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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

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date OCT 04 2010

IN RE:

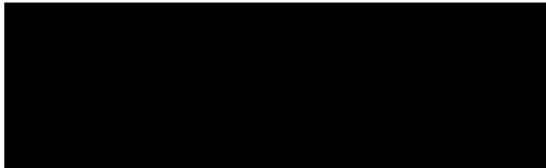
Petitioner:



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.

Thank you,

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 AAO will remand the matter for further consideration action, including a new decision.*

The petitioner is an Evangelical Christian church. It seeks to classify the beneficiary as a nonimmigrant religious worker under section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1), to perform services as a world missions director. The director determined that the petitioner had not established that the beneficiary belonged to the petitioner's religious denomination for at least two years immediately prior to the filing of the petition.

On appeal, counsel argues that the beneficiary has belonged to the petitioning church, and therefore its denomination, for several years.

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.

U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 214.2(r)(1) state 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;
- (ii) Be coming to the United States to work at least in a part time position (average of at least 20 hours per week);
- (iii) Be coming solely as a minister or to perform a religious vocation or occupation as defined in paragraph (r)(3) of this section (in either a professional or nonprofessional capacity);
- (iv) Be coming to or remaining in the United States at the request of the petitioner to work for the petitioner; and
- (v) Not work in the United States in any other capacity, except as provided in paragraph (r)(2) of this section.

The petitioner filed the Form I-129 petition on August 11, 2008. The director denied the petition on May 12, 2009, stating that the petitioner had not established that the beneficiary met the denominational membership requirement defined by the regulation at 8 C.F.R. § 214.2(r)(3).

The director reopened the petition on September 14, 2009, and withdrew the sole ground for denial from the May 2009 decision, while informing the petitioner of the director's intent to deny the petition on other grounds. We agree with the director's decision to withdraw the original ground (relating to the beneficiary's denominational membership). The director's September 2009 notice, however, has raised other procedural issues.

On the front page of the September 2009 notice, the director treated the petitioner's appeal as a motion, in accordance with 8 C.F.R. § 103.3(a)(2)(v)(B)(2). That regulation, however, relates to untimely appeals. In this instance, the director correctly observed that "[t]he appeal was filed timely." Counsel has protested that the director had no authority to reopen the petition in order to issue a notice of intent to deny the petition on new grounds. Counsel contends that the regulation at 8 C.F.R. § 103.3(a)(2)(iii) permits the adjudicating officer to treat a timely appeal as a motion only if the adjudicator intends "to take favorable action," *i.e.*, to approve the petition. We disagree with counsel. The official who denied an application or petition may treat the appeal from that decision as a motion for the purpose of granting the motion. 8 C.F.R. § 103.5(a)(8). In this instance, the director did grant the motion, reopening the petition and withdrawing the original basis for denial. To this extent, the director's action was procedurally correct.

The director also, however, stated "a new decision has been rendered. . . . Please see the attached decision." The attached notice, however, was not a decision at all. Rather, it was labeled "Notice of Intent to Deny" and worded as such, with a blue cover sheet labeled "Response to an Intent to Deny." The blue cover sheet stated that the petitioner had "until October 14, 2009 in which to submit the

required information.” The director then forwarded the record to the AAO for appellate review, apparently in response to counsel’s protest that the director had no basis to reopen the proceeding. Thus, the director has reopened the petition, and issued a new notice of intent to deny the petition, but the director has not yet issued a new decision. The proceeding, therefore, remains open, and the petition is still pending. The director must issue a new decision before the AAO can issue its final decision.

We note that, in the notice of intent to deny the petition, the director cited the regulation at 8 C.F.R. § 214.2(r)(9)(i), which requires the petitioner to submit a currently valid determination letter from the Internal Revenue Service (IRS) showing that the organization is a tax-exempt organization. The director acknowledged that the petitioner had executed IRS Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code. The director, however, observed that an official of the petitioning entity signed this application on December 29, 2008, several months after the petition’s August 11, 2008 filing date. The director cited the regulation at 8 C.F.R. § 103.2(b)(1), which requires the petitioner to establish eligibility as of the petition’s filing date. Because the petitioner did not apply for IRS recognition until after the filing date, the director concluded that the petitioner did not possess the qualifying documentation of tax-exempt status as of the filing date.

The petitioner has since submitted a copy of an IRS determination letter dated February 16, 2010. As counsel notes, the letter shows the “Effective Date of Exemption” as February 18, 2005, meaning that the letter applies retroactively to that date.

We acknowledge the general principle that a petitioner must meet eligibility requirements as of the petition’s filing date, and that normally a petitioner cannot retroactively meet those requirements after the filing date. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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 (Regl. Commr. 1978). *See also Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998) (A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements.)

Special circumstances apply here, however. As the director has acknowledged, the requirement that the petitioner submit an IRS letter first appeared in revised regulations published on November 26, 2008. When the petitioner filed the petition in August 2008, those new regulations were not yet in effect. Once the director advised the petitioner of the new documentary requirement in correspondence dated December 1, 2008, the petitioner took prompt action to obtain the newly required IRS letter. While the petitioner did not yet have an IRS determination letter at the time of filing, we cannot fairly fault the petitioner for failing to anticipate a future change in the regulations. Also, because the IRS letter is retroactive to 2005, it is clear that the IRS considers the petitioner to have been a qualifying tax-exempt organization as of the August 2008 filing date. We ask that the director take these circumstances into account when considering the issue of the petitioner’s tax-exempt status.

The director raised a second issue in the notice of intent to deny the petition, relating to the apparently administrative (and therefore secular) nature of the beneficiary's work, which could indicate that the beneficiary's position does not meet the regulatory classification of a religious occupation at 8 C.F.R. § 214.2(r)(3). To date, the petitioner has offered no substantive response to this issue, because counsel has focused solely on the procedural objection to the reopening of the petition. The AAO considers the procedural issue to be resolved.

Therefore, the AAO will remand this matter to the director. The director, having reopened the proceeding and issued a notice of intent to deny the petition, must now issue a new decision. In addition, the director has the discretion to request any additional evidence deemed warranted. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.