U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 03 2006

SRC 98 078 53736

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.

Mary Gibson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The director rejected the appeal as untimely and found that it did not meet the requirements of a motion to reopen or to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a constituent church of the [redacted] 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 its director of church education. The director revoked the approval of the petition based on perceived discrepancies that arose during the beneficiary's adjustment proceedings. In addition, the director determined that the petitioner had not established its ability to pay the beneficiary's proffered salary, or that the beneficiary's position qualifies as a religious occupation.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The phrase "at any time" indicates that there is no time limit to institute revocation proceedings.

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

Numerous procedural problems afflict this proceeding. The petitioner filed the petition on January 20, 1998, and **the director approved the petition on September 24, 1998. Subsequently, the beneficiary applied for** adjustment of status, and during that proceeding the beneficiary twice reported to the Miami District Office on October 24, 2002 and on November 12, 2002. During the adjustment process, information came to light suggesting pervasive secular employment by the beneficiary throughout the period that his primary

employment was purported to be qualifying religious work. Also, the beneficiary was unable to provide a valid address for the petitioning church, and officers investigating the beneficiary's claims were unable to locate the petitioning church at any of the addresses provided previously.

Based on these apparent discrepancies, the director issued a notice of intent to revoke on August 18, 2003. The record contains a facsimile message from counsel, dated September 17, 2003, with an introductory statement that reads: "Enclosed please find an advanced copy of a response to a Notice of Intent to Revoke issued in the above named case. The original hardcopy along with the accompanying documentary exhibits will follow by overnight delivery."

We note that the record, as it is presently constituted, does not contain "the original hardcopy" or "the accompanying documentary exhibits." It is not clear whether these documents were submitted and then misplaced, or simply never submitted at all. If these documents cannot be located at the Texas Service Center, then we strongly encourage the director to permit the petitioner to resubmit these documents.

Without delving into the substance of the response to the notice of intent, we note that counsel correctly identifies certain factual errors in that notice, concerning the identity of the president of [redacted] and the address of [redacted]

On September 21, 2005, the director revoked the approval of the petition. From the wording of the revocation notice, it is not clear whether or not the director received any supplemental submission after the facsimile response to the notice of intent. In the revocation notice, the director repeated the grounds stated in the notice of intent, and also stated that the petitioner had failed to establish that it is able to pay the beneficiary's proffered salary, or that the position of director of church education qualifies as a religious occupation.

The issues of ability to pay, and the nature of the occupation, were not cited in the notice of intent. 8 C.F.R. § 205.2(b) requires that the petitioner must be given the opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval. A decision to revoke approval of a visa petition can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations specified in the notice of intention to revoke. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988). Therefore, if the director believes that these issues warrant revocation, then the director must issue a new notice of intent that encompasses all of these grounds.

In the September 21, 2005 revocation notice, the director stated:

> You may appeal this decision to the Board of Immigration Appeals by completing the enclosed Form EOIR-29 (NOTICE OF APPEAL).
>
> (A **fee of $110.00** is required; Per the rule in the Federal Register on August 29, 2005 (70 FR 50954), **effective September 28, 2005 the appeal filing fee is increased from $110 to $385**).
>
> Your NOTICE OF APPEAL must be filed within **15 days** (plus 3 days if mailed) of this notice.

(Emphasis in original.) According to a later statement from counsel, the revocation notice included Form I-290B, Notice of Appeal to the AAO, rather than Form EOIR-29, Notice of Appeal to the Board of Immigration Appeals.

On October 11, 2005, the director received the petitioner's Form EOIR-29 and $385 appeal fee. The same day, the director returned the form and fee to the petitioner, with the note "The proper fee is $110." On October 24, 2005, the director received the Form EOIR-29 and a $110 fee, along with a letter from counsel protesting the confusing and sometimes contradictory instructions. Counsel noted that Form EOIR-29 allows for a 30-day filing period, rather than the 15-day period specified by the director.

On the Form EOIR-29, counsel expressed the intention to submit "a separate written brief or statement," but did not indicate when this would be forthcoming. (Counsel protested that the appeal form gave no deadline for this submission.) To date, the record contains no subsequent brief or other submission addressing the merits of the director's September 21, 2005 notice of revocation. As with the response to the earlier notice of intent to revoke, we cannot determine if this omission is because documents were submitted and lost, or simply never submitted in the first place.

