identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

C1

[redacted]

DATE: AUG 0 9 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition on July 20, 2010. The petitioner filed a Motion to Reopen/Reconsider on August 23, 2010, which the director dismissed on September 7, 2010. The petitioner appealed the matter to the Administrative Appeals Office (AAO) on October 6, 2010. The appeal will be dismissed.

The petitioner is 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 (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a head priest. In her September 7, 2010 decision, the director determined that the petitioner had failed to meet the requirements of a motion to reopen or a motion to reconsider. The director found that, despite her April 22, 2010 specific Request for Evidence (RFE) and despite the fact that the petitioner should have first submitted all requisite information upon filing the petition, the petitioner had still failed to submit an Internal Revenue Service (IRS) 501(c)(3) letter establishing its qualifying tax-exempt status and recent signed and certified audits/annual financial statements establishing its continuing ability to compensate the beneficiary the proffered wage.

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 September 30, 2012, 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 September 30, 2012, 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).

The issue presented on appeal is whether the director properly dismissed the petitioner's motion based on a finding that the petitioner failed properly to submit an IRS 501(c)(3) letter establishing

its qualifying tax-exempt status as well as recent signed and certified audits/annual financial statements establishing its continuing ability to compensate the beneficiary the proffered wage.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(8) reads, in full:

> *Evidence relating to the petitioning organization.* A petition shall include the following initial evidence relating to the petitioning organization:
>
> (i) A currently valid determination letter from the Internal Revenue Service (IRS) establishing that the organization is a tax-exempt organization; or
>
> (ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or
>
> (iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, as something other than a religious organization:
>
> (A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;
>
> (B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;
>
> (C) Organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization; and
>
> (D) A religious denomination certification. The religious organization must complete, sign and date a religious denomination certification certifying that the petitioning organization is affiliated with the religious denomination. The certification is to be submitted by the petitioner along with the petition.

As part of the December 18, 2009 petition, the petitioner signed and certified that it was affiliated with the Ethiopian Orthodox Tewahedo Church Archdiocese of Washington, DC and its Surroundings (EOTCA), which was purportedly tax-exempt under 501(c)(3) of the Internal Revenue Code of 1986. The petitioner did not, however, submit evidence of EOTCA's group

exemption from the IRS. The petitioner additionally submitted a July 22, 2009 letter from the IRS stating that its own organization had not yet been recognized by the IRS as being tax-exempt.

The director issued an RFE on April 22, 2010 specifically requesting a valid IRS 501(c)(3) determination letter showing that the petitioner's organization was tax-exempt or that it was affiliated with an organization with federal tax-exemption. In its June 25, 2010 response, the petitioner submitted an additional letter from the IRS dated May 6, 2010 again stating that its organization had not yet been recognized as being tax-exempt. The petitioner also submitted a September 2, 2009 letter from the EOTCA stating that the petitioner's church was one of the parish churches under its archdiocese, but no evidence of EOTCA's group exemption.

The director noted in her July 20, 2010 decision denying the petition that she sent the petitioner an RFE on April 22, 2010 asking for a valid 501(c)(3) determination letter from the IRS confirming that the petitioner's organization was tax-exempt.

In its material accompanying its August 23, 2010 motion, the petitioner submitted a Form 1023 indicating that it had filed for recognition of tax-exemption with the IRS on August 16, 2010. The petitioner again failed to submit evidence of its tax-exempt status or that it was covered under its parent's group exemption. Instead, the petitioner indicated that the EOTCA was currently undergoing a period of fasting and prayer and was therefore unable to provide evidence of the petitioner's tax-exempt status or of EOTCA's group exemption. The petitioner provided a copy of the fasting schedule for the archdiocese. For the second time, the petitioner submitted the September 2, 2009 letter from the EOTCA stating that the petitioner's church was one of the parish churches under its archdiocese.

The director again noted in her September 7, 2010 decision denying the motion that she had sent the petitioner an RFE on April 22, 2010 asking for a valid 501(c)(3) determination letter from the IRS confirming that the petitioner's organization was tax-exempt.

In its material accompanying its October 6, 2010 appeal, the petitioner provided a copy of the EOTCA's June 25, 2009 501(c)(3) determination letter from the IRS. For the third time, the petitioner also submitted the September 2, 2009 letter from the EOTCA stating that the petitioner's church was one of the parish churches under its archdiocese. The petitioner also submitted a letter dated August 18, 2010 from the EOTCA stating that the petitioner's church is a registered non-profit incorporation within the state of Oklahoma and that it is a registered member within its archdiocese. The EOTCA further states that it is a 501(c)(3) tax-exempt organization that will "appreciate any of the support being given thereof." Counsel then asserts that churches are automatically tax-exempt.

