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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 and Immigration Services

PUBLIC COPY



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Date: **MAY 09 2012** Office: CALIFORNIA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

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:

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, Vermont Service Center (VSC), initially approved the employment-based immigrant visa petition on May 19, 2004. On further review, the Director, VSC, determined that the beneficiary was not eligible for the visa preference classification. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the preference visa petition stating the reasons therefore and subsequently exercised his discretion to revoke the approval of the petition on June 18, 2007. The Administrative Appeals Office (AAO) remanded the matter to the Director, California Service Center (CSC), for consideration under new regulations. The Director, CSC, denied the petition and, following the AAO's instructions, certified the decision to the AAO for review. The AAO will affirm the director's revocation of the petition.

As stated, the instant petition was previously approved on May 19, 2004 and was subsequently revoked. The AAO's remand for application of the new regulation was in error. Accordingly, for purposes of this certification, we withdraw our previous finding and focus our review on the original decision of the Director, VSC, which was correctly based upon the regulations in effect at the time the petition was originally approved. As the AAO conducts de novo review, we will consider all evidence of record, including any relevant evidence submitted by the petitioner following the remand. *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 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 senior pastor.

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).

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.*

At the time the approval of the petition was revoked, the regulation at 8 C.F.R. § 204.5(m)(1) provided:

(m) *Religious workers.* (1) An alien, or any person in behalf of the alien, may file an I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States. The alien must be coming to the United States solely for the purpose of carrying on the vocation of a minister of that religious denomination, working for the organization at the organization's request in a professional capacity in a religious vocation or occupation for the organization or 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. All three types of religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition. Professional workers and other workers must obtain permanent resident status through immigration or adjustment of status on or before September 30, 1997, in order to immigrate under section 203(b)(4) of the Act as section 101(a)(27)(C) special immigrant religious workers.

The regulation at 8 C.F.R. § 204.5(m)(2) contained the following definition:

Religious denomination means a religious group or community of believers having some form of ecclesiastical government, a creed or statement of faith, some form of worship, a formal or informal code of doctrine and discipline, religious services and ceremonies, established places of religious worship, religious congregations or comparable indicia of a bona fide religious denomination. For the purposes of this definition, an interdenominational religious organization which is exempt from taxation pursuant to section 501(c)(3) of the Internal Revenue Code of 1986 will be treated as a religious denomination.

The petitioner filed the petition on July 28, 2003. The petitioner did not identify its denomination on the Form I-360 petition or in the supporting evidence submitted with the petition. According to the evidence submitted with the petition, the petitioning organization had previously used the name [REDACTED] Church before changing its name to [REDACTED] Church. The beneficiary's resume, submitted with the petition, indicated that he served as a youth teacher at his "Home church: [REDACTED] Presbyterian Church" in Seoul, Korea, and subsequently worked at Vancouver [REDACTED] Presbyterian Korean Church and [REDACTED] Church of Vancouver in Canada. A letter from the [REDACTED] An Presbyterian Church of Vancouver indicated that the beneficiary worked as a youth pastor at that church in 1997. The petitioner submitted a copy of the beneficiary's diploma from [REDACTED] Bible College, dated April 25, 1999, stating that the beneficiary holds a "Bachelor of Arts in Pastoral Leadership" degree. In a letter submitted with the petition, the petitioner asserted that the petitioning church ordained the beneficiary on February 1, 2001.

On November 4, 2005, USCIS issued a notice to the petitioner indicating its intent to revoke the approval of the petition based on information obtained during an interview with the beneficiary at the District Office in Boston regarding his Form I-485 Application for Adjustment of Status. The notice stated, in pertinent part:

It has come to the attention of this office that the beneficiary is no longer with Presbyterian Church Doctrine. He believes in no denomination, He wants to set up his own church. He believes in evangelism. He is not a member of any recognized church.

The notice instructed the petitioner that it had 30 days in which to submit evidence to overcome the reasons for revocation. The petitioner did not respond to the notice.

On June 18, 2007, the Director, VSC, revoked the petition with a finding of fraud. The director noted the following:

You were granted an opportunity to submit any evidence you thought would overcome the grounds of revocation. The record does not include a response to that request for evidence. Therefore, the grounds for revocation have not been overcome.

On July 2, 2007, the petitioner appealed the revocation of the petition. On the Form I-290B Notice of Appeal, the petitioner stated:

We submitted [sic] all documents you asked and one of the officer interviewed [REDACTED] the beneficiary his second interview. In his second time, the officer told that [REDACTED] was free from his belief and denominational issue. So we want you to reconsider the decision or ask more evidences we can provide to overcome the decision. Thank you.

