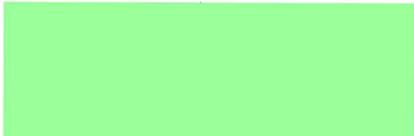


(b)(6)

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



Date: **APR 30 2013** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

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

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to extend the beneficiary's classification beneficiary as a nonimmigrant religious worker pursuant to section 101(a)(15)(R) of the Act to perform services as a "gabbai." 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).

Counsel asserts on appeal that the director "erred in denying the request for R-1 classification for the beneficiary by ignoring the automatic tax exemption for churches without the need to file for designation as a 501(c)(3) exempt organization" and that "the statute at INA section 101(a)(15)(R) makes no mention of a need to possess a determination letter from the Internal Revenue Service (IRS), but rather only states that the religious organization must be a bona fide nonprofit organization." Counsel submits a brief and 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 [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.

With the petition, filed on May 1, 2012, the petitioner submitted a copy of a May 22, 2009 letter from the IRS advising the petitioner of its employee identification number (EIN). The letter advised the petitioner that “An EIN does not indicate that a non-profit organization is tax-

exempt. Organizations that want to be recognized as exempt from Federal income tax must file Form 1023 or Form 1024, with limited exceptions.” The letter further states:

Churches, their integrated auxiliaries, and conventions or associations of churches that meet the qualifications for exemption are automatically considered tax exempt under section 501(c)(3) of the Code without applying for formal recognition of such status. No determination letters are issued to those organizations. Refer to Publication 1828, Tax Guide for Churches and Religious Organizations, Publication 557, Tax Exempt Status for Your Organization, and our website . . . for the organizational and operational requirements if you feel you meet these requirements.

The petitioner also submitted a copy of what counsel describes as its constitution and bylaws.

In a September 27, 2012 request for evidence (RFE), the director instructed the petitioner to submit documentation in accordance with the above-cited regulation to establish that it is a bona fide nonprofit religious organization. In response, the petitioner resubmitted a copy of the May 22, 2009 letter from the IRS and an excerpt from IRS Publication 1828, on which the following language is highlighted: “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.” The petitioner also submitted a copy of a March 3, 2010 letter from a certified public accountant (CPA), in which she stated that the petitioner “has a 50 plus year history as a Church (Jewish Congregation) and operates exclusively for religious purposes and thus meets the IRS requirements for automatic exemption for churches.” The petitioner submitted a similar letter signed by its secretary.

The director denied the petition, stating:

Although the Service does not dispute the IRS’s interpretation of its own requirements, in the present proceeding the petitioner seeks a benefit not from the IRS, but from USCIS [U.S. Citizenship and Immigration Services]. The USCIS regulation at 8 C.F.R. § 214.2(r)(9) requires the petitioner to submit an IRS determination letter confirming it is tax exempt under IRC section 501(c)(3).

On appeal, counsel asserts:

[The petitioner] contacted the IRS and requested a determination letter. The IRS advised [the petitioner] that “No determination letters are issued to . . . organizations” which are automatically considered tax exempt under section 501(c)(3) of the [IRC. The petitioner] complied with every item in the September 27, 2012 [RFE]. More significantly, [the petitioner] supplied the Director with a copy of the IRS correspondence, thereby advising the Director of the impossibility of obtaining a determination letter.

A November 29, 2012 letter from the IRS indicates that it is in response to the petitioner's "request for information regarding [its] tax-exempt status." The letter further advised the petitioner that the IRS had "no record that you are recognized as exempt from Federal income tax under [IRC] section 501(a)." The letter repeats that churches are automatically considered tax exempt under section 501(c)(3) and again refers the petitioner to IRS Publications 1828 and 557.

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. The AAO notes that while IRS Publication 1828<sup>1</sup> states that churches "are automatically considered tax exempt and are not required to apply for and obtain recognition of tax-exempt status from the IRS," the publication also includes the following advisory:

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.

Thus, 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. IRS Publication 1828 provides detailed guidance on how to obtain a determination letter and applies equally to churches as to other religious organizations.

According to IRS Publication 557, an organization must meet the requirements of section 501(c)(3) to be automatically exempt from income tax, and one of the reasons for choosing to file the Form 1023 is to receive IRS recognition of the organization as a church.<sup>2</sup> Therefore, counsel's assertion that it is impossible for the petitioner to obtain the required determination letter from the IRS is without merit. Further undermining counsel's argument is that, on appeal, the petitioner submits a copy of the IRS Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, that it filed with the IRS on November 30, 2012, and in supplemental documentation submitted after the appeal was filed, the petitioner submits a copy of a February 22, 2013 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 indicated that the "effective date" of the exemption is June 18, 2010.

Counsel asserts in a supplemental brief that "the effective date of the exemption is June 18, 2010, thus valid at the time [of] the filing of the requested classification on April 30, 2012." However, a review of the record indicates that the IRS made this exemption effective as of the date the

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<sup>1</sup> IRS Publication 1828 at page 3, incorporated into the record of proceeding.

