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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

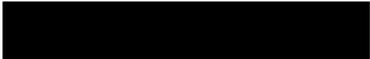
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Date: DEC 08 2011

Office: CALIFORNIA SERVICE CENTER

FILE: 

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The decisions of the director and the AAO will be withdrawn and the petition will be remanded for further action and consideration.

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 U.S. Citizenship and Immigration (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner is an Islamic school. It seeks to extend the beneficiary's status as a nonimmigrant religious worker pursuant to section 101(a)(15)(R)(1) of the Act to perform services as a teacher. 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 AAO affirmed the director's decision on appeal.

On motion, counsel asserts that the AAO "erred by failing to recognize the automatic tax exempt status of the petitioner conferred by law," that requiring an Internal Revenue Service (IRS) determination letter to prove tax-exempt status exceeds the scope of the statute governing immigration benefits for religious workers, that the regulations allowed for an alternative means for providing tax-exempt status, and that the decision "impermissibly burdens the separation of Church and State." Counsel submits a brief in support of the motion. Subsequent to the motion, the petitioner also submits a March 4, 2011 letter from the IRS.

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].” 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.

Counsel argues that section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), requires proof of tax-exempt status only as it applies to organizations affiliated with the religious denomination and then only for nonprofessional workers. Therefore, counsel argues, the requirement that a petitioner provide proof of tax-exemption exceeds the scope of the statute, is ultra vires and therefore void.

According to counsel, in cases other than nonprofessionals working for an affiliated organization, the statute requires a petitioner to establish only that it is a nonprofit organization and not that it is tax-exempt. Counsel's argument is without merit. For IRS purposes, the two terms are generally the same. While an organization does not have to be a nonprofit to be recognized as tax-exempt, a nonprofit organization must be recognized as tax-exempt under federal taxation laws. See "Applying for Exemption – Difference Between Nonprofit and Tax-exempt Status," at <http://www.irs.gov/charities/article/0,,id=136195,00.html>, accessed on November 3, 2011, a copy of which has been incorporated into the record.

Counsel further argues that "the petitioner submitted ample proof of its status as a nonprofit organization eligible for tax-exempt status under IRC § 501(c)(3)." Nonetheless, the petitioner did not submit a currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization as required by the regulation at 8 C.F.R. § 214.2(r)(9)(i). Counsel argues that the AAO erred "in relying solely upon over-broad regulatory requirements that exceed the scope of the statute."

Counsel's argument is not persuasive. The wording of the relevant legislation demonstrates Congress' interest in USCIS regulations. Section 2(b)) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008), reads in pertinent part:

Regulations – Not later than 30 days after the date of the enactment of this Act, the Secretary of Homeland Security shall –

- (1) issue final regulations to eliminate or reduce fraud related to the granting of special immigrant status for special immigrants described in subclause (II) or (III) of section 101(a)(27)(C)(ii) of the Immigration and Nationality Act (8 U.S.C.) 1101(a)(27)(C)(ii).

When USCIS published the new rule in November 2008, it did so in accordance with explicit instructions from Congress. Supplementary information published with the new rule 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).

Furthermore, the October 2008 legislation extended the special immigrant nonminister religious program only until March 5, 2009. From the wording of the statute, it is clear that this extension was so short precisely because Congress sought to learn the effect of the new regulations before granting a longer extension. Congress has since extended the life of the program three times.¹ On any of those occasions, Congress could have made substantive changes in response to the regulations they requested, but Congress did not do so. Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). We may therefore presume that Congress has no objection to the new regulations as published, or to USCIS' interpretation and application of those regulations.

Counsel also argues that “despite their over-broad approach, the regulations contemplate alternative means of proof of tax-exempt status,” which the petitioner has provided. Counsel cites to the regulation that was in effect in 2007 when the petition was filed. Counsel further argues that the prior regulation “follows the statute” in that it did not require a determination letter from the IRS but permitted proof by “any appropriate means.”

