U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JAN 1 3 2014 Office: CALIFORNIA SERVICE CENTER

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a Jewish Orthodox 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 Judaic Studies assistant teacher. The director determined that the petitioner failed to submit required initial evidence to establish that it qualifies as a bona fide non-profit religious organization and that the beneficiary has the requisite two years of continuous, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a letter from the petitioner, a letter from the Internal Revenue Service (IRS), a Consumer's Certificate of Exemption from the Florida Department of Revenue, a Fictitious Name Detail from the Florida Department of State, a printout from the website chabad.org, and copies of the covers and faculty pages from the petitioner's yearbooks.

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 September 30, 2012, 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 September 30, 2012, 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 U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(3) provides that in order to be eligible for classification as a special immigrant religious worker, an alien must be coming to work for a bona fide non-profit religious organization in the United

States, or a bona fide organization which is affiliated with the religious denomination in the United States. The regulation at 8 C.F.R. § 204.5(m)(5) states, in pertinent part:

> (5) Definitions. As used in paragraph (m) of this section, the term:
>
> *Bona fide non-profit religious organization in the United States* means a religious organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the IRS confirming such exemption.
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> *Bona fide organization which is affiliated with the religious denomination* means an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code and possessing a currently valid determination letter from the IRS confirming such exemption.
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> *Tax-exempt organization* means an organization that has received a determination letter from the IRS establishing that it, or a group that it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the Internal Revenue Code . . .

The regulation at 8 C.F.R. § 204.5(m)(8) states that the following is required initial evidence that must be submitted:

> (i) A currently valid determination letter from the Internal Revenue Service (IRS) establishing that the organization is a tax-exempt organization; or
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> (ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or
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> (iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, as something other than a religious organization:
>
> > (A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;
> >
> > (B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;

(C) Organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization; and

(D) A religious denomination certification. The religious organization must complete, sign and date a religious denomination certification certifying that the petitioning organization is affiliated with the religious denomination. The certification is to be submitted by the petitioner along with the petition.

The petitioner filed the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, on December 11, 2012. On the petition, the petitioner identified the prospective employer as , and identified the organization's "IRS Tax #" as

Accompanying the petition, the petitioner submitted a determination letter from the IRS to confirming that organization's tax-exempt status under section 501(c)(3), along with a directory for which included a listing for the petitioning school. Additionally, the petitioner submitted a determination letter for along with a letter from the president of that organization stating that the petitioning school "is a beneficiary agency of Neither of the determination letters indicated that the respective organizations had been granted a group exemption which would apply to subordinate units. Further, the letters indicated that both organizations were organizations "of the type described in section 170(b)(1)(A)(vi)." While section 170(b)(1)(A)(i) of the Code refers specifically to churches and related organizations, section 170(b)(1)(A)(vi) of the Code has no such limitations. Accordingly, the letters did not demonstrate the religious nature or purpose of either organization.

The petitioner also submitted literature about its organization and a copy of its Articles of Incorporation. The petitioner submitted a religious denomination certification stating that the petitioner is affiliated with Orthodox Judaism. The certification was signed by identified as "Executive Director," but the "Attesting Organization Name" was not provided.

On March 11, 2013, the director issued a Notice of Intent to Deny the petition (NOID), in part based on the petitioner's failure to meet the documentary requirements of 8 C.F.R. § 204.5(m)(8). The director stated that, as neither of the submitted determination letters was addressed to the petitioning organization and neither indicated a group exemption, the petitioner failed to establish that it is exempt from taxation under section 501(c)(3) under either an individual or group exemption. The director additionally stated that, although the petitioner had demonstrated its affiliation to the it had not submitted a determination letter confirming the petitioner's tax-exempt status or a completed religious denomination certification as required under 8 C.F.R. §§ 204.5(m)(8)(iii)(A) and (D) to establish that the petitioner is a bona fide organization which is affiliated with the denomination.

The petitioner's response to the NOID, through former counsel, did not address the petitioner's failure to demonstrate its status as a bona fide non-profit religious organization. On May 7, 2013, the director denied the petition in part based on that issue.

On appeal, the petitioner submits an October 15, 2010 determination letter from the IRS to confirming the organization's tax exempt status under 501(c)(3) as a religious organization. The petitioner submits a "Fictitious Name Detail" from the Florida Department of State Division of Corporations, indicating that the does business under the name

The petitioner provides no explanation as to why the EIN listed on the determination letter does not match the number listed on the Form I-360 petition It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). A document entitled "2005 Not-For-Profit Corporation Annual Report," submitted with the petition, lists 65-1025989 as the petitioner's "FEI Number."

Regardless, at issue on appeal is whether the director erred based upon the record that was before her. In the preamble to the current regulations governing special immigrant and nonimmigrant religious workers, USCIS discussed the rationale for requiring a petitioner to submit an IRS determination letter. USCIS stated that the requirement is a "valuable fraud deterrent" and that a determination letter provides "verifiable documentation that the petitioner is a bona fide tax-exempt organization or part of a group exemption." *See* 73 Fed. Reg. 72280 (Nov. 26, 2008). At the time the petition was filed, the petitioner submitted no evidence of a currently valid determination letter from the IRS. In response to the NOID, the petitioner again failed to submit qualifying required documentation of its federal tax-exempt status. A petitioner must establish eligibility at the time of filing. *See* 8 C.F.R. §§ 103.2(b)(1), (12). A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971). The petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. The AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

In a letter submitted on appeal, the petitioner states:

> If our understanding is correct, attorney was unable to provide evidence that:
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> ... Our school is, in fact, a bonafide non profit religious organization.

