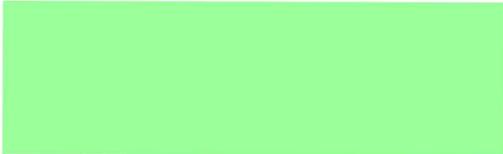




U.S. Citizenship  
and Immigration  
Services

(b)(6)



Date: JUN 14 2013

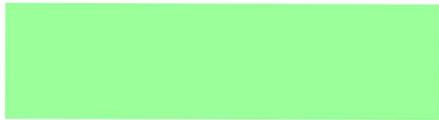
Office: CALIFORNIA SERVICE CENTER

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 in accordance with the instructions on 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 and subsequent motions to reopen and to reconsider. 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 status as a nonimmigrant religious worker pursuant to section 101(a)(15)(R) of the Act to perform services as a religious instructor. 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) or that the position qualifies as that of a religious occupation.

On appeal, counsel asserts that the director dismissed the motions to reopen and to reconsider on a ground other than that that was stated in the denial and thus did not give the petitioner an opportunity to respond to the new ground. Counsel also asserts that in her decision the director stated that the petitioner had submitted sufficient documentation to establish that the position qualifies as that of a religious occupation. 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 Title 26) at the request of the organization in a religious vocation or occupation.

The first 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 [Internal Revenue Service] 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 Form I-129, Petition for a Nonimmigrant Worker, filed on May 29, 2012, the petitioner submitted a copy of a June 22, 2007 letter from the IRS stating that the petitioner had been recognized as a tax-exempt organization under section 501(c)(3) of the IRC as a school under section 170(b)(1)(A)(ii) of the IRC. Because the IRS determination letter cannot, by itself, establish that the petitioner is a religious organization, the petitioner must submit documentation of its affiliation with the denomination as outlined in subsections (B), (C) and (D) of 8 C.F.R.

§ 214.2(r)(9)(iii) listed above. The petitioner completed and signed the religious denomination certificate contained at Section 2 of the Form I-129 Supplement R, and this document was included with the petitioner's initial filing. The only potential documentation of the religious nature of the petitioner presented with the petition is a statement on the New Student Application that:

The creation of the State of Israel is one of the seminal events in Jewish history. Recognizing the significance of the State and its national institutions, we seek to instill in our students an attachment of the State of Israel and its people as well as a sense of responsibility for their welfare.

In a June 5, 2012 request for evidence (RFE), the director advised the petitioner that as its tax-exempt status was that of a school, it needed to submit additional documentation to establish its nature as a religious organization. The director specifically advised the petitioner to submit documentation in accordance with 8 C.F.R. § 214.2(r)(9)(iii), subsections (B) and (C). In response, the petitioner submitted excerpts from its website, brochures, and its parent-student handbook that describes its mission as "providing our students with a comprehensive, Torah-based education." The petitioner also submitted a copy of a September 2011 letter from the national director of [REDACTED] informing the petitioner that it "has met all of the requirements and standards as set forth by [REDACTED] and is an accredited affiliate of that organization."

On September 6, 2012, the director denied the petition, finding, in part, that the petitioner had failed to establish that it is a bona fide nonprofit organization pursuant to the regulation at 8 C.F.R. § 214.2(r)(9)(iii)(B) as it failed to provide a copy of its organizing instrument, such as its articles of incorporation, that specifies the purposes of the organization.

The director granted the petitioner's subsequent motions to reopen and to reconsider which argued that the director's RFE did not specifically request a copy of the petitioner's articles of incorporation and neither were they required by the regulation. Counsel stated that the RFE and regulation required only that the petitioner submit documentation that establishes the religious nature and purpose of the organization, and that the petitioner complied with these instructions with excerpts from its website, brochures, and other literature. The director again denied the petition, finding, *inter alia*, that the petitioner had failed to comply with the provisions of 8 C.F.R. § 214.2(r)(9)(iii)(D) because the petitioner had signed the religious denomination certificate rather than "the religious organization" with which the petitioner is affiliated.

Counsel asserts on appeal that the director's dismissal of the petitioner's motions is "fundamentally unfair" because it was based on a different reason than that set forth in the initial denial. Counsel then asserts that the petitioner has complied with the director's request for evidence and that the denial of the petition on the ground that the petitioner failed to submit documentation in accordance with 8 C.F.R. § 214.2(r)(9)(iii)(B),(C) was "invalid."

