2) states, in pertinent part:

Religious occupation means 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.

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 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. Persons in such positions would reasonably be expected to perform services directly related to the creed and practice of the religion. The regulation reflects that non-qualifying positions are those whose duties are primarily administrative or secular in nature. The lists of qualifying and non-qualifying occupations derive from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

Citizenship and Immigration Services (CIS) 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 petitioner describes itself as a Jewish congregation devoted to furthering the educational teachings and religious beliefs of the Jewish tradition to the members of its congregation and the students in its school. The petitioner indicates that it offers several programs to meet the religious needs of its members by providing a variety of religious activities consisting of Shabbat services, Bar and Bat Mitzvahs, holiday programs, classes in Hebrew, Talmudic ethics, and Kabbalah Jewish Mysticism, and numerous other activities throughout the year.

The petitioner indicates the proffered position, director of religious activities and Jewish education, requires experience in the instruction of the history and culture of the Jewish religion. The petitioner states that the beneficiary has been attending synagogue and participating in the Jewish religion her entire life, and while attending college: 1) she took classes on Israeli and Jewish traditions, costumes, steps, movements history, heritage, choreography, and scenography; 2) through “Anajnu Veatem,” she participated in presentations throughout the Mexican Republic, California and Argentina to share the culture and traditions of Judaism.; and 3) instructed children of all ages at many different schools and institutions in the history of Jewish music and dance. As evidence to support its statements, the petitioner provides letters from several Jewish institutions. The petitioner describes the responsibilities of the beneficiary as follows:

- Responsible for directing and coordinating our congregation and school activities to meet the religious, cultural, and educational needs of our members (child/adolescent/adult).
- Visits the homes of congregation members and confer with me and members of the instructional staff to determine the needs for religious education to effectively plan, organize, coordinate and direct religious education programs designed to meet the needs of the congregation members.

- Encourage participation in religious education and congregation participation including activities emphasizing Jewish dance and music.
- Counsel students and promote student participation in extracurricular activities, including Jewish dance and music activities.

In response to a Request for Evidence (RFE) issued on December 11, 2006, counsel provided a weekly schedule which outlined the beneficiary's duties and hours worked as follows:

- Research and study material, using religious books, text books, the internet, and other sources, on the upcoming Jewish holidays for ideas to plan events around these holidays - 4 hours.
- Plan activities to celebrate and commemorate Jewish religious holidays and to unite the community. The Director is in charge of conferring with the [REDACTED] and staff on activity ideas; coordinating the dates and times of activities; contacting speakers, vendors, and suppliers; publicizing the events to the community via direct mailings, phone calls, and word of mouth; shopping for any necessary supplies; hosting the events – 20 hours.
- Attend Friday night and Saturday services and assist the [REDACTED] before and after services to answer questions on upcoming activities, encourage community participation, perform public relations for the petitioning organization, and to obtain feedback or ideas from the congregation's members – 6 hours.
- Read letters and e-mail and listen to messages from congregation members, particularly as they relate to upcoming activities – 2 hours.
- Coordinate with and assist the [REDACTED] in performing outreach to the Jewish clubs of local high schools. The Director and the [REDACTED] bring the high school clubs' members kosher meals.... The Director and the [REDACTED] give the girls Shabbat candles and teach them different Jewish blessings – 2 hours.
- Coordinate religious lectures that the [REDACTED] presents – 1 hour.
- Visit the sick and elderly in their homes and bring them donations or gift baskets – 1 hour.
- Arrange and deliver holiday appropriate gifts to congregation members – 1 hour.

On March 7, 2007, the director issued an additional RFE and instructed the petitioner to submit a brief description of the beneficiary's past and current ministries/programs, a detailed description of the work to be done, including specific job duties, level of responsibility/supervision, number of hours per week to be spent performing each duty, explain how the duties of the proffered position relate to a traditional religious function and a detailed explanation of the requirements of the proffered position.

Counsel, in response, asserted that the beneficiary is not a minister and described the religious programs, in pertinent part, as follows:

[The beneficiary] coordinates an outreach program, "Tefillin and Chillin'," with Jewish students at local high schools, such as Torrey Pines High School and Canyon Crest Academy, usually on Thursdays and Fridays, at lunchtime.

