

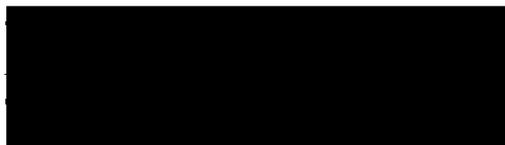
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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**



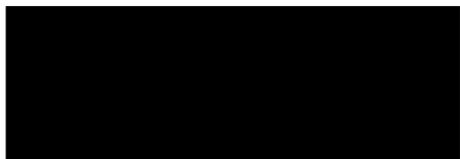
C1

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 28 2010

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO subsequently remanded the petition to the director for a new decision based on revised regulations. The director determined that the petitioner had failed to submit required evidence, and therefore the director again denied the petition and certified the decision to the AAO. The AAO will affirm the director's decision.

The petitioner is 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 pastor. The director determined that the petitioner had not established that it qualifies as a tax-exempt religious organization.

The record contains no response to the director's certified decision.

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 petitioner filed the Form I-360 petition on June 11, 2007. At that time, the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(2) defined a "*bona fide nonprofit religious organization in the United States*" 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.” The USCIS regulation at 8 C.F.R. § 204.5(m)(3)(i), at that time, read as follows:

Unless otherwise specified, each petition for a religious worker must be accompanied by:

(i) 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.

In a letter dated April 29, 2006, from [REDACTED], pastor of the petitioning church, stated that the petitioner “meets the description of an exempt organization described in IRC 501(c)(3).” The petitioner submitted a document entitled “Formal Recognition of Federal Tax Exempt Status,” which included the observation that churches “are not required under federal law to seek formal recognition of exemption from federal income tax and thereby obtain a letter of determination.”

We note that, on Form I-360, the petitioner showed its federal employee identification number (EIN) as 58-1175609. Spanish-language church brochures identify the beneficiary as pastor of [REDACTED] which is a Spanish translation of the petitioner’s English name, [REDACTED]

On September 5, 2007, the director requested additional evidence, including further documentation to satisfy the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B), quoted above. In response, the petitioner submitted another copy of the “Formal Recognition of Federal Tax Exempt Status” document.

The director denied the petition on January 31, 2008, stating that the petitioner had failed to submit the required evidence to show either IRS recognition of tax-exempt status, or the documentation necessary for such recognition. The petitioner appealed the decision, and submitted incorporation documents for [REDACTED] with EIN [REDACTED]. The materials show that [REDACTED] filed articles of incorporation on October 31, 2007.

While the appeal was pending, USCIS published new regulations for special immigrant religious worker petitions, which applied to all petitions pending on the publication date. *See* 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). The revised USCIS regulation at 8 C.F.R. § 204.5(m)(8) requires a church claiming tax-exempt status to submit either (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. (The regulation at 8 C.F.R. § 204.5(m)(8)(iii) deals with affiliated organizations that are not, themselves, churches.)

The AAO remanded the petition on December 12, 2008, for a new decision based on the revised regulations. On February 4, 2009, the director advised the petitioner of the revised regulations and instructed the petitioner to submit an IRS determination letter. In response, the petitioner submitted a copy of an IRS determination letter dated June 26, 2008. The letter recognized the tax-exempt status of [REDACTED] EIN [REDACTED] effective October 31, 2007 (which was the church's date of incorporation).

A photocopied letter, dated December 28, 2007 and signed by the petitioner's financial secretary, [REDACTED] indicated: "The Spanish ministry of [the petitioning church] . . . is now [REDACTED] A note from [REDACTED] to the beneficiary, dated February 4, 2008, referred to "the final payroll check from" the petitioner, to cover the beneficiary's salary "for 13 weeks." [REDACTED] indicated that the beneficiary would "continue to receive \$100 each month missionary support for now."

