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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 0 1 2004

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.

Marc Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner filed a motion to reopen,[1] receipt number SRC 03 216 52618, simultaneously with the appeal. By properly filing an appeal, the petitioner placed the matter under the jurisdiction of the AAO. The concurrent motion is, therefore, superfluous and moot. We hereby dismiss the petitioner's motion.

The petitioner identifies itself as a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(4), to perform services as a pastor. The director determined that the petitioner is not a qualifying tax-exempt religious organization, and that the petitioner has not established that the beneficiary entered the United States to perform qualifying religious work.

The first issue concerns the petitioner's tax-exempt status. The regulation at 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.

The Internal Revenue Service (IRS) classifies churches under section 170(b)(1)(A)(i) of the Internal Revenue Code of 1986 (the Code). The petitioner has submitted a copy of an advance ruling letter from the IRS, dated July 17, 1997, indicating that the petitioner "can reasonably expect to be [classified as] a publicly supported organization described in sections 509(a)(1) and 170(b)(1)(A)(vi)" of the Code.

Section 170(b)(1)(A)(vi) of the Code pertains to publicly supported organizations "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes," or for other specified purposes. Clearly, an organization that qualifies for tax exemption as a publicly supported organization under section 170(b)(1)(A)(vi) 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)(vi) of the Code derives primarily from its religious character, rather than from its status as a publicly supported charitable and/or educational institution.

The organization can establish this by submitting documentation which establishes the religious nature and purpose of the organization, such as brochures or other literature describing the religious purpose and nature of the activities of the organization. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operations, *Extension of the Special Immigrant Religious Worker*

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[1] Counsel refers to the motion as a "motion to reconsider." By regulation, however, a motion to reconsider is limited to arguments regarding the record as it stood at the time of denial. A motion that includes new evidence, as this motion does, is a motion to reopen. *See* 8 C.F.R. § 103.5(a)(2) and (3).

Program and Clarification of Tax Exempt Status Requirements for Religious Organizations (December 17, 2003):

(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 the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization;
(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. Tax-exempt entities are required by law to make their Forms 1023 available for public inspection (as noted in the petitioner's advance ruling letter from the IRS). Therefore, if the director were to request a copy of the petitioner's Form 1023, failure to submit that document would appear to be a permissible basis for denial.

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 IRS tentatively classified the petitioner under section 170(b)(1)(A)(vi) rather than section 170(b)(1)(A)(i) of the Internal Revenue Code. This finding relies on an impermissibly restrictive reading of the regulations. The director must, therefore, 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.

We note that, on appeal, counsel asserts that the petitioner is covered by a group exemption granted to the Georgia District Church of the Nazarene. Under the terms of such group exemptions, the entity holding the group exemption must provide the IRS with a listing of subordinate entities covered by the exemption. The petitioner has not established that the Georgia District Church of the Nazarene has formally notified the IRS of the petitioner's inclusion under the group exemption.

Furthermore, as noted above, the petitioner had sought its own exemption in 1996. The IRS' advance ruling letter of July 17, 1997, indicates that the advance ruling period ends December 31, 2000, after which the IRS would issue a final ruling regarding the petitioner's classification. The 1997 letter informed the petitioner that "[w]ithin 90 days after the end of your advance ruling period, you must send us the information needed to determine whether you have met the requirements of the applicable support test during the advance ruling period." The petition was filed March 8, 2002, and the appeal was filed August 1, 2003, both dates falling well after the end of the advance ruling period and the 90-day period that followed. Nevertheless, the petitioner has not provided a copy of the IRS' final determination letter, nor has the petitioner explained the absence of such a letter. Because the record proves that the petitioner has applied for its own individual exemption, the petitioner's new reliance on a claimed group exemption raises questions that the petitioner should have the opportunity to answer.

The other issue raised in the director's decision concerns the beneficiary's entry into the United States. Section 101(a)(27)(C)(ii)(I) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii)(I), requires that the alien seeking classification "seeks to enter the United States . . . solely for the purpose of carrying on the vocation of a minister." In this instance, the beneficiary entered the United States as a B-2 nonimmigrant visitor. Thus, the director concluded, the beneficiary did not enter the United States solely for the purpose of working as a minister.

This finding is not defensible. The AAO interprets the language of the statute, when it refers to "entry" into the United States, to refer to the alien's intended *future* entry *as an immigrant*, either by crossing the border with an immigrant visa, or by adjusting status within the United States. This is consistent with the phrase "*seeks* to enter," which describes the entry as a future act. We therefore withdraw this particular finding by the director.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position 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.