As the petition was pending on November 26, 2008, it is subject to new regulations promulgated on that date which requires submission of an IRS determination letter. See 73 Fed. Reg. at 72285 Counsel argues that similar to not requiring a passport to prove citizenship, an organization does not have to provide an IRS determination letter to prove that it is tax exempt. Counsel further argues:

What the petitioner produced trumps a mere letter. It is a statutory determination by Congress that religious organizations are exempt from taxation on their religious activities. This is automatic, and the AAO grudgingly acknowledges it. This automatic tax-exempt status springs from the Constitutional separation of Church and State in the First Amendment. It starts immediately upon the inception of the organization and continues. The Federal Government is prohibited from imposing restrictions upon religious institutions that prevent the free exercise of religion.

Counsel's argument is again unpersuasive. First, the IRS does not grant automatic exemptions to all religious organizations. See, e.g., IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*, in which the IRS distinguishes between churches and their integrated auxiliaries and other religious organizations. Further, as the AAO stated in its previous decision, the regulations governing immigration under the purview of USCIS and those governing federal taxation under the purview of the IRS serve two different purposes. While IRS regulations may provide automatic exemption for churches for the purpose of determining whether such an organization is required to file a tax return and pay taxes, the USCIS regulation offers no such

¹ Pub. L. No. 111-9 § 1 (March 20, 2009) extended the program to September 29, 2009. Pub .L. No. 111-68 § 133 (October 1, 2009) extended the program to October 30, 2009. Pub .L. No. 111-83 § 568(a)(1) (October 28, 2009) extended the program to September 29, 2012.

exemption for those organizations who seek benefits under immigration laws. An IRS determination letter is only one tool in determining an organization's eligibility for benefits under immigration laws. While a currently valid letter from the IRS recognizing an organization as tax-exempt 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.

Counsel provides no evidence to establish how a requirement to prove nonprofit status as required by the statute interferes with an organization's ability to practice its religion. By extension of this argument, the United States would be constitutionally prohibited from establishing any limits on immigration if the organization alleges it is a religious activity. This position is clearly at odds with the interest of United States in protecting its borders.

Subsequent to the motion, the petitioner submitted a copy of a March 4, 2011 letter from the IRS, advising the petitioner that it was granted tax-exempt status under section 501(c)(3) as an organization described in section 170(b)(1)(A)(ii) of the IRC. The AAO notes that at the time the petition was filed on December 10, 2007, the applicable regulations did not require the submission of a certification letter from the IRS. As previously discussed, new regulations established this requirement while the petition was pending before USCIS, therefore the petitioner was subject to the new evidentiary requirements. Supplementary information published with the new rule 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).

However, in her NOID of January 29, 2009, the director did not notify the petitioner of the new requirement and provide the petitioner with sufficient opportunity to provide the newly required evidence. Documentation in the record indicates that the petitioner filed for tax-exempt status with the IRS in February 2009 before the director issued her March 19, 2009 decision. Because the director did not provide the petitioner with a reasonable period in which to submit the IRS documentation, the AAO will accept the letter from the IRS submitted subsequent to the motion. Accordingly, the AAO finds that the petitioner has submitted sufficient documentation to establish that it is a bona fide nonprofit religious organization.

Nonetheless, the petition may not be approved as the record now stands.

First, the regulation at 8 C.F.R. § 214.2(r)(8) requires the petitioner to submit a detailed attestation regarding the petitioner, the beneficiary, the job offer, and other aspects of the petition. The record does not contain this attestation. On remand, the director shall provide the petitioner with an opportunity to comply with the provisions of 8 C.F.R. § 214.2(r)(8).

Additionally, the regulation at 8 C.F.R. § 214.2(r)(16) provides:

Inspections, evaluations, verifications, and compliance reviews. 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, or 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.

The record does not reflect that the petitioner has successfully completed a compliance review. On remand, the director shall determine whether an additional compliance review, onsite visit, or other verification under 8 C.F.R. § 214.2(r)(16) is appropriate.

Accordingly this matter will be remanded for the director to address the issues as discussed above. The director may request any additional evidence deemed warranted and if so, should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. 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 motion is granted. The decisions of the director and the AAO are 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 AAO for review.