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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

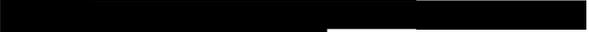


U.S. Citizenship
and Immigration
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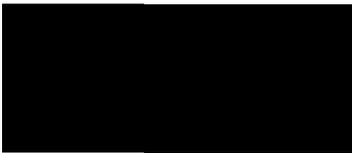
D13

DATE: **FEB 09 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

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 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, 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 dismiss the appeal.

The petitioner is a member church of the Russian Orthodox Church Outside Russia. 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 choir director. The director determined that the petitioner had failed to submit required evidence of its tax-exempt status, and that the beneficiary had worked without authorization.

On appeal, the petitioner submits a brief from counsel and several supporting exhibits.

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 U.S. Citizenship and Immigration Services (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;

- (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.

One of the two stated grounds for denial concerns unauthorized employment by the beneficiary, who was an F-1 nonimmigrant student at the time the petitioner filed the petition. Under the USCIS regulation at 8 C.F.R. § 248.1(a), an alien must maintain status in order to qualify for change of nonimmigrant status. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status. 8 C.F.R. § 214.1(e). Therefore, the beneficiary's unauthorized employment would disqualify him from changing to R-1 nonimmigrant status. This issue, however, lies outside the AAO's appellate jurisdiction, because it is a change of status issue rather than a petition issue. *See* 8 C.F.R. § 248.3(g).

The AAO can, however, review the other stated ground for denial, concerning the petitioner's submission of required Internal Revenue Service (IRS) documentation. The USCIS regulation at 8 C.F.R. § 214.2(r)(9) states that 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.

The instructions to Form I-129 quote the above regulations, including the requirement that the petitioner provide "a currently valid determination letter from the IRS."

The petitioner filed the Form I-129 petition on July 23, 2009. The petitioner's initial submission included a copy of a December 8, 2008 letter from Father [REDACTED] rector of the petitioning church, stating that the petitioner "is a bona-fide and fully active corporation, having a tax-exempt non-profit status in the state of New Jersey." The petitioner also submitted a copy of an Exempt

Organization Certificate, dated December 2, 2008, from the State of New Jersey. This is a state document, not issued by the IRS, and it does not confer exemption from federal income tax.

The only IRS documentation in the petitioner's initial submission is a July 3, 2008 letter, with the salutation "Dear Taxpayer," confirming the petitioner's Employer Identification Number (EIN) as [REDACTED]. The letter does not mention tax-exempt status, and the issuance of an EIN is an entirely separate matter from tax exemption.

On September 7, 2010, the director issued a request for evidence (RFE), instructing the petitioner to submit, among other things, evidence of "Federal tax exempt status in the form of a signed letter from the Internal Revenue Service." The director mailed the RFE directly to the petitioner's own address.

The envelope containing the petitioner's response showed the church's address as the return address, but bore a Flushing, New York postmark. In that response, Father [REDACTED] stated: "**Federal Tax Exempt Status:** Evidence of our federal ID number [REDACTED] is confirmed by the 2 letters attached, one from IRS Service and the other from our certified Accountant" (emphasis in original).

Accountant [REDACTED] stated that the petitioner "fall[s] within the guidelines of Sec. 501 (c) (3) as a religious organization and [is] therefore automatically exempt."

The petitioner resubmitted a copy of the July 3, 2008 IRS letter, which relates to the petitioner EIN, not to its tax-exempt status. That the letter's salutation reads "Dear Taxpayer" is evidence enough that the letter is not, on its face, evidence of tax-exempt status. The IRS issues EINs to tax-exempt and taxable entities alike.

The director denied the petition on January 18, 2011. The director quoted the regulation at 8 C.F.R. § 214.2(r)(9) and stated:

On September 7, 2010, the petitioner was requested to provide a currently valid determination letter from the Internal Revenue Service (IRS) confirming their organization is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code. . . .

On November 24, 2010, the petitioner responded to the request for evidence, but did not submit the requested evidence. . . .

The petitioner did not submit either a valid determination letter from the Internal Revenue Service establishing that the organization is a tax-exempt organization or a valid determination letter from the IRS establishing that the petitioner is recognized as tax-exempt under a group tax-exemption. The petitioner did not provide requested evidence to establish that the petitioner qualifies as a bona fide religious organization.