Accompanying the Form I-290B, the petitioner submitted two letters dated June 27, 2007, the same date as the appeal. In the letters, the petitioner provided explanations regarding the denomination of the petitioner and beneficiary and regarding the statements made by the beneficiary during his interview.

Although the petitioner asserted on appeal that it submitted all requested documents, there is no indication in the record that the petitioner had submitted any evidence in response to USCIS' November 4, 2005 notice of intent to revoke. Again, as indicated above, the only evidence in the record consists of the petitioner's letters dated the same date as the appeal. The letters of explanation, submitted by the petitioner for the first time on appeal, will not be considered by the AAO. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the petition was revoked. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

As the petitioner submitted no evidence in response to the notice of intent to revoke the petition, the AAO agrees with the director's finding that the petitioner failed to overcome the grounds for revocation. The AAO therefore affirms the director's decision to revoke the petition.

Furthermore, a review of the record shows additional obstacles to approval of the petition. The AAO may deny an application or petition that fails to comply with the technical requirements of

the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1025, 1043; *see also Soltane v. DOJ*, 381 F.3d at 143, 145.

The AAO finds that the petitioner has not established that it has the ability to pay the beneficiary the proffered wage.

The regulation at 8 C.F.R § 204.5(m)(4), as was in effect at the time the petition was approved, stated:

(4) *Job offer.* The letter from the authorized official of the religious organization in the United States must also state how the alien will be solely carrying on the vocation of a minister (including any terms of payment for services or other remuneration), or how the alien will be paid or remunerated if the alien will work in a professional religious capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or solicitation of funds for support. In doubtful cases, additional evidence such as bank letters, recent audits, church membership figures, and/or the number of individuals currently receiving compensation may be requested.

The regulation at 8 C.F.R § 204.5(g)(2), also in effect when the petition was approved, stated:

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. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by the Service.

Accompanying the Form I-360 petition, the petitioner submitted a letter in which it indicated that the beneficiary was being offered a full-time, permanent position and that the petitioner planned to pay him \$2,500 per month. The petitioner did not submit evidence of its ability to pay the proffered wage at the time of filing. 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)). In a letter submitted in response to a request for evidence issued by USCIS on September 10, 2003, the petitioner again asserted its intent to pay the

beneficiary \$2,500 per month and specified that this amount would “include housing allowance and medical insurance” and would “come from the church budget.” In an additional letter, the petitioner asserted that the beneficiary was currently working on a voluntary basis and was “supported by aid from sponsoring church in Korea.” The petitioner also submitted bank statements showing wire transfers purportedly from the church in Korea to the beneficiary’s wife.

On June 23, 2009, the AAO erroneously remanded the matter to the Director, CSC, for consideration under the new regulations and the director subsequently requested additional evidence under the new regulations regarding the petitioner’s ability to compensate the beneficiary. In response to these requests, the petitioner has submitted a bank account statement purportedly from the petitioner’s business checking account for the month of February 2010 indicating an ending balance of \$4,345.00, as well as a letter from the petitioner which states in part:

As small size of church, our church budget alone can be difficult to support Rev. [REDACTED] needs. We also as non-profit religious organization, do not force the congregation for offering or donations on any church services and activities. All donations totally are accepted on voluntary base. As the church approaches socially week [sic] groups, our budget is not that big from direct membership. However part of donations and offerings come from other Christian supporters who share the same mission visions with this church. Our own budget with the supports helps this church maintain church finance, its activities and compensation for [REDACTED] ..

Because of the generous supports, we pay [REDACTED] average worth of a bit more than \$2,500 a month with housing, food, clothes and some form of cash and we will continuously pay him at least that amount or more.

Among the supporting One of the supporters, for examole [sic] has provided Rev. [REDACTED] residence for free rent...as a way of donations and will continue to provide the house for both [REDACTED] residence and church office. It is a value of \$ 1,500 a month. And other supporters donate with \$ 300 a month, \$ 100 a month or even \$ 10 a month. Our church also provide him food, clothes, gas payments and other needs including some cash....

As ministers are exempt from federal and social security tax withholding, we do not have quarterly wage reports and we will send payroll summary of IRS Forms W-3 soon along with beneficiary’s W-2 Forms.

Although the petitioner indicated its intent to submit IRS documentation, no such documentation has been received as of the date of this decision. The petitioner has not established its ability to pay the proffered wage in accordance with 8 C.F.R § 204.5(m)(4) and 8 C.F.R § 204.5(g)(2) as were in effect at the time the petition was approved.

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. Here, that burden has not been met.

ORDER: The AAO will affirm the director's decision to revoke approval of the petition.