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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: MAY 10 2013 Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)

ON BEHALF OF PETITIONER:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. Alternatively, the appeal will be dismissed.

The regulation at 8 C.F.R. § 103.2(a)(1) provides, in pertinent part:

> *Preparation and submission.* Every benefit request or other document submitted to DHS [Department of Homeland Security] must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

Pursuant to the regulation at 8 C.F.R. § 1.2, "Form instructions means instructions on how to complete and where to file a benefit request, supporting evidence or fees, or any other required or preferred document or instrument with a DHS immigration component."

As it pertains to the proper filing of an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides:

> *Filing Appeal.* The affected party must submit an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by §103.7 of this part. The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions within 30 days after service of the decision.

If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.8(b).

The date of filing is not the date of submission, but the date of actual receipt at the location designated for filing with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i).

The instructions to the Form I-290B, Notice of Appeal or Motion, advise the appellant, "Do **not** send your appeal or motion directly to the Administrative Appeals Office (AAO)." [Bold emphasis in original.] The instructions further instruct the appellant that for appeals or motions for other than specific classifications, to mail the Form I-290B to the U.S. Citizenship and Immigration Services (USCIS) Phoenix Lockbox and provide the mailing address to that activity.

The record indicates that the director issued the decision on October 16, 2012. It is noted that the director properly gave notice to the petitioner that it had 30 days to file the appeal. The notice advised: "**The appeal may not be filed directly with the AAO. The appeal must be filed with the USCIS Phoenix Lockbox**." (Emphasis in original.)

Counsel dated the appeal November 15, 2012. However, despite the clear instructions in the director's notice and in the instructions to the Form I-290B, counsel sent the appeal to the AAO. On November 19, 2012, the AAO rejected the filing and returned it to the petitioner. The appeal

was received at the USCIS Phoenix Lockbox, the location designated for filing, on December 14, 2012, 59 days after the decision was issued. Accordingly, the appeal was untimely filed.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the Director of the California Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director determined that the late appeal did not meet the requirements of a motion and forwarded the matter to the AAO.

As the appeal was untimely filed, the appeal must be rejected.

Even if timely filed, the appeal would be dismissed. Counsel states on the Form I-290B that the decision to deny the petition is not supported by the record and that a brief and/or additional evidence would be submitted within 30 days. As of the date of this decision, however, more than 4 months after the appeal was filed, no further documentation has been received by the AAO. Therefore, the record is considered complete.

The petitioner is a church. It seeks classification of the beneficiary as a nonimmigrant religious worker pursuant to section 101(a)(15)(R) of the Act to perform services as a deacon. The director determined that the petitioner had not established that it qualifies as a bona fide nonprofit religious organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code (IRC), that the beneficiary had been a member of the petitioner's religious denomination for two full years preceding the filing of the petition, and that the petitioner had not established how it intends to compensate the beneficiary.

The regulation at 8 C.F.R. § 214.2(r)(3) defines a tax-exempt organization as "an organization that has received a determination letter from the IRS [Internal Revenue Service] establishing that it, or a group it belongs to, is exempt from taxation in accordance with section[] 501(c)(3) of the [IRC]." The regulation at 8 C.F.R. § 214.2(r)(9) provides:

> *Evidence relating to the petitioning organization.* A petition shall include the following initial evidence relating to the petitioning organization:
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> (i) A currently valid determination letter from the IRS showing that the organization is a tax-exempt organization; or
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> (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), or subsequent amendment or equivalent sections of prior enactments, of the [IRC], 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 statement certifying that the petitioning organization is affiliated with the religious denomination. The statement must be submitted by the petitioner along with the petition.

With the petition, filed on June 26, 2012, the petitioner submitted a copy of its articles of incorporation and an April 28, 2004 certificate of incorporation that it filed with the State of New York, which recognized the petitioner as a religious corporation. The petitioner submitted no other documentation with its petition.

In response to the director's July 12, 2012 request for evidence (RFE), the petitioner resubmitted the articles of incorporation and a copy of its bylaws. The petitioner submits no additional documentation on appeal and does not address the issue of its bona fides as a religious organization. Accordingly, the petitioner has failed to establish that it is a bona fide nonprofit organization as that term is defined by the regulation, and in failing on appeal to address this ground for the director's denial, the petitioner has waived the issue. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

The director also found that the petitioner had failed to establish that the beneficiary had been a member of the petitioner's denomination for two years prior to the filing of the petition. The director, however, erroneously stated that the petitioner had failed to establish the beneficiary's membership in the Baptist church. On appeal, counsel states:

> The beneficiary is not and has never been a member of the Baptist Church. Beneficiary is an Orthodox Christian and member of the In its decision, the Service states beneficiary has not demonstrated he is a member of the Baptist Church. The evidence submitted all demonstrate the beneficiary is an Orthodox Christian, therefore cannot submit proof regarding the Baptist Church.

The regulation at 8 C.F.R. § 214.2(r)(1) states that, to be approved for temporary admission to the United States, or extension and maintenance of status, for the purpose of conducting the activities of a religious worker for a period not to exceed five years, an alien must:

> (i) Be a member of a religious denomination having a bona fide non-profit religious organization in the United States for at least two years immediately preceding the time of application for admission.

As noted, the petition was filed on June 26, 2012. Therefore, the petitioner must establish that the beneficiary was a member of its denomination for at least the two years immediately preceding that date. The petitioner submitted no documentation regarding the beneficiary's membership in its denomination with the petition and failed to submit the attestation required by the regulation at 8 C.F.R. § 214.2(r)(8) attesting to the beneficiary's required membership in the denomination. In response to the RFE, the petitioner provided an October 2, 2012 letter in which it stated that the beneficiary "has been part of the clergy for our Church, serving tirelessly as the main Deacon" since the organization was established in 2003. The petitioner, however, submitted no primary evidence of the beneficiary's membership in the petitioner's denomination. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The petitioner, therefore, failed to establish that the beneficiary has been a member of its religious denomination for two full years immediately preceding the filing of the petition.

The director also determined that the petitioner had failed to establish how it would compensate the beneficiary.

The regulation at 8 C.F.R. § 214.2(r)(11) provides:

> *Evidence relating to compensation.* Initial evidence must state how the petitioner intends to compensate the alien, including specific monetary or in-kind compensation, or whether the alien intends to be self-supporting. In either case, the petitioner must submit verifiable evidence explaining how the petitioner will compensate the alien or how the alien will be self-supporting. Compensation may include:
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> (i) *Salaried or non-salaried compensation.* Evidence of compensation 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. IRS documentation, such as IRS Form W-2 [Wage and Tax Statement] or certified tax returns, must be submitted, if available. If IRS documentation is unavailable, the petitioner must submit an explanation for the absence of IRS documentation, along with comparable, verifiable documentation.

The petitioner indicated on the Form I-129 that it would pay the beneficiary a salary of $10,400 plus room and board. The petitioner submitted no documentation with the petition to establish how it intended to compensate the beneficiary. In response to the RFE, the petitioner submitted unaudited copies of financial statements for 2004 and 2005. In denying the petition, the director stated that the evidence "does not provide the USCIS with current information on the petitioning organization's ability to provide the compensation stated on the application." On appeal, counsel asserts that the petitioner "has submitted evidence showing how it will compensate the beneficiary." However, counsel provides no explanation as to how documentation that precedes filing by 7 to 8 years is accurate evidence of the petitioner's current ability to pay the beneficiary. The regulation requires the petitioner to provide verifiable evidence explaining how it will compensate the beneficiary, including non-salaried compensation of room and board. The petitioner has failed to provide such evidence.

Beyond the director's decision, and as previously noted, the petitioner failed to meet the requirements of the regulation at 8 C.F.R. § 214.2(r)(8), which requires the petitioner to submit a detailed attestation with details regarding the petitioner, the beneficiary, the job offer, and other aspects of the petition. The record contains no such attestation. Additionally, the petitioner failed to complete and submit a Form Supplement R with the Form I-129.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Thus, had the appeal been timely filed, it would still have been dismissed for the petitioner's failure to establish the basic requirements for the immigration benefit, including its status as a bona fide nonprofit religious organization, that the beneficiary has been a member of its religious denomination for the two years immediately prior to the filing of the petition, how it intends to compensate the beneficiary, and by failing to submit the Form I-129 Supplement R and the accompanying employer attestation.

ORDER: The appeal is rejected as untimely filed. Alternatively, the appeal is dismissed.