As the Director of Religious Activities and Jewish Education, [the beneficiary] communicates with her contacts at the high school to coordinate the date and time of their outreach. She then organizes a kosher meal for the students, utilizing her knowledge of kashrut, the body of law derived from the Torah regarding which foods are kosher. [The beneficiary]

accompanies [REDACTED] to the high schools and assists him with his outreach.

Other “programs” in which [the beneficiary] is involved are the [REDACTED] holiday celebrations and religious education programs, which [the beneficiary] directs and coordinates. She used her knowledge of the Jewish religion’s tenets of faith, its traditions, the timing and meaning of its holidays, and rules of kashrut to plan and coordinate the [REDACTED] religious activities and education programs. She confers with the [REDACTED] the staff, and volunteers about her ideas and plans for activities and events. She schedules the activities to ensure that the timing conforms to Jewish religious law and to ensure that the [REDACTED] and other religious authorities are available for the holidays. [The beneficiary] is in charge of contacting religious authorities and other speakers, as necessary, for activities and education programs. [The beneficiary] directs the publicity of the activities and education programs, which she accomplished through direct mailing, phone calls, and word of mouth at [REDACTED] services, which she attends. She coordinates all aspects of the events, and she attends them to ensure that the “programs” run smoothly.

* * *

Other “programs” that [the beneficiary] coordinates include the [REDACTED] ongoing Jewish Awareness courses, classes on the Torah, and various themed lectures, which the [REDACTED] offers each month to educate its members and deepen their faith.

Including the duties outlined in the above mentioned programs and weekly schedule, counsel described the proffered position as follows:

... [the beneficiary] directs and coordinates the activities and educational programs of the [REDACTED] to meet the spiritual needs of its members. She uses her knowledge of the Jewish faith, traditions, music, dance, rules of kashrut, etc. to plan organize, coordinate, and direct religious education and holiday programs. Her goals in organizing these programs are to offer a rich assortment of activities that promote active participation in the Jewish religion; to promote education in Judaic studies and worship; to instill a sense of pride in Judaism in [REDACTED] members; and to strengthen the faith and spiritual identity of the [REDACTED] as a community by providing community activities through which the individual members may worship together.

[The beneficiary] researches upcoming Jewish holidays and studies religious writings and prayers about the holidays. She uses religious books, text books, the internet, and other print and media sources to conceive ideas for Jewish religious activities. [The beneficiary] confers with [REDACTED] congregation members, and the staff of other Jewish centers and synagogues to brainstorm ideas, rule out ideas that have not proven effective in the past, and to decide on program activities. In this process, [the beneficiary] analyzes member participation in activities and perceives changes in the congregation’s emphasis to determine the [REDACTED] needs and maximize participation in the [REDACTED] activities.

Once [the beneficiary], in consultation with [REDACTED], decides on an event or activity to celebrate ... [the beneficiary] plans, coordinates, and directs the event, utilizing the

knowledge she has gained from her research along with her background knowledge of the Jewish faith, so that the event achieves its purpose. She coordinates the date, time, and location, if not on site. She contacts outside speakers and vendors of religious items ... and she shops for any necessary supplies. She arranges for the performance of Jewish music and dance groups. She writes and composes the direct mailings that the [REDACTED] sends to publicize the event, using the knowledge that she has gained from her research and studies and her own personal faith experience. She also publicizes the events and activities by direct phone calls and word of mouth....

In explaining how the proffered position relates to a traditional religious function, counsel stated that the petitioning organization has, in an earlier letter, indicated that it offers several programs to meet the religious needs of its members and listed various religious activities and services that it provides its members to deepen their faith. Counsel states that offering these activities and services is a primary way, other than pure preaching, by which the petitioner carries out its religious mission of "bringing the [REDACTED] and its teachings to all levels of understanding." Counsel indicated that the person in this position at the petitioning organization who designs and organizes these religious activities and services is furthering the petitioner's religious mission.

