

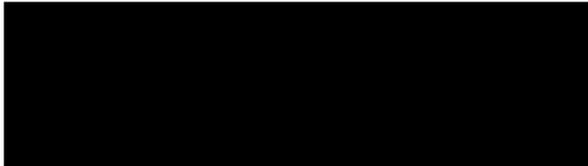
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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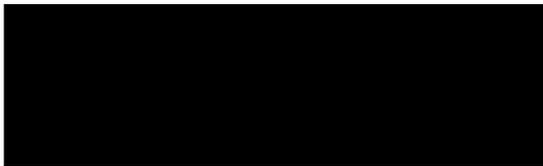
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **JAN 19 2011**

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,

9 Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is described as a [REDACTED] congregation. 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 ritual slaughter supervisor. The director determined that the petitioner had failed to establish its existence as a bona fide non-profit religious organization. The petitioner did not document its claimed tax-exempt status; the beneficiary had been employed by for-profit meatpacking companies during the two years preceding the filing of the petition; and the petitioner's claimed address is a vacant private mailbox.

On appeal, counsel indicates that a brief will be forthcoming within 30 days. To date, more than sixteen months after the filing of the appeal, the record contains no further substantive submission from the petitioner. We therefore consider the record to be complete as it now stands.

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 first issue we will address concerns the petitioner's tax-exempt status. At the time the petitioner filed the Form I-360 petition on August 10, 2007, the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(3)(i) required 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 [IRS] to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

We note that, on Form I-360, under "IRS Tax #," the petitioner provided the number [REDACTED]. The IRS tax number is also known as the federal employer identification number, or EIN.

In a letter dated June 12, 2007, [REDACTED], identified as administrator of the petitioning entity, claimed that the petitioner "is a 501(c)(3) Tax Exempt religious organization." The initial filing did not contain any IRS documentation of the petitioner's tax-exempt status.

On October 2, 2007, the director instructed the petitioner to submit evidence as described in the regulation at 8 C.F.R. § 204.5(m)(3)(i). The director stated that, if the petitioner did not submit a copy of an IRS determination letter, then "the documentation should include, at a minimum, a completed IRS Form 1023, the Schedule A supplement that applies to churches, and a copy of the organizing instrument of the church that contains a proper dissolution clause and that specifies the purpose of the organization."

The petitioner's response included an original (not copied) IRS Form 1023 Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code. On that form, the petitioner listed its EIN as [REDACTED]. Therefore, without explanation, the petitioner has claimed two different EINs. The record contains no IRS documentation to establish which of these EINs (if either) is the petitioner's actual EIN.

The petitioner also submitted a copy of its articles of incorporation, but no documentation to show that the petitioner had actually filed these articles with the State of New York.

While the petition was pending, USCIS published revised regulations for special immigrant religious worker petitions. Supplementary information published at the time specified: "All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or

information.” 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). The revised regulation at 8 C.F.R. § 204.5(m)(8) requires the petitioner to submit a copy of a currently valid IRS determination letter to establish the petitioner’s tax-exempt status. The former regulatory clause at 8 C.F.R. § 204.5(m)(3)(i)(B), which permitted the petitioner to establish tax-exempt status without an IRS letter, is no longer part of the regulations.

The director denied the petition on June 25, 2009, in part because “[t]he petitioner failed to submit a valid IRS determination letter certifying that the petitioning organization is tax exempt according to section 501(c) of the Internal Revenue Code.”

On appeal, counsel protests that the director “failed to give notice for the bases for the denial, depriving the Petitioner of the required notice.” This is counsel’s only substantive argument on appeal.

We agree with counsel that the director failed to give the petitioner due notice with regard to required IRS documentation. At the time the petitioner filed the petition, the regulations did not yet require the petitioner to submit an IRS determination letter. After the regulations changed, the director did not advise the petitioner of the new requirement.

Our finding here is strictly procedural. The director’s error lies not with the director’s finding of fact (which was correct), but with the director’s failure to request the newly-required evidence before citing its absence as a basis for denial.

Nevertheless, the director cited other grounds for denial as well. The denial did not rest entirely on the absence of an IRS letter. Under the circumstances, the remedy for the director’s error would not be to reverse the director’s decision, but rather to accept on appeal the documentation that the petitioner would have submitted earlier in response to a request by the director.

In this instance, the AAO would have accepted, on appeal, the petitioner’s submission of a valid IRS determination letter. The record does not contain this document, or any supplement to the petitioner’s nearly-skeletal appeal. Therefore, while the director should have raised the issue of the IRS letter before denying the petition, the petitioner was aware of this evidentiary deficiency when it filed the appeal. Accordingly, the petitioner has forfeited an opportunity to submit the required evidence.

With the above in mind, we agree with the director that the petitioner has not established its qualifying tax-exempt status. The record does not contain the now-required IRS determination letter. Also, the petitioner’s submission of two different EINs raises serious questions of credibility. Doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies,

absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 582, 591-92.

