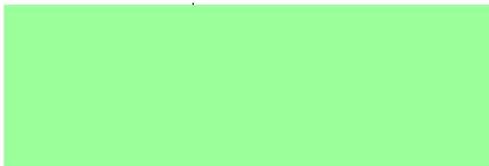




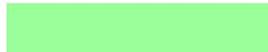
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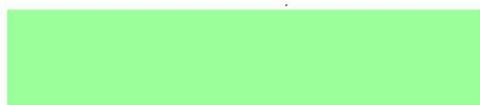
Office: CALIFORNIA SERVICE CENTER

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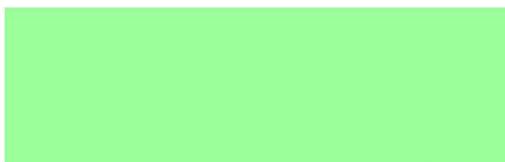
Petitioner:

Beneficiary:



PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1)

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based nonimmigrant visa petition and subsequent motions to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification of the beneficiary as a nonimmigrant religious worker pursuant to section 101(a)(15)(R)(1) of the Act to perform services as an outreach pastor. The director determined that the petitioner had not established that it qualifies as a bona fide nonprofit religious organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code (IRC). The director also determined that the petitioner's subsequent motions did not meet the regulatory requirements of a motion. The director denied the petitioner's motion to reopen, finding that the petitioner had "not submitted nor alleged new facts for consideration in the reopened proceeding." While acknowledging the petitioner's argument that the requirement to submit a determination letter from the Internal Revenue Service (IRS) violates the Constitution, the director also denied the petitioner's motion to reconsider, stating:

[T]he petitioner neither states a clear reason for reconsideration nor provides any precedent decision to establish that the decision was based on an incorrect application of law or USCIS [U.S. Citizenship and Immigration Service] policy. The record thus contains only the petitioner's conclusion and provides no precedent decisions that might support a conclusion other than the one already reached by USCIS in this matter.

On appeal, counsel asserts that the "petitioner's motion met the applicable requirements for a motion for reconsideration" but does not contest the director's denial of the motion to reopen. Counsel submits a brief in support of the appeal and a copy of a November 30, 2012 letter from the IRS recognizing the petitioner as tax exempt under sections 501(c)(3) and 170(b)(1)(A)(i) of the IRC.

Section 101(a)(15)(R) of the Act pertains to an alien who:

- (i) for the 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; and
- (ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii).

Section 101(a)(27)(C)(ii) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii), pertains to a nonimmigrant who seeks to enter the United States:

- (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) . . . 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) . . . 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.

The regulation at 8 C.F.R. § 214.2(r)(3) defines a tax-exempt organization as “an organization that has received a determination letter from the IRS establishing that it, or a group it belongs to, is exempt from taxation in accordance with section[] 501(c)(3) of the [IRC].” The regulation at 8 C.F.R. § 214.2(r)(9) provides:

*Evidence relating to the petitioning organization.* A petition shall include the following initial evidence relating to the petitioning organization:

- (i) A currently valid determination letter from the IRS showing 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; or
- (iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3), or subsequent amendment or equivalent sections of prior enactments, of the [IRC], as something other than a religious organization:
  - (A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;
  - (B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;
  - (C) Organizational literature, such as books, articles, brochures, calendars, flyers, and other literature describing the religious purpose and nature of the activities of the organization; and

- (D) A religious denomination certification. The religious organization must complete, sign and date a statement certifying that the petitioning organization is affiliated with the religious denomination. The statement must be submitted by the petitioner along with the petition.

In its motion for reconsideration, the petitioner asserted that requiring the petitioner to provide an IRS determination letter violates the establishment cause of the First Amendment and interferes with the petitioner's free exercise of its religion. Citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), counsel argued that the requirement "is not a neutral law of general applicability."

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. See *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

The AAO finds that the petitioner's motion met the requirements of the regulation at 8 C.F.R. § 103.5(a)(3) as a motion to reconsider. However, such a finding does not change the ultimate outcome of the proceeding. In reviewing the record in its totality and considering the petitioner's arguments on motion, the petitioner provided no evidence or argument "that might support a conclusion other than the one already reached by USCIS in this matter."