Counsel concludes that USCIS should recognize the petitioner's 501(c)(3) group tax-exempt status and that USCIS should have considered the IRS and financial information that the petitioner did submit to constitute sufficient evidence of its ability to compensate the beneficiary. Regarding counsel's argument that the petitioner is automatically considered to be tax-exempt because it is a

church, the regulations governing immigration under the purview of USCIS and those governing federal taxation under the purview of the IRS serve two different purposes. While the IRS regulations may automatically exempt churches as nonprofit organizations for the purpose of determining whether such an organization is required to file a federal tax return and pay taxes, the USCIS regulation offers no such exemption for those organizations who seek benefits under immigration laws. The IRS guidance to churches includes the following advisory:

> Although there is no requirement to do so, many churches seek recognition of tax-exempt status from the IRS because such recognition assures church leaders, members, and contributors that the church is recognized as exempt and qualifies for related tax benefits.
>
> IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*.

Thus, the IRS recognizes that there may be reasons why a church may want to obtain official IRS recognition as a tax-exempt organization, although under IRS regulations, the church is not required to do so. The IRS provides detailed guidance on how to obtain a determination letter that applies equally to churches as to other religious organizations. *Id.*

According to IRS Publication 557, the IRS does not automatically accept that a particular organization is a church simply because the organization states that it is. The organization must meet the requirements of section 501(c)(3) to be automatically exempt, and one of the reasons for choosing to file the Form 1023 is to receive IRS recognition of the organization as a church.[1]

Further, while the Act and its implementing regulations do not require an organization to establish that it is a church to qualify as a bona fide nonprofit religious organization, it must establish that its tax-exemption is based on its religious nature. As discussed earlier, the IRS and USCIS regulations serve different purposes, and while a currently valid letter from the IRS recognizing an organization as a church is required under USCIS regulation, the IRS automatic exemption of a church as nonprofit is unrelated to the USCIS requirements that the organization establish itself as both a religious organization and as a nonprofit organization for immigration purposes.

As stated in the final rule implementing this requirement:

> USCIS recognizes that the IRS does not require all churches to apply for a tax-exempt status determination letter, but has nevertheless retained that requirement in this final rule. See Internal Revenue Service, Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities under the Federal Tax Law (IRS pub. no. 1828, Rev. Sept. 2006). A requirement that petitioning churches submit a tax determination letter is a valuable fraud deterrent. An IRS determination letter represents verifiable documentation that the petitioner is a bona fide tax-exempt organization or part of a group exemption. Whether an organization qualifies for

---

[1] IRS Publication 557 at page 21.

> exemption from federal income taxation provides a simplified test of that organization's non-profit status.
>
> Requiring submission of a determination letter will also benefit petitioning religious organizations. A determination letter provides a petitioning organization with the opportunity to submit exceptionally clear evidence that it is a bona fide organization.

The USCIS regulation at 8 C.F.R. § 204.5(m)(5) defines a tax-exempt organization as:

> an organization that has received a determination letter from the IRS establishing that it, or a group that it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the Internal Revenue Code of 1986 or subsequent amendments or equivalent sections of prior enactments of the Internal Revenue Code.

The AAO finds that the petitioner should have submitted the above mentioned information with the original petition as part of the petition's requisite initial evidence. As the director had offered the petitioner an additional 84 days by means of the RFE in which to submit these materials, the AAO finds that the petitioner has had more than ample time to submit the requested information pertaining to eligibility for the benefit sought. The purpose of the RFE 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). The petitioner also failed to submit this requested evidence on motion.

As in the present matter, where 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 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (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. Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal or on motion.

The AAO further finds that the petitioner has continuously failed to submit the requested information regarding its ability to compensate the beneficiary, which calls into question its continuous and future ability to compensate the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(10) states that:

> *Evidence relating to compensation.* Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that

> room and board will be provided; or other evidence acceptable to USCIS. If IRS documentation, such as IRS Form W-2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

Evidence of ability and intent to compensate may be established by documentary evidence that the proffered salary was paid to the beneficiary in the past or through budget set aside for salary, leases, etc. On the petition, the petitioner stated that it would be paying the beneficiary $1,150.00 per month ($13,800.00 per year). With the petition, the petitioner submitted copies of its 2009 bank account statements; financial reports for 2006, 2007, and part of 2008; and the beneficiary's Form 1040 for 2008. The petitioner did not submit evidence of any past salary paid to the beneficiary and no IRS Form W-2.

