U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 30 2005

EAC 03 208 52780

IN RE: Petitioner:
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:

[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.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center denied this employment-based immigrant visa petition on June 21, 2004, and rejected a subsequent motion to reconsider. On July 19, 2004, the petitioner filed an appeal of the director's June 21, 2004 decision. On September 1, 2004, the director reopened her decision and issued a new decision on October 12, 2004. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decisions of the director will be withdrawn and the petition will be remanded for further action and consideration.

The Form I-360, Petition for Ameriasian, Widow or Special Immigrant, filed with Citizenship and Immigration Services (CIS) indicates that the [redacted] is the petitioner. The petition, however, is signed by [redacted] Therefore, the [redacted] cannot be considered as having filed the petition on behalf of [redacted] and [redacted] shall be considered as the self-petitioner.

The petitioner seeks classification 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 religious counselor/urban missionary. In a decision dated June 21, 2004, the acting director initially determined that the petitioner had not established that the organization with she would be associated qualified as a bona fide nonprofit religious organization. The petitioner's motion for reconsideration of the director's decision was rejected on July 9, 2004 for failure to attach the proper fee.

The petitioner filed an appeal of the director's June 21, 2004 decision on July 19, 2004; however, the appeal was not forwarded to the AAO for consideration. The director notified the petitioner on September 1, 2004, that "[a]fter review, we have reopened the . . . petition, or reconsidered the decision previously issued." On October 12, 2004, the director denied the petition, determining the petitioner failed to establish that the proffered position qualified as that of a religious worker.

The petitioner appealed the director's October 12, 2004 decision on November 10, 2004. Counsel argues on appeal that, as the director treated the petitioner's appeal of July 19, 2004 as a motion, the director was required by CIS policy to approve the petition.

The regulation at 8 C.F.R. § 103.3(a)(2) states, in pertinent part:

> (iii) *Favorable action instead of forwarding appeal to AAU.* The reviewing official shall decide whether or not favorable action is warranted. Within 45 days of receipt of the appeal, the reviewing officer may treat the appeal as a motion to reopen or reconsider and take favorable action.

The regulation at 8 C.F.R. § 103.5(a)(8) states, "The official who denied an application or petition may treat the appeal from that decision as a motion for the purpose of granting the motion."

It is unclear from the record whether or not the director treated the appeal as a motion pursuant to 8 C.F.R. § 103.3(a)(2) and 8 C.F.R. § 103.5(a)(8). The director did not indicate under which authority she reopened or reconsidered her decision, and did not indicate in her October 12, 2004 decision that the prior decision was withdrawn. However, the director's notice to the petitioner that the petition would be reopened or the decision reconsidered was within the time frame specified by the regulation, and adds credence to counsel's assertion that the appeal was treated as a motion pursuant to 8 C.F.R. § 103.3(a)(2)(iii). Therefore, the director's decision denying the petition on motion appears to have been in error.

The first issue to be addressed is whether the petitioner established that her prospective U.S. employer qualified as that of a religious organization.[1] The regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

> (3) *Initial evidence.* Unless otherwise specified, each petition for a religious worker must be accompanied by:
>
> (i) Evidence that the organization qualifies as a nonprofit organization in the form of either:
>
> (A) Documentation showing that it is exempt from taxation in accordance with § 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 § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organization.

To meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(A), a copy of a letter of recognition of tax exemption issued by the Internal Revenue Service (IRS) is required. In the alternative, to meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B), a petitioner may submit such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code (IRC) as it relates to religious organizations. This documentation includes, at a minimum, a completed IRS Form 1023, the Schedule A supplement, if applicable, and a copy of the organizing instrument of the organization that contains a proper dissolution clause and which specifies the purposes of the organization.

The petitioner submitted no evidence of its tax-exempt status with the petition. In response to the director's request for evidence (RFE) dated August 13, 2003, the petitioner submitted a copy of a New York State Exempt Organization Certification and a copy of the articles of incorporation for [redacted] The church's articles of incorporation do not meet the requirements of the regulation, in that they do not state the purpose of the organization and do not contain the dissolution clause required by the IRS in determining tax-exempt status under section 501(c)(3) of the IRC.

In its appeal of the director's decision of June 21, 2004, in which the director determined that the petitioner had not established tha[redacted] qualified as a bona fide nonprofit religious organization, the petitioner submitted a copy of a February 12, 1988 letter from the IRS notifying the church of its employer identification number. The petitioner also resubmitted copies of the church's articles of incorporation and the New York State Exempt Organization Certification.

