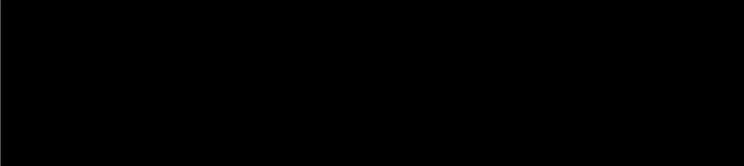




U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearances unwarranted  
invasion of personal privacy

01



FILE: [REDACTED]  
EAC 06 102 52811

Office: VERMONT SERVICE CENTER

Date: AUG 06 2007

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)

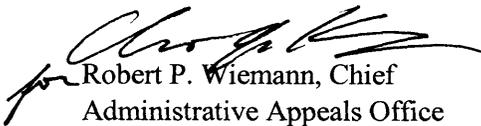
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

RECEIVED

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.

  
for Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 identified as a Baptist 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 established its ability to pay the beneficiary's salary.

On appeal, the petitioner submits an audited financial report that the director had previously requested.

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).

The sole stated basis for denial concerns the petitioner's ability to compensate the beneficiary. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence.

The petitioner's initial submission on February 23, 2006 contained almost no substantive information. On May 1, 2006, the director issued a request for evidence (RFE), outlining the various evidentiary requirements. The director requested "evidence to establish the net and gross annual income for 2005 for the proposed employer." The director specified that this "evidence should include one of the following": either a copy of a recent Form 990 Return of Organization Exempt From Income Tax, or "a current financial statement that has either been reviewed or audited by a Certified Public Accountant." In keeping with 8 C.F.R. § 103.2(b)(8), the director advised that the petitioner had until July 27, 2006 to respond, and that the entire response had to be submitted at the same time. Although the petitioner had twelve weeks to respond, the petitioner responded within two weeks, the director receiving the response on May 12, 2006.<sup>1</sup>

In response to the RFE, [REDACTED] Trustee of the petitioning church, stated that the beneficiary's "[w]eekly compensation is expected to be \$650. In addition the church will provide health insurance, a parsonage to reside in, retirement package, and three weeks vacation." The weekly salary annualizes to about \$33,900 per year (a year being slightly more than 52 weeks), not including the additional benefits for which [REDACTED] cited no monetary value.

[REDACTED] also stated: "Churches are not required for file form 990 or 990-EZ. . . . We are not required to have audited financial statements prepared by a CPA. Please see a copy of our internally prepared Treasurer's Report." The three-page unaudited document indicates that the petitioner had about \$74,000 in various bank accounts as of the end of 2005. The document also indicates that the petitioner's income exceeded its expenses by \$29,443.29 in 2005. An itemized list of those expenses does not list any salaries or payments sufficient to support a person, let alone a family of four such as the beneficiary's family. Therefore, once we factor in the beneficiary's annual salary of about \$33,900, the petitioner's annual expenses exceed its income by nearly \$4,500.

The director denied the petition on August 2, 2006, stating that the petitioner failed to submit the evidence that the director had requested in the RFE.

On appeal, the petitioner submits an audited financial report prepared on July 25, 2006. Assuming that date is correct, the petitioner could have sent this audited report to the Service Center by overnight mail in time for the July 27, 2006 RFE deadline. The petitioner, however, did not do so, instead responding to the RFE within two weeks of its issuance and thereby forfeiting the remaining time. The petitioner's submission of its RFE response amounted to a request for a decision, pursuant to 8 C.F.R. § 103.2(b)(8)(ii). The petitioner, in that RFE response, did not mention that it had commissioned, or was about to commission, an audited report. Instead, the petitioner asserted that it did not need to submit an audited report, an assertion which understandably could be interpreted as a statement that the petitioner had no intention of preparing or submitting such a document.

---

<sup>1</sup> We note that the petitioner submitted its RFE response, and its subsequent appeal, through the office of United States [REDACTED] rather than directly to the Vermont Service Center. Why the petitioner involved the senator's office is not clear, as submitting the materials in this manner incurred no adjudicative advantage or special treatment for the petition.

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), (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 RFE. *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.

We note that the director's stated standards for financial evidence do not conform to the regulations currently in effect. According to 8 C.F.R. § 204.5(g)(2), evidence of ability to pay must be either in the form of copies of annual reports, federal tax returns, or audited financial statements. The regulation does not indicate that "reviewed" financial statements will suffice. Nevertheless, the director was correct in finding that the petitioner's own internal report was insufficient to establish the petitioner's ability to pay the beneficiary.

While the above discussion is, by itself, sufficient to justify dismissal of the appeal, review of the record reveals an additional obstacle to approval of the petition. 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization seeking to employ the beneficiary 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.

We acknowledge that Internal Revenue Service (IRS) Publication 1828, *Tax Guide for Churches and Religious Organizations*, states that churches are automatically considered to be tax-exempt, and need not apply for recognition. Nevertheless, churches can voluntarily apply for recognition, in which case they must meet certain evidentiary requirements. It is to these requirements that 8 C.F.R. § 204.5(m)(3)(i)(B) refers.

A list of the necessary documents appears in a memorandum from William R. Yates, 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.

If an organization cannot provide an IRS recognition letter to fulfill 8 C.F.R. § 204.5(m)(3)(i)(A), then the organization must fulfill 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting the above documents. No organization can satisfy that requirement simply by citing IRS Publication 1828 or otherwise observing that churches are presumptively exempt. The organization must provide the documentation that the IRS would have required, had the organization chosen to apply for recognition. This requirement is crucial, because the bare assertion that churches are automatically exempt, while true, does not allow us to distinguish a church (which lacks IRS recognition because it is not required to obtain it) from a non-qualifying organization (which lacks IRS recognition because it cannot obtain it).<sup>2</sup> IRS Publication 1828 does not exempt the petitioner from the evidentiary requirements of 8 C.F.R. § 204.5(m)(3)(i)(B). Indeed, that publication indicates that many churches choose to apply for recognition in order to avoid future confusion about their tax-exempt status.

Here, the petitioner has not submitted evidence to satisfy 8 C.F.R. § 204.5(m)(3)(i)(A) or (B). Therefore, the petitioner has failed to meet its burden of proof regarding its claimed tax-exempt nonprofit status.

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.

---

<sup>2</sup> We note that a recent benefit fraud assessment by the Office of Fraud Detection and National Security confirmed that there was a 33% rate of fraud in the religious worker program. Of the petitions found to be fraudulent, 44% involved prospective employers that falsely claimed to be qualifying religious organizations. 72 Fed. Reg. 20442, 20444 (April 25, 2007).