Numerous procedural problems are evident here. The director correctly provided the petitioner with Form I-290B, but erroneously instructed the petitioner to submit Form EOIR-29, leading to counsel's complaint that that director "mistakenly enclosed the Form I-290B." By leading the petitioner and counsel to believe that they had to obtain Form EOIR-29 before the expiration the appeal period, the director prejudiced the petitioner's ability to devote that short period of time to preparation of an appeal.

Even more seriously, the director correctly apprised the petitioner of the pending fee increase, and the petitioner complied with that increase, but the director then erred by refusing to accept the $385 fee because it was supposedly incorrect. This is a particularly grave error because it delayed the acceptance of the filing until after the appeal period had tolled. The appeal would have been timely (allowing for weekends and the Columbus Day holiday pursuant to 8 C.F.R. § 1.1(h)) had the director accepted the initial $385 fee which the director had properly identified and the petitioner had properly submitted. Because an appeal with the proper fee had arrived timely at the Service Center, it would be unconscionable to require the petitioner to shoulder the consequences of the director's subsequent error.

On November 28, 2005, the director declared the appeal to have been improperly filed because it was not accompanied by Form G-28, Notice of Entry of Appearance as Attorney or Representative. 8 C.F.R. §§ 103.3(a)(2)(v)(A)(*2*)(*ii*) and (*iii*) require the director to contact the attorney or representative and request a Form G-28 if the appeal is otherwise properly filed. The record contains no evidence that the director contacted counsel in this way. This issue is now moot because the record now contains a duly executed Form G-28.

The director stated: "the appeal was not timely filed, therefore, it will be treated as a motion per the regulations" at 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*). The director, in this notice, acknowledged that "this office advised [the petitioner] in error to submit EOIR-29" but did not discuss its erroneous refusal to accept the $385 fee. The director, citing the absence of legal arguments and new evidence, dismissed the motion, stating that it did not meet the regulatory requirements for a motion to reopen or reconsider under 8 C.F.R. §§ 103.5(a)(2) and (3).

The director then advised the petitioner of its right to appeal this decision. This in itself appears to be a procedural error, as the regulations offer no provision for the appeal of the dismissal of a motion (as opposed to the denial of a petition reopened or reconsidered on motion). Because it does not appear that the petitioner was able to appeal this latest notice, but at the same time there are numerous deficiencies that demand to be addressed, we consider this matter under certification pursuant to 8 C.F.R. § 103.4(a)(5).

The petitioner, through counsel, appealed the director's latest decision on January 3, 2006, stating that the prior appeal was late only because of the director's repeated errors, and that, by treating that appeal as a deficient motion instead of as an appeal, the director has further prejudiced the proceeding against the petitioner.

We concur with counsel that the petitioner's due process rights have become hopelessly entangled in a series of procedural errors in which the petitioner and counsel are largely blameless. The most expedient course of action, at this time, is to withdraw the director's deficient notice of revocation. The director may either issue a new decision, based on the August 18, 2003 notice of intent and consistent with *Matter of Arias*, or else issue a superseding notice of intent that more thoroughly encompasses all of the director's concerns. A new notice of intent would permit the director to issue a more comprehensive notice of revocation if the petitioner fails to address the director's concerns.

The AAO, at this time, takes no position on the merits of the grounds for revocation, because the petitioner has not as yet had an opportunity to respond fully to those grounds, and procedurally these grounds have yet to arrive properly under the AAO's jurisdiction. Nevertheless, the AAO strongly urges the director to give full consideration to the petitioner's past submissions and any future submissions in this regard, so that the director's ultimate decision may rest on the strengths – and weaknesses – of those submissions.

We note that, on repeated occasions, counsel has stated that he will supplement the record with additional submissions, but none of these additional submissions are now contained in the record. If, in the future, counsel intends to offer partial submissions with supplements to follow, we emphatically encourage counsel to submit these supplements via a method that provides reliable confirmation of delivery. Even more preferable would be to submit all the materials at once, rather than a skeletal advance message with the assertion that more documents will follow. At present, it is impossible for us to determine whether the petitioner ever actually submitted the materials that counsel had identified as forthcoming.

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.