<sup>2</sup> IRS Publication 557 at page 26; incorporated into the record of proceeding.

petitioner stated that it was incorporated. There is nothing in the record to reflect that the petitioner had a valid determination letter from the IRS at the time it filed the petition or at the time it responded to the RFE. 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. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Pursuant to 8 C.F.R. § 214.2(r)(9), a currently valid determination letter shall be included as initial evidence. In the record as constituted before the director, the petitioner failed to submit this evidence. Accordingly, the AAO finds no error on the part of the director.

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.

Counsel argues that the requirement to submit an IRS determination letter is *ultra vires* to the Act. Citing *Mejia v. Gonzales*, 499 F.3d 991 (9<sup>th</sup> Cir. 2007) and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), counsel asserts:

Congress clearly set forth the requirements for a religious organization to establish "bona-fide non profit status," and the Director's reliance on the regulation at 8 C.F.R. § 214.2(r)(9) is misplaced and unnecessary for the adjudication of the instant petition. Specifically, 8 C.F.R. § 214.2(r)(9) grafts an additional requirement on a religious organization, beyond the scope of what is required according to INA § 101(a)(15)(R).

Counsel's argument is not persuasive. In *Chevron*, the Supreme Court stated:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Counsel asserts that “INA § 101(a)(15)(R) simply requires a church, synagogue or mosque to produce and submit documentation establishing its’ bona-fides as a religious organization, for purposes of the non-profit tax exempt requirement.” However, the Act does not set forth any documentation that an organization may use to establish its bona fides as a nonprofit religious organization and does not distinguish between a church, synagogue, mosque or any other religious organization. The Act states only that a prospective employer must be a bona fide nonprofit religious organization. Accordingly, as Congress has not explicitly spoken to this issue, USCIS has properly exercised its authority in its implementing regulations for section 101(a)(15)(R)(1) of the Act. Therefore, the petitioner has not shown that the first prong of *Chevron* is applicable in the instant proceeding.

Counsel states that the director acknowledges that the IRS does not require a church to request a determination letter in order to qualify for tax-exempt status. Counsel then asserts:

Accordingly, the Director reasons any established religious body is considered to be tax exempt, concedes that a “determination letter” is not necessary to demonstrate tax-exempt status, then denied [the petitioner’s] application for lack of “an IRC section 501(c)(3) determination letter. . . . [T]he Director’s reading of the regulation requires additional paperwork, supplied by a different agency, and where the policy of the agency is that the documentation the Director requests is unnecessary.

The AAO is not persuaded by counsel’s characterization of the director’s findings. The director’s decision reveals no suggestion that “any established religious body is considered tax exempt.” Furthermore, the director does not “concede” that an IRS determination letter is unnecessary for the purpose of establishing tax-exempt status for purpose of obtaining immigration benefits under section 101(a)(15)(R) of the Act. In fact, the director specifically stated that the petitioner sought “a benefit not from the IRS, but from USCIS,” and that the “USCIS regulation at 8 C.F.R. § 214.2(r)(9) requires the petitioner to submit an IRS determination letter confirming it is tax exempt under IRC section 501(c)(3).”

Counsel further argues:

In *Lain v. UNUM Life Insurance Company of America*, 279 F. 3d 337 (5<sup>th</sup> Cir. 2007), the Fifth Circuit stated “a decision is arbitrary when made “without a rational connection between the known facts and the decision or between the found facts and the evidence.”. . . Nowhere in the Decision does the Director dispute that [the petitioner] is a religious organization within the meaning of INA 101(a)(15)(R). The record is replete with a history of the synagogue and worship community, [the petitioner’s] financial records, a membership list, and monthly congregational newsletters. The record shows [the petitioner] is qualified, tax exempt religious organization.

Counsel's argument is not persuasive. The director's only ground for denial is that the petitioner failed to establish that it is a bona fide nonprofit religious organization under section 101(a)(15)(R) of the Act as defined by the implementing regulation. The Court in *Chevron* stated:

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulations. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometime the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. *Chevron*, 467 U.S. at 842-844 (footnotes omitted).

Therefore, whether USCIS could have required different documentation to establish the petitioner's bona fides as a nonprofit religious organization is not the issue. The question is whether the USCIS requirement is "arbitrary, capricious, or manifestly contrary to the statute." Counsel's argument centers on the fact that the IRS does not require a church to seek official determination from the IRS to establish that it is a 501(c)(3) exempt organization. However, as previously discussed, 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. A statement accompanying the implementation of the current regulations governing special immigrant religious worker petitions provided:

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. . . . A requirement that petitioning churches 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.

The petitioner has provided no substantive legal argument and submitted no documentation to establish that the requirement to submit a currently valid determination letter from the IRS is arbitrary, capricious, or manifestly contrary to the statute.

As previously stated, the petitioner failed to submit required initial evidence before the director. The AAO will not consider this evidence for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The record demonstrates no error on the part of the director in finding that the petitioner has failed to establish that it is a bona fide nonprofit religious organization as defined by the regulation at 8 C.F.R. § 214.2(r)(3).

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.