The second basis for denial concerns the beneficiary's past experience. At the time the petitioner filed the petition, the USCIS regulation at 8 C.F.R. § 204.5(m)(3)(ii)(A) required the petitioner to attest to the beneficiary's continuous employment in a qualifying religious capacity throughout the two years immediately preceding the filing of the petition. The former regulation at 8 C.F.R. § 204.5(m)(1) made it clear that qualifying religious employment must take place at a tax-exempt religious organization.

We note that the 2008 revisions to the regulations added further evidentiary requirements with respect to the beneficiary's prior employment. The new regulation at 8 C.F.R. § 204.5(m)(11) requires the petitioner to submit IRS documentation and other evidence of qualifying employment. The director, however, did not base the decision in whole or in part on the petitioner's failure to meet the new requirements.

In a letter dated December 24, 2007, [REDACTED] stated:

[The petitioner] was incorporated more than 10 years ago primarily to ensure adherence to the highest possible level of kashruth standards so that meat products under our supervision would meet the needs of our community. To achieve this goal we developed a relationship with International [REDACTED] and [REDACTED] . . . In this role we placed highly trained and qualified ritual slaughterers and kashruth supervisors throughout the [REDACTED] meat procurement process. . . .

In all cases, these personnel work under our control and direction but are paid by the company – in the case of [the beneficiary], by [REDACTED]. This is the norm for virtually all [REDACTED] agencies. . . . I am enclosing an article from last week's edition of the Jewish Week which describes this situation.

A printout from the online publication [REDACTED] includes the sentence: "Although the restaurants pay the mashgiach [kosher food inspector] directly, the mashgiach is answerable only to the [REDACTED] and cannot be fired by the restaurant." The article does not discuss whether arrangements for meatpacking companies are similar to those for restaurants, nor does it indicate that the mashgiach is considered an employee on the restaurant's payroll (as opposed to a contractor).

The petitioner submitted copies of payroll documents from [REDACTED], identifying the beneficiary as a paid employee of that company.

The director denied the petition based, in part, on the finding that "[t]he record clearly shows that Beneficiary . . . does not work for the petitioning organization. Although Petitioner states that

Beneficiary's activities are controlled by [the petitioner], there is no evidence to substantiate such a relationship between Petitioner and Beneficiary."

As we have already noted, counsel, on appeal, protests that the director gave no advance notice of this finding. Counsel, however, cites no statute, regulation or case law that requires advance notice when the information provided is, on its face, disqualifying.

If the record evidence establishes ineligibility, the application or petition will be denied on that basis. 8 C.F.R. § 103.2(b)(8)(i). If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS. 8 C.F.R. § 103.2(b)(8)(iii).

Given the petitioner's submission of payroll documents identifying the beneficiary as the employee of a for-profit meatpacking company, rather than a tax-exempt religious organization, the director had the discretion to deny the petition on that basis. We agree with the director's finding in this regard. We note that the regulation at 8 C.F.R. § 204.5(m)(7)(xii) requires the petitioner to attest that the prospective employer has the ability and intention to compensate the alien. If the beneficiary's compensation is to come directly from an outside source, then the petitioner, supposedly the "prospective employer," will not compensate the beneficiary at all. The petitioner has not established that a qualifying tax-exempt religious organization intends to employ and compensate the beneficiary.

The third and final basis for denial relates to USCIS's efforts to verify the petitioner's claims. The regulation at 8 C.F.R. § 204.5(m)(12) states:

The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

In this instance, the Form I-360 showed the petitioner's address as a box number on [REDACTED] in [REDACTED]. On August 12, 2008, a USCIS officer traveled to that address and found a

Shiprite store that rents private mailboxes. The box claimed as the petitioner's address was vacant. The officer spent several weeks attempting, without success, to contact both the petitioner and counsel in order to learn the actual, physical address of the petitioning organization.

The officer eventually visited [REDACTED] residence, at which time [REDACTED] was able only to provide vague answers to the officer's questions (for example, he could not definitively confirm that he was the person who signed the Form I-360 petition).

On April 1, 2009, the director advised the petitioner of USCIS's intent to deny the petition based on USCIS's inability to verify many of the basic claims in the petition. In response, the petitioner submitted a letter from counsel, co-signed by [REDACTED] and by the beneficiary, intended to rebut the director's assertions. Counsel, for example, claimed that [REDACTED] "shock at seeing Investigators at his home . . . contributed to his lack of clarity" when answering the officer's questions. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaighena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner's response to the notice did not include any new documentary evidence. The petitioner did not even provide a new business address to replace the now-abandoned mailbox address listed on Form I-360.

The director based the denial, in part, on the finding that the petitioner had failed to pass compliance review, because the petitioner has been either unwilling or unable to support or verify key claims. This ground for denial relates directly to issues raised in the earlier notice of intent to deny the petition. Therefore, counsel's protest that the notice of intent to deny did not raise these issues clearly does not apply here. Counsel's initial appeal statement does not address this finding at all, and the record contains no sign of the appellate brief that, supposedly, was to follow the appeal within 30 days. We consider this basis for denial to be, in effect, uncontested.

The AAO will dismiss the appeal 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 appeal is dismissed.