The petitioner submitted no documentation with the petition, filed on February 23, 2012, to establish that it is a bona fide nonprofit religious organization. In a request for evidence (RFE) dated April 5, 2012, the director instructed the petitioner to submit documentation of its "Federal tax exempt status in the form of a signed letter from the [IRS]." In her June 22, 2012 letter submitted with the petitioner's response, counsel stated:

The [IRS] issues a tax guide for Churches and Religious organizations. . . . Per IRS guidelines, [the petitioner] is a church and is automatically considered tax exempt. There is no confirmation letter or determination letters issued by the IRS to confirm the church's exempt status. . . .

Counsel provided a copy of IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*, which provides, "Churches that meet the requirements of IRC section 501(c)(3) are automatically considered tax exempt and are not required to apply for and obtain recognition of tax-exempt status from the IRS." Counsel also provided a copy of an undated letter from the IRS to the petitioner stating, "Churches . . . are automatically considered tax exempt under section 501(c)(3) of the [IRC] without applying for formal recognition of such status. No determination letters are issued to these organizations." The letter refers the petitioner to IRS Publication 1828, which includes the following:

Although there is no requirement to do so, many churches seek recognition of tax-exempt status from the IRS because such recognition assures church leaders, members, and contributors that the church is recognized as exempt and qualifies for related tax benefits.

Therefore, the IRS recognizes that there may be reasons why a church may want to obtain official IRS recognition as a tax-exempt organization although under IRS regulations, the church is not required to do so. The IRS provides detailed guidance on how to obtain a determination letter that applies equally to churches as to other religious organizations. *Id.*

Furthermore, the regulations governing immigration under the purview of the USCIS and those governing federal taxation under the purview of the IRS serve two different purposes. While the IRS regulations may automatically exempt churches as nonprofit organizations for the purpose of determining whether such an organization is required to file a federal tax return and pay taxes, the USCIS regulation offers no such exemption for those organizations who seek benefits under immigration laws.

Additionally, according to IRS Publication 557, the IRS does not automatically accept that a particular organization is a church simply because the organization states that it is. The organization must meet the requirements of section 501(c)(3) to be automatically exempt, and one of the reasons for choosing to file IRS Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, is to receive IRS recognition of the organization as a church.<sup>1</sup>

Furthermore, while the Act and its implementing regulations do not require an organization to establish that it is a church to qualify as a bona fide nonprofit religious organization, it must establish that its tax-exemption is based on its religious nature. As discussed earlier, the IRS and USCIS regulations serve different purposes, and while a currently valid letter from the IRS recognizing an organization as a church is required under USCIS regulation, the IRS automatic exemption of a church as nonprofit is unrelated to the USCIS requirements that the organization establish itself as both a religious organization and as a nonprofit organization for immigration purposes.

This issue was also addressed in the supplementary information accompanying the final rule to the regulations promulgated on November 26, 2008:

USCIS recognizes that the IRS does not require all churches to apply for a tax-exempt status determination letter, but has nevertheless retained that requirement in this final rule. See Internal Revenue Service, Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities under the Federal Tax Law (IRS pub. no. 1828, Rev. Sept. 2006). A requirement that petitioning churches

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<sup>1</sup> IRS Publication 557 at page 25.

submit a tax determination letter is a valuable fraud deterrent. An IRS determination letter represents verifiable documentation that the petitioner is a bona fide tax-exempt organization or part of a group exemption. Whether an organization qualifies for exemption from federal income taxation provides a simplified test of that organization's non-profit status.

Requiring submission of a determination letter will also benefit petitioning religious organizations. A determination letter provides a petitioning organization with the opportunity to submit exceptionally clear evidence that it is a bona fide organization.

73 Fed. Reg. 72276, 72280 (Nov. 26, 2008).

Counsel's argument that requiring the petitioner to submit an IRS determination letter violates the establishment and free exercise of religion clauses of the Constitution is not persuasive. Counsel points to nothing in the requirement that interferes with the petitioner's ability to worship in the manner and at the time it chooses, to organize as it deems appropriate, to establish its own membership requirements, or to hire any individual legally in the United States. The USCIS regulation provides procedures for the organization to sponsor alien workers and simply specifies that if an organization seeking to hire an alien purports to be a religious organization, then it must submit documentary evidence of this in the form of a determination letter from the IRS recognizing the organization as tax-exempt. Counsel's argument that the requirement is "targeting churches" is baseless. The regulation applies to all organizations on an equal basis.

