U.S. Department of Homeland Security
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MAIL STOP 2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 29 2008

WAC 07 187 54957

IN RE: Petitioner:
Beneficiary: [redacted]

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, 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 on appeal. The appeal will be dismissed.

The petitioner is a local branch of a Hasidic Jewish movement, operating a synagogue, Hebrew school, and other facilities. 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 religious studies instructor. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as a Hebrew and religious studies instructor immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established that it had made a qualifying job offer to the beneficiary.

On appeal, the petitioner submits additional materials and arguments from counsel.

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).

Citizenship and Immigration Services (CIS) regulations 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 June 11, 2007. Therefore, the petitioner

must establish that the beneficiary was continuously performing the duties of a Hebrew and religious studies instructor throughout the two years immediately prior to that date.

8 C.F.R. § 204.5(m)(4) requires an official of the entity seeking to employ the beneficiary to state the terms of the job offer, including how the alien will be paid. The intending employer's documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or solicitation of funds for support.

The petitioner's initial submission included a photocopy of the beneficiary's R-1 visa, issued in Tel Aviv, Israel, on June 16, 2005. That visa is annotated with the petitioner's name, and only the petitioner was authorized to employ her under the terms of that visa. The initial submission also showed that, on March 26, 2006, Tarbut V'Torah Community Day School applied for an extension of the beneficiary's R-1 status. The director approved the application, and granted the requested status for the period from May 31, 2006 to March 20, 2009.

In an introductory letter, of the petitioning entity stated that the beneficiary "spent the last decade as an Elementary School Teacher where she taught grades 3 and 4. Her curriculum included Biblical Studies, Literature, Reading Comprehension, and Language Arts of the Hebrew Language. . . . In addition, [the beneficiary] has also worked with senior citizens as an art teacher, whereby enabling her students to use art as a therapeutic method." Rabbi [redacted] did not indicate that the petitioner operates its own elementary school (as opposed to a Hebrew school that offers weekly rather than daily classes).

The petitioner's initial submission include no description of the proffered terms of employment, and only a skeletal description of the beneficiary's past experience. On September 24, 2007, the director issued a request for evidence, instructing the petitioner to submit evidence relating to the beneficiary's compensation, work history, and other material subjects. The director specifically requested "evidence of the beneficiary's work history beginning June 11, 2005 and ending June 11, 2007."

In response, counsel stated that the petitioner "would pay the Beneficiary and have her on payroll at a salary of at least $13520 per year for her services." Regarding the position offered, counsel stated: "See the attached statement of the [petitioner] regarding the position that [the beneficiary] will hold." An accompanying exhibit list did not include any mention of such a statement from the petitioner, and the AAO can find no statement in the record that matches this description. One statement from the petitioner discussed only the beneficiary's past experience, and another statement contained a general description of the petitioner's educational programs, with no specific mention of the beneficiary or her intended role in those programs. That description included a "pre school [for] children ages 2-5" and a "Hebrew School – k-12 for children to learn about their religion," but no full-day elementary school or other full-time educational facility.

Relating to the beneficiary's prior employment, the petitioner submitted two employer letters. Rabbi stated that the beneficiary "was employed by [the petitioner] for six months from January, 2006 until June, 2006. [The beneficiary] worked as a Hebrew/Judaic teacher in the afternoon Hebrew School." Rabbi [redacted] did not indicate that the beneficiary had worked for the petitioner either before or after that six-month period, nor did Rabbi [redacted] indicate that the petitioner intended to employ the beneficiary in

the future. The petitioner submitted copies of paychecks and related documents from the petitioner, but these all fell within the first half of 2006.

[redacted] and [redacted], both officials of Tarbut V'Torah School, stated in a joint letter that the beneficiary "was hired by Tarbut V'Torah School as a Hebrew/Judaic Staff Member on August 31, 2005. She is employed on an annual contract. Her contract for the current school year runs from August 27, 2007 thru August 26, 2008, her teaching duties run from August 27, 2007 thru June 26, 2008. She works 8 hours a day on student school days, and required staff in-service days." The letter contained no specific terms of compensation.

