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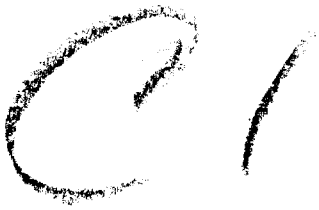
U.S. Citizenship and Immigration Services



[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 28 2005
WAC 01 217 54789

IN RE: Petitioner: [redacted]
Beneficiary:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be dismissed.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

In its previous decision, the AAO held that the petitioner had not established that the proffered position qualified as that of a religious worker. On motion, counsel asserts that the AAO stated that the petitioner presented "no evidence" that the position was "normally employed and that music is an integral part of the religion." Counsel references a letter by the petitioner's minister to establish that the petitioner presented evidence of the significance of music in the petitioner's religious practices. Counsel argues that the AAO failed to address the evidence presented.

Counsel misstates the AAO's decision. Citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972), the AAO found that the petitioner had submitted no documentary evidence to support its contention that the position of music director was a traditional full-time, salaried position within its denomination. The petitioner submitted no documentary evidence with the petition, on appeal or in support of this motion to corroborate the statements contained within the minister's letter. The letter, without corroborating documentary evidence, does not meet the petitioner's burden of proof. *See id.*

Counsel further asserts on motion that evidence of the petitioner's ability to pay the proffered wage, in the form of annual reports, federal tax returns, or audited financial statements," was never requested. This argument is without merit.

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 above-cited regulation requires that with every employment-based immigrant petition, the petitioner must submit evidence of its ability to pay the proffered wage and that evidence of that ability "shall be" in the form of tax returns, audited financial statements, or annual reports. In other stages of these proceedings, the petitioner submitted no evidence to establish its ability to pay the proffered wage. In a request for evidence dated October 19, 2001, the director instructed the petitioner to submit evidence to show "[h]ow the beneficiary [would] be paid for his . . . services." The director's list of acceptable evidence included "recent audits." Additionally, in his decision, the director cited the above regulation and determined that the petitioner had not submitted evidence to meet the regulatory requirement.

On motion, the petitioner submits a copy of its year 2001 Form 990-EZ, Short Form Return of Organization Exempt from Income Tax.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *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 or on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

As the petitioner failed to present new facts supported by documentary evidence in its motion to reopen, the petitioner's motion will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.