On appeal, counsel states:

In order to prepare the paperwork for the immigration case, the Petitioner and the Beneficiary retained services of [REDACTED] who represented himself as one of the most experienced immigration attorneys. At that time, neither Petitioner nor Beneficiary were aware of the fact that [REDACTED] had been arrested, charged with immigration fraud and, as a result of the conviction, was subsequently expelled from practice before any immigration tribunal.

. . . Both Petitioner and the Beneficiary fully trusted [REDACTED] because he presented himself as the most experienced attorney in the field, and provided him with all requested documents without questioning or doubt.

. . . [REDACTED], acting without due diligence, did not obtain a letter from the IRS confirming the Petitioner's tax-exempt status.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The petitioner has submitted a statement from church warden [REDACTED] certified under penalty of perjury. This certified statement appears to be comparable to the affidavit required to fulfill the first part of the [REDACTED]. The petitioner has not, however, shown that it has informed [REDACTED] of the allegations against him, or that the petitioner has filed a grievance against [REDACTED] (or explained its failure to do so). The AAO notes that, while [REDACTED] is not permitted to practice before immigration authorities, he remains registered as an active attorney with the New York State Unified Court System.

The AAO notes that the record does not contain Form G-28, Notice of Entry of Appearance as Attorney or Representative, to indicate that [REDACTED] ever formally acted as the petitioner's attorney in this proceeding. The retainer agreement was between [REDACTED] and the beneficiary; the petitioner was not a party to the agreement.

The record contains no direct evidence that [REDACTED] prepared the Form I-129 petition. [REDACTED], under the title "church counsel," signed Part 6 of the Form I-129 petition. Part 7, "Signature of person preparing form, if other than above," is blank. The implication is that [REDACTED]

Levitsky, not ██████████ prepared the petition form (the instructions to which quote from the regulations, clearly listing an IRS determination letter among the required evidence).

The mailing envelope that contained the Form I-129 and supporting documents shows the return address of the petitioning church, not ██████████. The director addressed the September 2009 request for evidence directly to the petitioner, at its physical address. That request for evidence clearly stated that an IRS determination letter was required evidence. The director, therefore, exercised due diligence by notifying the petitioner directly of the deficiency in the record.

The director did not send the RFE to ██████████ because no one had informed the director of Mr. ██████████ involvement in the proceeding. The mailing envelope that contained the petitioner's response shows the return address of the petitioning church. Like the initial petition, the response to the notice contains no mention of ██████████. The response to the RFE included statements from officials of the petitioning entity, demonstrating that the petitioner was aware of the RFE. The petitioner has not submitted any evidence to establish the nature or extent of the petitioner's communication with ██████████ in connection with the RFE or, indeed, any direct evidence that ██████████ was still involved with the matter at the time of the RFE.

Whatever the nature of ██████████ activities in this proceeding, the petitioner itself was repeatedly in possession of USCIS materials (the request for evidence and, earlier, the instructions to the petition form itself) that specified the evidence necessary to establish eligibility.

The submission of IRS documentation on appeal would overcome a finding that the petitioner is not tax-exempt. The director, however, did not make such a finding. Instead, the director found that the petitioner had failed to submit required documentary evidence in response to an RFE. To overcome this finding, it cannot suffice for the petitioner to submit evidence on appeal that it should have submitted when the director first requested it. Rather, the petitioner may only overcome such a finding by showing that it previously submitted the material upon request, and that the director mistakenly found otherwise, or that the missing evidence was not, in fact, required.

USCIS regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether the petitioner has established eligibility for the benefit sought. *See* 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, the director has notified the petitioner of a deficiency in the evidence and given the petitioner an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO may not consider the evidence submitted on appeal.

The petitioner does not dispute the director's finding that the petitioner failed to submit required evidence in response to an RFE. For reasons explained above, the petitioner cannot overcome this finding with a partial [REDACTED] claim based on the claimed actions of an attorney who appears to have concealed his involvement from USCIS. Consequently, the AAO will dismiss the appeal.

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 AAO will dismiss the appeal.

ORDER: The appeal is dismissed.