

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
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

[REDACTED]

813

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **DEC 17 2010**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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
Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner seeks to classify the beneficiary as a nonimmigrant religious worker pursuant to section 101(a)(15)(R)(1) of the Act to perform services as a granthi (assistant priest). The director determined that the petitioner had not established that it qualifies as a bona fide nonprofit religious organization.

The director also determined that the petitioner had not maintained the R-1 nonimmigrant religious worker employment status previously approved and that the beneficiary had violated the terms of his visa by working for the petitioner. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 214.2(r)(12) requires that any request for an extension of stay as an R-1 must include initial evidence of the previous R-1 employment (including Internal Revenue Service (IRS) documentation if available). The regulation at 8 C.F.R. § 214.1(e) states that a nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act. Under 8 C.F.R. § 214.2(r)(5), extension of status is available only to aliens who maintain R-1 status.

The issues of the beneficiary's prior employment and maintenance of R-1 status are significant only insofar as they relate to the application to extend that status. An application for extension is concurrent with, but separate from, the nonimmigrant petition. There is no appeal from the denial of an application for extension of stay filed on Form I-129, Petition for a Nonimmigrant Worker. 8 C.F.R. § 214.1(c)(5). Because the beneficiary's past employment and maintenance of status are extension issues, rather than petition eligibility issues, the AAO lacks authority to decide those questions, and they will not be further addressed in this decision.

On appeal, counsel asserts that the director erred in determining that the petitioner was not a bona fide nonprofit religious organization and that the petitioner should not be penalized for the delay in the IRS processing of its application for nonprofit status. The petitioner submits additional documentation in support of the appeal.

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 issue presented is whether the petitioner has established that it is a bona fide nonprofit tax-exempt religious organization.

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 Internal Revenue Code [IRC].” Additionally, 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.

With the petition, filed on February 12, 2010, the petitioner submitted a January 15, 2010 letter from the IRS in which it advised the petitioner that the IRS needed more information before it could complete its consideration of the petitioner's application for exemption. The letter further advised the petitioner that its articles of incorporation did not meet the IRS test to qualify for exemption under section 501(c)(3) of the IRC and that it needed to provide information that was omitted from Schedule C of IRS Form 1023, Application for Recognition of Exemption Under Section 501(c)(3). The petitioner submitted no other documentation to establish its status as a nonprofit, tax-exempt religious organization.

In a request for evidence (RFE) dated April 20, 2010, the director informed the petitioner of the requirements of the regulation and instructed the petitioner that documentation of its tax-exempt status from the IRS was required as initial evidence for processing its petition. In response, counsel stated:

[The petitioner] is awaiting final determination on their tax-exempt status from the IRS. They have filed all the necessary paperwork, fulfilled all requirements, and submitted all documents requested by the IRS. . . .

The [petitioner] and its officers have made numerous attempts to expedite the IRS' final determination. They were told that the contact person at the IRS for their tax exemption application is currently on vacation, and have been unable to speak to any person who can take action on their application. All they have been told is that everything they needed to submit has been received by the IRS.

The petitioner also submitted a copy of a March 2, 2010 letter from the IRS advising the organization that additional information was needed before the application for exemption could be completed. The requested additional documentation included evidence of its budgets and a "file stamped copy" of its amended articles showing that they were filed with the State of Texas. The petitioner submitted a copy of a message from [REDACTED] the official who signed the Form I-129 on behalf of the petitioner, who stated that the organization's calls to IRS had not been answered and no one returned their calls. The record does not, however, support counsel's assertions that the petitioner had submitted all of the required documentation to the IRS, that the individual who was processing the petitioner's application was on vacation, and no other IRS officer could assist the petitioner. 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).

Regardless, the petitioner did not submit a currently valid letter from the IRS establishing its tax-exempt status under section 501(c)(3) of the IRC as required by the regulation. Therefore, the director determined that the petitioner had not established that it is a bona fide, nonprofit religious organization and denied the petition.