The documentation submitted by the petitioner does not meet the requirements of the regulation. The petitioner must either submit a letter from the IRS granting it tax-exempt status as a religious organization pursuant to C.F.R. § 204.5(m)(3)(i)(A), or the alternative evidence permitted by 8 C.F.R. § 204.5(m)(3)(i)(B). The necessary documentation to establish tax-exempt status pursuant to 8 C.F.R. § 204.5(m)(3)(i)(B) is described in a memorandum from William R. Yates, Associate Director of Operation for CIS, *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003). The documentation includes:

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[1] The director raised this issue in her June 21, 2004 decision.

(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, and
(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. The memorandum specifically states that the above materials are, collectively, the "minimum" documentation that can establish "the religious nature and purpose of the organization." Thus, for example, a petitioner cannot meet this burden by submitting only its articles of incorporation. Also, obviously, it is not enough merely for the petitioner to *submit* the documents listed above. The *content* of those documents must establish the religious purpose of the organization.

Counsel argued that these documents were the basis of establishing tax exemption under section 501(c)(3) of the IRC in previous "successful" petitions by [redacted]

If the previous petitions were approved based on the same evidence contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Nevertheless, the director, prior to initially denying the petition, made no effort to ascertain whether the petitioner could establish the employing organization's qualification as a bona fide nonprofit tax-exempt religious organization pursuant to 8 C.F.R. § 204.5(m)(3)(i)(B). The director did not provide the petitioner with an opportunity to submit the materials outlined in Mr. Yates' memorandum, and thereby demonstrate that the prospective U.S. employer qualifies as a bona fide nonprofit tax-exempt religious organization. Furthermore, the director did not address the petitioner's failure to provide the required evidence in her decision of October 12, 2004.

Therefore, assuming that the director treated the petitioner's initial appeal as a motion pursuant to 8 C.F.R. § 103.3(a)(2), her decision of October 12, 2004 was in error. However, the record clearly establishes that the petition could not have been approved based on the evidence before the director.

We note that the director could have reopened or reconsidered her decision pursuant to the regulation at 8 C.F.R. § 103.5(a)(5), which states, in pertinent part:

> (ii) When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision, and the new decision may be unfavorable to the affected party, the officer shall give the affected party 30 days after services of the motion to submit a brief.

The record is not clear as to whether the above-cited regulation was used as the basis for the director's decision to reopen or reconsider her prior decision. If this provision of the regulation was the basis for the director's action, she failed to give the petitioner an opportunity to submit a brief in accordance with the regulation.

Counsel asserts on appeal that the director's decision of October 12, 2004 denied the petitioner "fair and impartial process and was a predetermined decision to deny the applicatio/petition [sic] regardless of the evidence," and that the director's decision to "unilaterally" treat the appeal as a motion, denied the petitioner her "right of review" by the AAO.

Counsel's assertion is without merit, as the record does not clearly establish under what basis the director reopened the petition or reconsidered her previous decision. Additionally, the petitioner was informed of her right to appeal the director's decision to the AAO.

The matter is remanded to the service center for the director to issue a decision that is in compliance with the regulations.

The second issue to be addressed is whether the petitioner established that she worked continuously in a qualifying religious occupation for two full years preceding the filing of the visa petition.[2]

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).

[2] This issue was the basis of the director's October 12, 2004 decision.

The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file a Form I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States." The regulation 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."

The regulation at 8 C.F.R. § 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

> (ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:
>
> > (A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

The petition was filed on July 7, 2003. Therefore, the petitioner must establish that she was continuously working as a religious counselor/urban missionary throughout the two-year period immediately preceding that date.

The petitioner submitted a letter from the rector/dean of the [redacted] & [redacted] Reverend Barclay Stoute. Reverend Stoute indicated that the petitioner began her work with the church in January 2001, and outlined her duties and the time she spent performing them. However, the petitioner submitted no evidence to substantiate any of her employment during the two years prior to the filing of the visa petition. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On remand, the director should address whether the petitioner established that she worked in a qualifying religious occupation for two full years prior to the filing of the visa petition.

Beyond the decision of the director, the petitioner failed to establish that her prospective U.S. employer has the ability to pay her the 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 letter from Reverend Stoute indicated that [redacted] & [redacted] would pay the petitioner $175.00 per week for her services. The petitioner submitted no evidence of this regulatory requirement.

On remand, the director should address whether the petitioner has established that her prospective U.S. employer has the ability to pay her the proffered wage.

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 her 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 AAO for review.