The director denied the petition on April 6, 2009, stating that the petitioner "failed to establish that at the time of filing this petition on June 11, 2007, Petitioner possessed a currently valid determination letter from the Internal Revenue Service." The regulation at 8 C.F.R. § 103.4(b)(2) requires the director to allow the petitioner 30 days in which to submit a brief in response to the certified decision. The director's notice did not contain this information, and therefore the AAO issued a notice to that effect on October 13, 2010. To date, the record contains no further correspondence from the petitioner or from counsel. We will therefore consider the record to be complete as it now stands.

We acknowledge that the regulations did not require the submission of an IRS determination letter until after the petitioner filed the petition. We will not fault the petitioner for failing to anticipate future revisions of the regulations. Once the petitioner knew of the revisions, however, the petitioner was responsible for meeting the new requirements. The record shows that an IRS determination letter is retroactive to the organization's incorporation date (if the organization qualified for exemption at that time). We would, therefore, have accepted a newly-issued determination letter, provided that the effective date retroactively covered the required period.

The petitioner, however, has still not documented its tax-exempt status. Instead, the petitioner has "spun off" its Spanish-language church into a separate corporation with its own EIN. That corporation did not exist until several months after the petition's June 2007 filing date.

The regulations require the petitioner to submit substantial information about the intending employer. *See, e.g.*, 8 C.F.R. §§ 204.5(m)(7), (8) and (10). More than a year after the filing date, the petitioner has essentially passed on its obligations to the newly-formed [REDACTED] which, despite its denominational affiliation, is a separate corporate entity from the petitioner.

A petition must be filed as provided in the petition form instructions either by the alien or by his or her prospective United States employer. 8 C.F.R. § 204.5(m)(6). The petitioner, [REDACTED] is no longer the prospective employer. If the beneficiary is to work for [REDACTED] then [REDACTED] must file its own petition on the beneficiary's behalf, including all required evidence to show that it can honor the terms of its employment offer.

For the reasons discussed above, we agree with the director's uncontested denial decision and will affirm the certified decision.

Review of the record shows another issue of concern. The AAO may identify additional grounds for denial beyond what the Service Center identified 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).

The USCIS regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation, either abroad or in lawful immigration status in the United States, continuously for at least the two-year period immediately preceding the filing of the petition. The USCIS regulation at 8 C.F.R. § 204.5(m)(11) requires that the beneficiary's qualifying prior experience, if acquired in the United States, must have been authorized under United States immigration law.

On Form I-360, the petitioner identified the beneficiary's nonimmigrant status as "WT," meaning that the beneficiary entered the United States as a tourist under the Visa Waiver Program (VWP). *See* 8 C.F.R. § 214.2(a)(2). Under section 217(a)(1) of the Act, 8 U.S.C. § 1187(a)(1), a tourist who enters the United States under the VWP is admitted as a B-2 nonimmigrant for a period not exceeding 90 days.

B-2 nonimmigrants are not authorized to work in the United States. *See* 8 C.F.R. § 214.1(e). There is no evidence that the beneficiary ever attempted to change his nonimmigrant status, and even if he had, WT nonimmigrants are not eligible to change status. *See* 8 C.F.R. § 248.2(a)(6). Therefore, the beneficiary never had authorization to work in the United States. The petitioner admitted, on Part 4 of Form I-360, that the beneficiary had worked in the United States without authorization.

Furthermore, the petitioner indicated that the beneficiary entered the United States on August 18, 1999, and that his WT nonimmigrant status expired on November 17, 1999. Thus, the beneficiary appears to have had no lawful status in the United States at all for more than seven and a half years before the petitioner filed the petition in June 2007.

Because the beneficiary's WT status had long since expired, and because the beneficiary never had authorization to work in the United States, we must find that he does not meet the lawful status requirement at 8 C.F.R. §204.5(m)(4) or the employment authorization requirement at 8 C.F.R. § 204.5(m)(11). The beneficiary's lack of status is a disqualifying factor on its face, and therefore it represents an additional ground for denial of the petition.

The AAO will affirm the director's decision to deny the petition for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's decision to deny the petition is affirmed.