On appeal, counsel asserts that the director erred in her decision and that the petitioner has operated as a bona fide nonprofit religious organization since its formation. The petitioner submits an undated and unsigned copy of its bylaws and an unsigned copy of a February 19, 2010 amendment to its articles of incorporation, indicating that it was organized exclusively for charitable, religious, educational or scientific purposes under section 501(c)(3) of the IRC and the distribution of its assets upon dissolution. We note that the IRS requires the language included in the petitioner's amendment in order to classify an organization as tax-exempt under section 501(c)(3). See IRS Publication 557, *Tax-Exempt Status for Your Organization*. The petitioner also submits an August 18, 2010 letter in which it states that it first applied for tax-exempt status from the IRS in October 2009 but as of the date of the letter, had not received the approved application. Finally, on November 24, 2010, the petitioner provided a copy of an October 29, 2010 letter from the IRS granting it tax-exempt status as a religious organization.

Counsel argues that the petitioner complied with all requests from the IRS and "made every reasonable attempt that could be expected of a newly formed religious organization to obtain tax-exempt status." Counsel further argues:

This unreasonably harsh interpretation of the immigration regulations ensures that all newly formed religious organizations will be held captive and be unable to petition for much needed priests during unreasonably long delays by the IRS in approving their tax-exempt applications.

The requirement for a determination letter from the IRS is not an "interpretation" of the regulation. The regulation at 8 C.F.R. § 214.2(r)(9) clearly requires that, as part of the initial evidence submitted in support of this petition for a nonimmigrant worker, the petitioner provide a copy of a currently valid letter from the IRS to establish that it is a nonprofit tax-exempt organization. Although the petitioner alleges that it filed for the exemption in October 2009, it chose to file the petition in February 2010 without first receiving the letter from the IRS. Documentation submitted with the petition indicates that the petitioner failed to provide all of the necessary documentation to the IRS to enable it to make a determination of the petitioner's tax-exempt status. The IRS issued two requests for additional documentation, the latter requesting information that was also included in the first request. Accordingly, the petitioner's attempt to place responsibility for the delay in processing its application on the IRS is without merit.

Counsel asserts that “USCIS has previously granted R-1 petitions without a valid IRS determination letter” and that “[e]xceptions should be made in the case of unreasonable delay by the IRS and for newly formed religious organizations.” As discussed above, we find no merit in the petitioner’s argument that the IRS unreasonably delayed the petitioner’s application. Regardless, the regulation provides for no exception to the requirement for a currently valid letter from the IRS. The IRS letters of January 15, 2010 and March 2, 2010 to the petitioner clearly indicate that the petitioner had not established its eligibility as a non-profit tax-exempt organization at the time the petition was filed.

On appeal, the petitioner submits a letter from the IRS granting it tax-exempt status. However, 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 of filing, the petitioner submitted no evidence of a currently valid determination letter from the IRS. In response to the RFE, the petitioner submitted documentation from the IRS indicating that it had not provided sufficient documentation for the IRS to make a decision regarding its tax-exempt status. 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). Further, as the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, we will not accept this new evidence on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal has been adjudicated based on the record of proceeding before the director.

We concur with the director’s determination that the petitioner failed to establish that it is a tax-exempt organization as required by the regulation at 8 C.F.R. § 214.2(r)(9).

Finally, counsel asserts that the denial of the Form I-129 petition violates the First Amendment rights of the petitioner’s members. Counsel argues:

The [petitioner’s] congregation would not be able to practice their religion if [the beneficiary’s] R-1 visa extension was denied. . . . Before [the beneficiary’s] arrival, local lay volunteers conducted religious services, but they found it very difficult to properly practice their faith without the guidance of a trained priest. That is why [the petitioner] brought over [the beneficiary] in October 2008, and to not allowing [sic] him to stay on would prevent the [petitioner’s] congregation from practicing their faith as the [C]onstitution guarantees.

Counsel’s argument is not persuasive. The petitioner has provided no evidence that the beneficiary is the only person who can lead its congregation. Additionally, the proffered position is that of assistant priest, indicating that position is not the primary religious leader within the organization.

Furthermore, nothing in the Constitution guarantees the right to have a particular individual as a religious leader or that the United States must permit any individual within its borders, especially in violation of its laws, so that a particular group can practice its religion as it believes it must.

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.