The letters quoted above identified the beneficiary as a former employee of the petitioner, and a current employee of Tarbut V'Torah School. The petitioner submitted financial documentation and other information about the petitioner, but no comparable documentation about Tarbut V'Torah School. The petitioner did not, at the time, identify any other school, in the United States or elsewhere, that employed the beneficiary between June 11 and August 31, 2005.

The petitioner submitted copies of Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements showing that the petitioner paid the beneficiary $6,770.79 in 2006, and Tarbut V'Torah School paid the beneficiary $7,545.56 in 2005 and $24,555.46 in 2006. Transcripts of the beneficiary's 2005 and 2006 income tax returns show that the beneficiary did not report any other income in those two years. These amounts are consistent with the dates of employment stated in the aforementioned letters.

The director denied the petition on January 30, 2008, stating that the petitioner had failed to establish the beneficiary's proffered rate of compensation. The director found the beneficiary's work at Tarbut V'Torah "is her primary employment and her employment with the petitioner was secondary. As such, the beneficiary's proffered position with the petitioning organization does not appear to be full time." The director concluded that the petitioner had not established a qualifying job offer. The director also noted that the petitioner had not established that the beneficiary performed any qualifying employment between June 2005, when the qualifying period began, and the end of August 2005, when she began working at Tarbut V'Torah School.

On appeal, counsel states: "The past documentation that was submitted to the Service related to part-time employment by the Beneficiary and was not reflective of the total annual salary that she would earn if she were to be employed on a full-time basis with the Petitioner." Counsel asserts that the petitioner intends to pay the beneficiary $35,000 per year, and the figure of "$13520 per year" stated earlier resulted from "a misinterpretation by legal counsel."

Counsel states that the director should not have relied on counsel's uncorroborated statement as a definitive assertion of the beneficiary's compensation. This statement derives from the position, well supported by case law, that the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel does not explain why the petitioner provided no first-hand information in this regard, such that counsel was compelled to offer only counsel's own "interpretation"

of the proffered terms of compensation. If we disregard counsel's estimation of the beneficiary's annual salary, then the petitioner's submissions, prior to the denial of the petition, contain no figures at all regarding the beneficiary's proffered compensation.

states that the beneficiary's prior employment with the petitioner was "approximately 4 hours per day or 20 hours per week. . . . We confirm that we will offer her an annual salary of at least $35,000 per year." Only on appeal did the petitioner state its intention to employ the beneficiary full-time, and the appeal marks the first appearance of the $35,000 salary offer. The petitioner submits no documentary evidence to show that this offer existed at the time the petitioner filed the petition. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998).

also asserts that "it is the nature of teacher's contracts that the periods of time in which they are on vacation is still considered as part of their employment contract and that they are paid for that time in the total compensation package that they are provided." [redacted] is correct that paid vacation time should not be counted against an alien's required two years of experience. Nevertheless, the burden is on the petitioner to establish that the apparent gap in employment was, in fact, paid vacation time. Officials of Tarbut V'Torah School have repeatedly stated that the school first hired the beneficiary on August 31, 2005, a date that is consistent with the ratio of payments reflected on the IRS Forms W-2 for 2005 and 2006 (showing that the beneficiary, in 2005, received about 16 weeks of salary at the 2006 rate).

[redacted], Principal of Hayovel Elementary Day School in Israel, claims in a new letter that the school employed the beneficiary "from September 1st 1993 until August 30th 2005." Prior to the appeal, the petitioner had not even mentioned Hayovel Elementary Day School, much less submitted evidence therefrom, even after the director specifically requested evidence regarding the beneficiary's work history in the RFE. The letter does not address the subject of compensation or, more specifically, paid vacation time.

The purpose of the RFE is to elicit further information that clarifies whether the petitioner has established eligibility for the benefit sought as of the petition's filing date. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The AAO finds that the director issued a comprehensive request for evidence, and that the petitioner's response to that request did not establish the existence of a valid job offer or the beneficiary's qualifying experience throughout the two-year qualifying period. The director was, therefore, justified in denying the petition on each of those grounds. The submission, on appeal, of entirely new claims and materials

previously withheld from the director cannot show that the director made the wrong decision without benefit of those materials. While the stated grounds for denial are without prejudice to a future filing of a new petition, including all evidence required by the regulations in effect at the time of filing, the time has already passed for the petitioner to establish that the present petition can and should be approved.

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.