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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: JUL 05 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) summarily dismissed the petitioner's appeal. The matter is now before the AAO on appeal. The AAO will reject the appeal and, in the alternative, dismiss the filing as a motion that fails to meet applicable requirements.

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 the senior pastor of the [redacted] The director denied the petition because the petitioner had not submitted a determination letter from the Internal Revenue Service (IRS) showing that his intending employer is exempt from federal income tax, as required by the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(8).

The AAO summarily dismissed the appeal on September 28, 2011, stating in part:

> The USCIS regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part, "[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."
>
> . . . The closest that counsel comes to discussing the denial is the assertion that the petitioner had previously submitted a "Tax Exempt Certification." The only document in the record that begins to match that description is a "Consumer's Certificate of Exemption," issued by the Florida Department of Revenue, indicating that the church "is exempt from the payment of Florida sales and use tax." The director, in previous correspondence, informed the petitioner that this document only applied to state tax, not to federal income tax, and that the document is not an IRS determination letter as the regulatory language specifically requires.
>
> The appeal includes no IRS determination letter, and no evidence that the petitioner had previously submitted an IRS determination letter. Counsel simply asserts that the petitioner has already submitted sufficient evidence of the church's tax-exempt status, whereas the petitioner had not submitted any evidence to that effect. The AAO notes that the petitioner claims that the church is affiliated with the [redacted]. It is possible that the denomination holds a group exemption that covers the individual church where the petitioner seeks to work, but the petitioner has submitted no evidence to show it.

The AAO advised the petitioner of the right to file a motion to reopen or reconsider the AAO's decision. The AAO did not indicate that the petitioner had the right to appeal the decision.

On October 27, 2011, the petitioner, through counsel, filed Form I-290B, Notice of Appeal or Motion. That form instructs the party filing the form to check one of six boxes. Three of the boxes describe various options for appeals; the other three describe types of motions. Counsel, acting on

the petitioner's behalf, checked the box "I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days."

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) under the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), except that petitions for approval of schools under § 214.3 are now the responsibility of Immigration and Customs Enforcement. That regulation did not give the AAO appellate jurisdiction over its own prior decisions.

In its last decision in this proceeding, on December 20, 2010, the AAO indicated that the petitioner "may file a motion to reconsider or a motion to reopen," but the AAO did not state or imply that the petitioner could appeal that decision. The USCIS regulation at 8 C.F.R. § 103.5(a) permits the petitioner to file a motion based on an AAO decision, but the petitioner filed an appeal, not a motion. There is no comparable provision to allow an appeal.

Because no statutory or regulatory provision exists to allow the petitioner to appeal an AAO decision to the AAO, the AAO must reject the appeal.

The AAO notes that counsel, in an accompanying brief, referred to the October 2011 filing as a "motion to reopen." Even if the AAO considered the petitioner's filing to be a motion to reopen, the filing does not meet the requirements of a motion to reopen.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The AAO notes that, while the regulation at 8 C.F.R. § 103.3(a)(2)(vii) permits affected parties to submit supplemental briefs and evidence after the filing of an appeal, there is no such regulation to allow the submission of briefs or evidence after the filing of a motion. A motion must, therefore, be complete at the time of filing.

The petitioner's latest submission includes a copy of an IRS determination letter, recognizing a group exemption for the religious denomination of the petitioner's intending employer. Counsel states that this document cures the deficiency in the record, and therefore adjudication of the petition may proceed.

By filing a motion to reopen, the petitioner is not automatically entitled to *de novo* review of the whole record, and a readjudication of the petition on its merits, using the evidence newly submitted on motion. The AAO, in its summary dismissal notice, did not rule that the petitioner is not tax-exempt. The AAO specifically acknowledged: "It is possible that the denomination holds a group

exemption that covers the individual church where the petitioner seeks to work, but the petitioner has submitted no evidence to show it."

The denial of the petition rested on the petitioner's failure to submit specific, requested evidence. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. . . . Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. 8 C.F.R. § 103.2(b)(1). Where an applicant or petitioner does not submit all requested additional evidence . . . , a decision shall be issued based on the record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request. 8 C.F.R. § 103.2(b)(14). Under these regulations, the failure to submit specific required evidence in response to a request for evidence is, itself, grounds for denial of the petition. The denial rests not so much on the absence of the evidence from the file, as on the failure to submit it in a timely manner in response to a request. In such an instance, the subsequent submission of the required evidence cannot remedy the ground for denial.

In this instance, the director requested evidence of the employer's tax-exempt status under section 501(c)(3) of the Internal Revenue Code. The petitioner did not submit that evidence, and the director denied the petition for that reason. On appeal, the petitioner did not address or remedy this issue, and the AAO therefore summarily dismissed the appeal. The petitioner's submission of a copy of an IRS determination letter at this late date cannot erase this procedural history, or show that the AAO was in error when it summarily dismissed the appeal. USCIS may not approve a visa petition based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The AAO and, earlier, the director based their decisions on the record as it stood at the time, which did not include the required and requested IRS determination letter. The purpose of a motion to reopen is to introduce new evidence not previously available, not simply to submit required documents that the petitioner failed to submit upon a prior specific request.

The petitioner's latest filing does not show that the petitioner had timely submitted the IRS determination letter, or that the earlier appeal was substantive. Therefore, even if the Form I-290B designated the latest filing as a motion rather than an appeal, the AAO would have to dismiss the motion because it does not meet the requirements of a motion.

ORDER: The appeal is rejected. Considered, in the alternative, as a motion to reopen, the motion is dismissed.