Although counsel asserts that the director's decision is "fundamentally unfair," he does not argue that the provisions of 8 C.F.R. § 214.2(r)(9)(iii)(D) are inapplicable to the instant petition and does not submit a properly signed religious denomination certification on appeal. The fact that the

petitioner's motions were granted required a new decision separate and apart from the original decision. USCIS is not precluded from adding grounds for denial at a later time or from removing grounds which have been overcome. Counsel's argument appears to be based upon the premise that the petitioner was not provided an opportunity to provide further evidence regarding the religious denomination certification prior to the director's determination on motion. However, the regulation at 8 C.F.R. § 214.2(r)(9) requires a religious denomination certification that is dated and *signed by the religious organization* to be submitted as "initial evidence." The regulation at 8 C.F.R. 103.2(b)(8) states that if all required initial evidence is not submitted with the benefit request, USCIS has the discretion to deny the petition without requesting further evidence. Accordingly, as required initial evidence was not submitted at filing, the petitioner failed to establish that the director abused his discretion in failing to request such evidence prior to the new decision on motion.

Even if the petitioner had successfully demonstrated that the director committed a procedural error by failing to provide the petitioner with the opportunity to submit a new certification, it is not clear what remedy would be appropriate beyond the appeal process. It would serve no purpose to remand the matter in order for the director to request evidence that the petitioner had the opportunity to address on appeal. As previously indicated, however, the petitioner did not provide a new and properly signed certification on appeal.<sup>1</sup>

The regulation at 8 C.F.R. § 214.2(r)(9)(iii) clearly states that if the petitioning organization's status as a bona fide nonprofit organization is based on its status as other than a religious organization, it "shall" submit the documentation listed in subsections (A) through (D). This language is repeated in the instructions for completing the Form I-129. The requirements are listed in the conjunctive, which means the petitioner must submit documentation in each of the categories. Subsection (D) also is clear that the "religious organization" must complete and sign a statement certifying that the "petitioning organization" is affiliated with the denomination. This language, operating as a check and verification of the claims in the petition, precludes the petitioner from certifying to its own membership and affiliation in a denomination.

Although made aware of this deficiency in its evidence by the director's decision on its motions, the petitioner submits no corrected denomination certificate on appeal. Accordingly, the director's decision finding that the petitioner failed to establish that it is a bona fide nonprofit religious organization is affirmed.

---

<sup>1</sup>As the petitioner failed to demonstrate error on the part of the director and did not submit a properly signed religious denomination certification on appeal, the AAO makes no finding regarding whether the submission of a new and properly signed certification cures the petitioner's failure to submit this required evidence at the time of filing the petition. Eligibility must be established at the time of filing. 8 C.F.R. 103.2(b)(1), (12). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The director also determined that the petitioner had failed to establish that the proffered position qualifies as that of a religious occupation.

The regulation at 8 C.F.R. § 214.2(r)(3) provides:

*Religious occupation* means an occupation that meets all of the following requirements:

- (A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination;
- (B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination;
- (C) The duties do not include positions which are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible; and
- (D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

In its May 25, 2012 letter submitted in support of the petition, the petitioner stated:

The Beneficiary has been and will continue to be employed in a religious occupation at our school. She has been and will continue to be responsible for providing religious instruction in Jewish studies for our students. As an instructor in our school, [she] has and will help to plan and develop curriculum, evaluate students' progress and participate in parent-teacher conferences. [She] has and will continue to conduct classes in various Jewish courses focusing on different aspects of the Jewish religion, including Jewish prayer, Torah, Jewish history, Jewish laws and customs, Jewish holidays, and rabbinic tenets. By continuing to be a religious instructor at our school, [the beneficiary] will continue to instill in our students the values and beliefs of the Jewish religion.

The petitioner also stated that the beneficiary was qualified for the position "because she acquired the requisite knowledge and experience working in her previous teaching positions in Caracas, Venezuela" and with the petitioner for the past two years. In her June 5, 2012 RFE, the director instructed the petitioner to submit additional documentation regarding the proffered position, and to:

Provide a detailed description of the work to be done, specific job duties, level of responsibility, number of hours per week performing the work duties and the minimum education, training, and experience necessary to do the job.