In describing the job requirements of the proffered position and the qualifications of the beneficiary, counsel asserted that neither the regulations nor the statute requires proof of training or education for a non-professional religious occupation. Counsel concluded that the request for the minimum requirements for this non-professional religious occupation and for proof that the beneficiary satisfies these requirements is unnecessary and irrelevant.

Nonetheless, counsel stated that the position requires a bachelor's degree in any area of specialization due to the research skills, personal discipline, and organization that completion of higher education requires, and one year of experience in the instruction of Jewish education or one year of experience in the instruction of Jewish culture, traditions, and dance. Counsel provided a copy of the beneficiary's degree, and letters from her prior employers demonstrating the beneficiary satisfies the minimum requirements for the proffered position.

The director, in denying the petition, noted that the beneficiary's duties are predominantly secular in nature as 50 percent of the beneficiary working time is spent doing administrative work. The director determined that the duties of the occupation do not have religious significance and embody the tenets of that particular religious denomination.

On appeal, counsel argues, that the director ignores the majority of the evidence submitted, including substantive examples of the Jewish religious activities that the beneficiary plans and executes in an effort to celebrate religious holidays. In citing *Perez v. Ashcroft*, 236 F. Supp. 2d 899, 904 (N.D. III. 2002), counsel asserts that the regulations "impose no requirement that for some to qualify as a religious worker he or she must never engage in any secular or administrative duties. It is difficult to imagine any position with any religious organization that would not involve a small amount of administrative duties." (Emphasis in original).

Counsel asserts that the director's finding that the position is not religious is contrary to statute and regulation because the director essentially rewrote the beneficiary's job description by deleting religious references. In citing *Campbell Soltane v. US Department of Justice, Immigration & Naturalization Service*, 381 F.3d 143 (3rd Cir. 2004), counsel asserts that the circuit court criticized CIS for describing

the job duties of the beneficiary in terms “that excluded any mention of the religious component.” The court held that the government’s analytical approach to determine whether a proposed position qualified as a traditional religious function was inconsistent with the text of the regulation. *Id.*

Counsel states that the petitioner has clearly demonstrated that the beneficiary is responsible for creating religious content and that her primary role revolves around planning and organizing religious activities and events for its organization. Counsel asserts that the petitioner’s purpose is further the educational teachings and religious beliefs of the Jewish tradition.”

According to the record of proceeding, the beneficiary’s intended place of work is in San Diego, California, which is not under the jurisdiction of the Third Circuit. *Camphill Soltane* was never a binding precedent for this proceeding. Nevertheless, upon review of the evidence, the AAO finds the petitioner’s claims and evidence to be credible and persuasive in this regard; the beneficiary has been and will be engaged primarily in directing and coordinating general religious studies and Jewish cultural matters. The AAO, therefore, withdraws the director’s finding that the beneficiary’s position is not a religious occupation.

The petition, however, may not be approved because the petitioner has not established its ability to pay the beneficiary’s proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, 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 petition, which was filed on August 30, 2006, was accompanied by a letter dated March 22, 2006, from the petitioner indicating that the beneficiary will be compensated with a yearly salary of \$25,000.00. Counsel submitted: 1) the petitioner’s bank statements from January 17, 2005 through July 30, 2006; 2) several pay stubs issued to beneficiary in 2004 and 2005; 3) the beneficiary’s wage and tax statements for 2004, 2005 and 2006, which reflect wages of 14,147.87, \$15,434.04 and \$23,682.45, respectively; 3) the petitioner’s unaudited financial statements for 2006; and 4) the petitioner’s balance sheet and profit and loss statement for December 31, 2002.

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).

In the RFE issued on December 11, 2006, the petitioner was instructed to submit evidence, such as copies of annual reports, federal tax returns or audited financial statements to demonstrate its ability to pay the beneficiary’s wage. The evidence provided reflects that the petitioner has paid the beneficiary a salary below the proffered rate. This issue was not addressed by the director in her decision to deny the petition.

The petitioner has overcome the sole grounds for denial; however, the ability to pay 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 to establish ability to pay the proffered wage 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.