On appeal, the petitioner submits a copy of a November 30, 2012 letter from the IRS recognizing the petitioner as tax exempt under sections 501(c)(3) and 170(b)(1)(A)(i) of the IRC. The letter indicates that the effective date of the exemption is February 16, 2012.

At issue here is whether the record before the director established that the petitioner was a tax-exempt organization. As previously indicated, at the time the petition was filed, the petitioner submitted no evidence of a currently valid determination letter from the IRS. The petitioner also failed to submit the letter in response to the RFE. Accordingly, we find no error on the part of the director in determining that the petitioner failed to establish that it had a valid determination letter from the IRS at the time it filed the petition or at the time it responded to the RFE as required by 8 C.F.R. § 214.2(r)(9). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. §§ 103.2(b)(1), (12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner failed to submit evidence of its tax-exempt status with the petition, as required by the regulation at 8 C.F.R. § 214.2(r)(9) and failed to submit the required documentation in response to the director's RFE. As the record before the director failed to establish that the petitioner is a tax-exempt organization as defined by the regulation, the AAO finds no error on the part of the director.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary was a member of its religious denomination for two full years prior to the filing of the visa petition.

The USCIS regulation at 8 C.F.R. § 214.2(r)(1) states that, to be approved for temporary admission to the United States, or extension and maintenance of status, for the purpose of conducting the activities of a religious worker for a period not to exceed five years, an alien must:

- (i) Be a member of a religious denomination having a bona fide non-profit religious organization in the United States for at least two years immediately preceding the time of application for admission.

The petition was filed on February 23, 2012. Therefore, the petitioner must establish that the beneficiary was a member of its denomination for at least the two years immediately preceding that date.

The regulation at 8 C.F.R. § 214.2(r)(3) provides:

*Denominational membership* means membership during at least the two-year period immediately preceding the filing date of the petition, in the same type of religious denomination as the United States religious organization where the alien will work.

*Religious denomination* means a religious group or community of believers that is governed or administered under a common type of ecclesiastical government and includes one or more of the following:

- (A) A recognized common creed or statement of faith shared among the denomination's members;
- (B) A common form of worship;
- (C) A common formal code of doctrine and discipline;
- (D) Common religious services and ceremonies;
- (E) Common established places of religious worship or religious congregations; or
- (F) Comparable indicia of a bona fide religious denomination.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that the beneficiary was currently in the United States pursuant to an R-1 visa to work for [REDACTED]

A copy of a Form I-797A, Notice of Action, dated February 25, 2011, indicates the beneficiary was approved for R-1 status to work for [REDACTED] from February 23, 2011 to May 29, 2013.

In Section 1, question 4 of the Form I-129 Supplement R, the petitioner stated:

The churches in the Philippines and in the United States are all evangelical churches who believe that Jesus is the Savior and the only way to heaven. The churches proclaim what they call is the "Good News" that Jesus died on the cross for all our sins and each person need[s] to receive Jesus as Lord and Savior in order to be saved. [The petitioner] is no different. It is an evangelical church that proclaims the Good news and has ministries that focuses [sic] on this very goal.

With the petition, the petitioner submitted a copy of its belief statement and statements from churches with whom the beneficiary was associated from 1994 to 2006. It submitted no documentation from the [REDACTED]

In response to the RFE, counsel again alleged that the petitioner belonged to a "community of Evangelicals" and that as a body, they share a similar faith, a "form of worship," common religious services, and established places of worship called "churches." Counsel stated that "[t]here is no formal affiliation between [REDACTED] and [the petitioner]. Both however, believe as its core creed the statements above." There is nothing in the record to support counsel's statement. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's statements are reiterated in an undated letter signed by the petitioner's pastor, [REDACTED]. The petitioner again submitted no other documentation to establish that it is of the same denomination as the [REDACTED]. 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)). Furthermore, it submitted no evidence that the two organizations are governed or administered under a common type of ecclesiastical government, as provided by the regulation at 8 C.F.R. § 214.2(r)(3).

Accordingly, the petitioner has failed to establish that the beneficiary was a member of its religious denomination for two full years prior to the filing of the visa 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 (9<sup>th</sup> 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).

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The petition will be denied 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.