In his August 27, 2012 letter submitted in response, counsel cites extensively to the Foreign Affairs Manual (FAM) as evidence that the position of religious instructor is a religious occupation that is not primarily administrative in nature. However, the FAM, which the United States Department of State uses to administer consular visa processing, is not binding on USCIS in the administration of the Act. Furthermore, the title of a position is insufficient to establish that it is a religious occupation. USCIS must determine whether the job duties are reflective of a religious occupation as that term is defined by the regulation.

Counsel stated:

Please note that Beneficiary is a kindergarten preschool teacher. As such, the Beneficiary acts as a facilitator and/or children's coach, using interactive discussions and "hands-on" approaches to help students learn and apply concepts in the subjects taught by her. She utilizes "props" or other "manipulatives" to help children understand abstract concepts, solve problems, and develop critical thought processes. For example, she teaches the concepts of biblical stories by playing role-playing games.

Counsel also stated that the petitioner followed the same schedule each day:

First period: *Musar* – stories regarding Jewish moral values, heroes of the bible and Jewish history, songs, free play for the students

Second period: *Tefilah* – Jewish prayers and symbols. Teaching of the blessings on different items. This is done with arts and craft and age appropriate activities. Some free time.

Third Period: Secular instruction adapted to religious school context. Activities and arts and crafts to complement this secular coursework.

Lunchtime and recess/free time: on lunch duty and then recess duty.

Fourth Period: Beneficiary spends this time during this administrative period for planning daily and weekly coursework and lesson plans.

Fifth Period: *Parashat Hashavua* – The weekly portion of bible is discussed at length with age appropriate activities, coloring, etc. During this time as well there is discussion of the Jewish holidays and the religious practices that go along with them.

Six Period: *Be-ma-agal Hachayim* – Jewish lifecycle events and the philosophy, background, practices that are a part of them.

The documentary evidence contained in the record does not support counsel’s claims. The petitioner submitted a copy of its parent-student handbook which outlined the preschool schedule as:

MONDAY - THURSDAY

Morning session	8:30 a.m.
Dismissal for half-day Playgroup [&] Nursery	12:00 noon
Alternate dismissal for Play, Nursery, [&] Pre-K	2:00 p.m.
Dismissal	4:00 p.m.

FRIDAY

Morning session	8:30 a.m. – 11:45 a.m.
Afternoon session	11:45 a.m. – 2:00 p.m.

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). The petitioner submitted no other documentation detailing the beneficiary’s job duties as instructed by the director in the RFE. The regulation states 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 eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(8) and (12). 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).

In her first decision denying the petition, the director inconsistently concluded that the petitioner had submitted sufficient documentation to establish that the position qualified as a religious occupation, stating initially that the petitioner had met its burden of proof and then later stating that the petitioner had not established that the position qualifies as a religious occupation. The director found that the petitioner had failed to provide a detailed description of the beneficiary’s duties, noting that, according to counsel, the beneficiary only taught preschool and kindergarten, that the handbook did not provide a schedule for the kindergarten class, and that the information listed in the handbook was inconsistent with the schedule outlined by counsel.

On motion, counsel stated that as the director had determined that the position qualifies as that of a religious occupation, the reason for the denial is “invalid.” Counsel also stated that while the substantive issues regarding whether the position qualifies as a religious occupation need not be addressed, the petitioner believes that it submitted the detailed schedule that the director requested. Counsel then references and repeats the information in his own unsupported letter and submits a letter from the petitioner’s principal stating that for the school year 2012-2013, the beneficiary worked from 8:10 to 4:30 on Monday through Thursday and from 8:10 to 2:30 on Friday.

The director again denied the petition, noting the petitioner’s submitted documentation in support of the claim that the position qualifies as that of a religious occupation but finding that the petitioner failed to provide a detailed schedule of the beneficiary’s duties as instructed by the RFE. The

director determined that the schedule outlined in the parent-student handbook lacked sufficient detail such that a comparison to the schedule in counsel's letter could not be made.

Counsel asserts on appeal that the petitioner provided a detailed schedule of the beneficiary's daily activities and the classes she teaches and that the handbook also provides a schedule of daily activities. As proof that the petitioner fully responded to the RFE, counsel again recites the schedule in his previous letters without referencing corroborating documentation or reflecting the source of counsel's information. Although the school principal provided the hours that the beneficiary worked, he did not provide any details of her daily schedule.

The petitioner has failed to provide sufficient documentation to establish that the proffered position qualifies as a religious occupation as that term is defined by the regulation.

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.