> We were shocked to find that the attorney was unable to provide these truths and that he never asked us for documentation that would prove legitimate claim. ...
>
> Again, we apologize for the confusion caused by the apparent slipshod handling of this case by the attorney ...

When an appeal is based on a claim of ineffective assistance of counsel, it requires the petitioner claiming such ineffectiveness to comply with the requirements set forth by the BIA in *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988). The *Lozada* decision requires the submission of:

1. An affidavit setting forth in detail the agreement with former counsel concerning what action would be taken and what counsel did or did not represent in that regard;

2. Proof that the alien notified former counsel of the allegations in the ineffective assistance of counsel claim and allowed counsel an opportunity to respond; and

3. If a violation of ethical or legal responsibilities is claimed, a statement as to whether the alien has filed a complaint with the disciplinary authority regarding counsel's conduct or, if a complaint was not filed, an explanation for not doing so.

Matter of Lozada, 19 I&N at 639. The petitioner has not submitted the above documentation.

The petitioner failed to submit required initial evidence to establish that it qualifies as a bona fide nonprofit religious organization in the United States or a bona fide organization which is affiliated with the denomination.

The second issue to be discussed is whether the petitioner has established that the beneficiary has the required two years of continuous, qualifying work experience immediately preceding the filing of the petition.

The USCIS regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation, either abroad or in lawful immigration status in the United States, continuously for at least the two-year period immediately preceding the filing of the petition. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work in lawful immigration status throughout the two-year period immediately preceding December 11, 2012.

The USCIS regulation at 8 C.F.R. § 204.5(m)(11) provides:

> *Evidence relating to the alien's prior employment.* Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United

States during the two years immediately preceding the filing of the application and:

(i) Received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns.

(ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.

(iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.

If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

On the petition, the petitioner stated that the beneficiary currently holds R-1 nonimmigrant status expiring on January 7, 2013, and that she has "several years of experience in the job offered." In a letter accompanying the Form I-360 petition, former counsel for the petitioner stated:

> has been employed on a permanent, full-time, and salaried basis for greater than two years as a . since December 2006.

The petitioner submitted a Form I-797A, Notice of Action, indicating that the beneficiary was granted R-1 nonimmigrant status authorizing her employment with the petitioning school from January 8, 2008 until January 7, 2011. The petitioner submitted uncertified copies of the beneficiary's Forms 1040, U.S. Individual Income Tax Return, for the years 2008, 2009, and 2010, along with copies of the beneficiary's Forms W-2, Wage and Tax Statement, from the petitioner, for 2008 and 2009. The 2010 Form 1040 listed $39,675 in total income, including $8,650 in "wages, salaries, tips, etc." and $31,025 identified as business income from

The petitioner also submitted copies of "QuickReport" payroll records relating to the beneficiary during the years 2008, 2009, and 2010.

In the March 11, 2013 NOID, the director stated that the petitioner had not submitted evidence to establish that the beneficiary held lawful status or employment authorization from January 8, 2011 until the filing of the petition. Additionally, the director found that the wages listed on the beneficiary's uncertified 2010 Form 1040 called into question the assertion that the beneficiary was working full time for the petitioner during that year. Further, the director stated that the

petitioner failed to submit any documentary evidence showing that the beneficiary was employed by the petitioner during 2011 or 2012.

In a letter responding to the notice, former counsel for the petitioner stated:

> Beneficiary was granted R-1 status from 01/08/2008-01/7/2011. A request for extension was granted from 01/07/2011-01/07/2013. Although that extension was revoked on 03/08/2012 an appeal was timely filed with the commissioner and that decision has been on appeal until 03/27/2013 the appeal was denied; because the revocation was on appeal, the beneficiary has been authorized to work all of this time.

No documentary evidence was submitted and the letter did not address the lack of evidence of employment during 2011 and 2012. Further, former counsel did not cite any law or regulation to support the assertion that a beneficiary of a revoked petition is authorized to work while an appeal of the revocation is pending.

In the May 7, 2013 decision denying the petition, the director found that "the petitioner did not submit any evidence to rebut the deficiencies stated in the NOID." Therefore, the director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous, qualifying work experience immediately preceding the filing of the petition.

On appeal, the petitioner submits no further documentation or arguments regarding the beneficiary's continuous, lawful status. Instead, the petitioner submits "[c]opies of yearbook covers and faculty photos showing that has been employed here as a religious educator since the 2006-2007 school year and is currently still employed." The regulation at 8 C.F.R. § 204.5(m)(11) specifically requires evidence of salaried or non-salaried compensation (such as room and board), or of qualifying self-support. At the time of filing, the petitioner indicated through counsel that the beneficiary was a salaried employee throughout the two-year qualifying period immediately preceding the filing of the petition. The regulation at 8 C.F.R. § 204.5(m)(11)(i) provides that, if the beneficiary received salaried compensation, "the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns." The petitioner submitted an uncertified copy of the beneficiary's tax return for 2010. No Form W-2 was submitted for 2010 and no IRS documentation of compensation was submitted for either 2011 or 2012. Accordingly, the petitioner has not established that the beneficiary was engaged in qualifying, compensated employment during the two years prior to filing the petition.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.