The director's April 22, 2010 RFE specifically asked the petitioner to:

> [s]ubmit recent audits or an annual financial statement (complete and itemized listing your sources of income and all your expenses), signed and certified by the petitioner AND supported by documentary evidence such as bank statements, certificates, and/or letters from financial institutions.

In its June 25, 2010 response, the petitioner submitted copies of its 2010 bank account statements, its unaudited treasurer's report for the first quarter of 2010, checks made out to the beneficiary for work performed in 2009 and 2010, the beneficiary's Form 1040X and Form 1040 for 2009, the beneficiary's 1099-MISC for 2009, the beneficiary's Form 1040 for 2008 (for a second time), the beneficiary's Form 1040X for 2008, and the beneficiary's Form 1099-MISC for 2008. The petitioner additionally submitted a letter dated June 22, 2010 from its [redacted], explaining why it had submitted revised tax returns for the beneficiary for 2008 and 2009, as the beneficiary's Forms 1099-MISC did not have a detailed breakdown of his payments for those years.

The director noted in her July 20, 2010 decision that she sent the petitioner an RFE on April 22, 2010 asking for recent audits or an annual financial statement that the petitioner had signed and certified. Within its material accompanying its August 23, 2010 motion, the petitioner submitted a 2010 compiled financial report.

The director again noted in her September 7, 2010 decision that she had sent the petitioner an RFE on April 22, 2010 asking for recent audits or an annual financial statement that the petitioner had signed and certified.

In its material accompanying its October 6, 2010 appeal, the petitioner again provided the beneficiary's Form 1040 for 2009. The petitioner resubmitted copies of the beneficiary's Form 1040 for 2008 and Form 1099-MISC for 2008. The petitioner also submitted financial reports for 2006, 2007, and part of 2008, which the petitioner had first submitted with the petition. The

petitioner failed to provide recent audits or an annual financial statement that the petitioner had signed and certified. The petitioner also failed to provide documents from 2007 establishing its ability to compensate the beneficiary throughout the full two-year qualifying period.

On appeal, counsel asserts that the petitioner's submission of bank account statements rather than a recent audit or financial statement should have been sufficient to demonstrate the petitioner's ability to compensate the beneficiary. Counsel claims that the director's specific requests within her April 22, 2010 RFE were ultra vires and were immaterial regarding eligibility. Counsel also cites memos and unpublished AAO decisions that predate the regulations that became effective on November 26, 2008. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The financial reports for 2006, 2007, and part of 2008 are based on the representations of management. The accountant offers no opinion or "any other form of assurance" regarding those representations. Therefore, they are insufficient to establish the petitioner's financial standing.

Tax preparer, [redacted] stated on the beneficiary's Form 1040X for 2008 that he was amending the tax return not because of any error on the Form 1099 itself but rather because the beneficiary had omitted Form SE and Form EIC when he filed the original Form 1040 for 2008. Similarly, he indicated that he was amending the beneficiary's Form 1040X for 2009 because the beneficiary had omitted Form SE, Form EIC, and Schedule M when he filed the original Form 1040 for 2009.

The beneficiary's Form 1099-MISC for 2008 states that the beneficiary received $5,100.00 in nonemployee compensation that year, which was significantly below the proffered wage of $13,800.00. The new Schedule SE on the beneficiary's Form 1040X for 2008 states that the beneficiary instead received $8,360.00 in net earnings from self-employment that year. The beneficiary's Form 1099-MISC for 2009 states that the beneficiary received $13,800.00 in nonemployee compensation that year. The new Schedule SE on the beneficiary's Form 1040X for 2009 states that the beneficiary instead received $8,299.00 in net earnings from self-employment that year.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

> [i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Like a delayed birth certificate, amended tax returns created several years after the fact raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec.

1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings).

The amount of nonemployee compensation listed on the beneficiary's Form 1099-MISC for 2008 is less than what is listed on the beneficiary's Forms 1040X for that year. Thus, the implication is that the petitioner was not paying the claimed salary that year. The amount of nonemployee compensation listed on the beneficiary's Form 1099-MISC for 2009 is greater than what is listed on the beneficiary's Forms 1040X for that year. Thus, the implication is that the beneficiary had additional, unexplained employment for that year.

Given these discrepancies and the lack of verifiable documentation in the record, the petitioner has failed to establish its ability to compensate the beneficiary.

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 met that burden. Accordingly, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed.