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

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FILE: [REDACTED]
SRC 02 229 52633

Office: TEXAS SERVICE CENTER Date: **MAR 01 2005**

IN RE: Petitioner: [REDACTED]
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:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. 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 minister. The director determined that the petitioner had not submitted the required evidence to show that it possesses, or qualifies for, recognition as a qualifying tax-exempt religious organization.

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).

8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization qualifies as a non-profit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with section 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 section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

The petitioner's initial filing on July 23, 2002 did not include the evidence described in the above regulations. Instead, the petitioner submitted a letter from its treasurer, [REDACTED], who asserted that the petitioning organization "has been approved as a tax-exempt organization under IRS Code Section 501(c)(3)." Mr. [REDACTED] also stated "we do not have a designation letter as is the current policy," but did not explain how, absent such a letter, the petitioner "has been approved as a tax-exempt organization." The petitioner

submitted no documentation from the Internal Revenue Service (IRS) to document any such "approval" or explain its nature.

A church or other religious organization can satisfy part (A) of the above regulation by submitting a determination letter from the IRS. In this instance, as of the filing date, the petitioner had not applied for such recognition (by filing IRS Form 1023) and, therefore, had no recognition letter. The documents necessary to satisfy part (B) are listed in a memorandum from [REDACTED] Associate Director of Operations, *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003):

- (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;
- (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

Because the petitioner's initial submission contained no IRS recognition letter, and no alternative evidence as required by 8 C.F.R. § 204.5(m)(3)(i)(B), the director issued a request for evidence on April 18, 2003. The director instructed the petitioner to "[s]ubmit a copy of the IRS's 501(c)(3) certification for the petitioning organization and/or evidence that the petitioning organization is under an umbrella of a parent organization with IRS's certification."

In response to the request, counsel states "***IRS § 501(c)(3) certification is not required by the Code of Federal Regulations.*** . . . The Code of Federal Regulations only requires that the organization be eligible for said status had the organization applied for the benefits. See 8 C.F.R. § 204.5(m)(2)" (counsel's emphasis). The cited regulation consists not of documentary requirements, but of definitions. The relevant definition is that of "bona fide nonprofit religious organization in the United States," which the regulation defines as "an organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations, or one that has never sought such exemption but establishes to the satisfaction of the Service that it would be eligible therefor if it had applied for tax exempt status." This definition requires the organization to "establish . . . that it would be eligible" for the exemption. In order to establish this, the petitioner must meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B); the petitioner cannot simply assert that it is eligible, or observe that, according to IRS Publication 557, the IRS considers churches to be presumptively exempt. The petitioner must show that it qualifies for this presumptive exemption. Otherwise, an entity that is not a qualifying church at all can falsely claim tax-exempt status, simply by asserting that churches are presumed exempt and therefore need not prove it. We note that IRS Publication 557, cited by counsel as proof that churches are not required to apply for recognition of exemption, nevertheless encourages churches to apply for such recognition in order to avoid future confusion about the church's tax status.

The director denied the petition on July 24, 2003, stating that the petitioner had failed to provide the required evidence regarding tax-exempt status. The petitioner filed an appeal, through counsel, on August 22, 2003. The appeal form allows the petitioner to request additional time to supplement the record, and indicates that the petitioner must show good cause if the requested extension exceeds 30 days. This advisory notice reflects the regulation at 8 C.F.R. § 103.3(a)(2)(vii), which states that the AAO *may*, for good cause shown, allow the petitioner additional time to submit a brief. The word "may" indicates that the decision to grant additional time is

within the AAO's sole discretion. The petitioner did not indicate that any further documentation was forthcoming, or that good cause existed for an extension.

The principal submission on appeal is an August 20, 2003 letter from the IRS, repeating the assertion that a church need not apply for formal recognition, but "must meet all the organizational and operational requirements of section 501(c)(3) of the [Internal Revenue] Code." As noted above, this letter is a general statement of IRS policy and therefore does not establish that any particular entity actually is a tax-exempt religious organization. The letter does not address or fulfill the regulatory requirements at 8 C.F.R. § 204.5(m)(3)(i).

On July 27, 2004, eleven months after the filing of the appeal, the petitioner, through counsel, submitted copies of a completed IRS Form 1023 and other documents, intended to fulfill the requirements set forth in the regulation at 8 C.F.R. § 204.5(m)(3)(i)(B) and listed in Mr. ██████████ December 17, 2003 memorandum. A letter from the IRS, acknowledging receipt of the Form 1023, is dated October 17, 2003. It appears that the petitioner did not file Form 1023 until after the filing of the appeal, and did not contact the IRS about filing the application until after the petition had been denied. Counsel acknowledges that this supplement to the record is "late-filed," but does not explain why it took until July 2004 for the petitioner to submit documents which were in its possession nine months earlier.

Pursuant to 8 C.F.R. § 103.3(a)(2)(vii), the AAO is not required to accept untimely supplements to appeals. Rather, the petitioner must, in advance, demonstrate that good cause exists for an extension of time, at which time the AAO "may" decide to accept the supplementary submission. In this instance, the petitioner did not show good cause, and the initial appeal contained no indication at all that the petitioner would need almost a year to obtain further documentation. The filing of an appeal does not secure for the petitioner an open-ended or indefinite period in which to supplement the record at will.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). In this instance, at the time the petition was filed, the petitioner did not meet the requirements of 8 C.F.R. §§ 204.5(m)(3)(i)(A) or (B). The petitioner took no concrete steps to remedy this deficiency until *circa* October 2003, some 15 months after the petition was filed in July 2002, and the petitioner did not actually *submit* the required evidence until July 2004, two years after the filing date.

Furthermore, the director had put the beneficiary on notice as early as April 2003 that it could not suffice for the petitioner simply to assert that it possessed or qualified for the required tax-exempt status. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence 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).

Where, as here, 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); *see also Matter of Obaighena*, 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. *Id.* Under the circumstances, the

AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed. If the petitioner desires consideration of evidence that did not exist until well after the filing date, then the proper forum for such would be in the context of a new petition filed after that evidence came into existence.

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 sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.