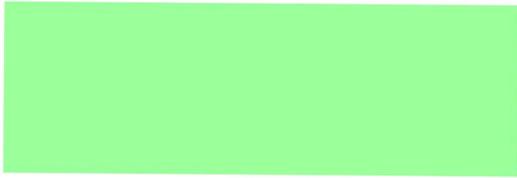




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: FEB 27 2015 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
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 on appeal. We will withdraw the director's decision. Because the record, as it now stands, does not support approval of the petition, we will remand the petition for further action and consideration.

The petitioner is an Islamic center and mosque. It seeks to classify the beneficiary as a nonimmigrant religious worker pursuant to section 101(a)(15)(R) of the Act, to perform services as an assistant imam. The director determined that the petitioner had not submitted a currently valid determination letter from the Internal Revenue Service (IRS) to establish its tax-exempt status as of the petition's filing date.

On appeal, the petitioner asserts that the denial rests on a technicality not found in the regulations.

I. Law

Section 101(a)(15)(R) of the Act pertains to a beneficiary 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)(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, the beneficiary 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 regulation at 8 C.F.R. § 214.2(r)(9) requires the petitioner to submit a currently valid determination letter from the IRS showing that the organization is a tax-exempt organization.

II. Facts and Analysis

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 24, 2013. The petitioner's initial submission did not include a copy of a currently valid IRS determination letter.

The director issued a request for evidence (RFE) on November 7, 2013, instructing the petitioner to submit a currently valid IRS determination letter and other evidence. On January 31, 2014, the director received a letter from the petitioner, requesting "an extension of time in which to reply" because the petitioner was "still waiting for information from IRS."

The regulations do not permit additional time to respond to an RFE. 8 C.F.R. § 103.2(b)(8)(iv). The director, however, reissued the RFE on February 6, 2014, with a response due date of May 1, 2014. The petitioner's response included a copy of an IRS determination letter dated January 25, 2014, recognizing the petitioner's tax-exempt status effective August 24, 2006.

The director denied the petition on July 30, 2014, stating that the petitioner "was not in possession of a currently valid Determination Letter from the IRS" at the time of filing in June 2013.

On appeal, the petitioner states: "the RFE and the regulations for that matter do not indicate that a currently valid determination letter must have been in the possession of the petitioner at the time the petition was filed."

The statutory requirement is that the petitioning employer must be a bona fide nonprofit, religious organization in the United States. See section 101(a)(15)(R)(i) of the Act. By specifying that the evidence of nonprofit status must take the form of an IRS determination letter, the regulation at 8 C.F.R. § 214.2(r)(9) "provides a petitioning organization with the opportunity to submit exceptionally clear evidence that it is a bona fide organization." 73 Fed. Reg. 72276, 72280 (November 26, 2008).

The IRS determination letter has an effective date of August 24, 2006. If the petitioner had not been tax-exempt as of the filing date, and only later took steps to qualify for the exemption, then the petition would be subject to denial because the petitioner was not eligible for the benefit sought after the filing date. *See* 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Here, however, the petitioner did not create a new set of facts, but rather obtained IRS documentation showing that it held the qualifying tax-exempt status at the time of filing.

The petitioner's submission of the IRS letter was not without procedural flaws, but the director did not cite those flaws in denying the petition. The director reissued the RFE on February 6, 2014, with the response due no later than May 1, 2014, with no extensions permitted. *See* 8 C.F.R. §§ 103.2(b)(8)(iv) and 103.8(b). USCIS received the response untimely, on May 9, 2014. Once the deadline passed with no substantive response from the petitioner, the regulation at 8 C.F.R. § 103.2(b)(13)(i) gave the director discretion to summarily deny the petition as abandoned, deny the petition based on the record, or deny for both reasons. Rather than deny the petition as abandoned, the director incorporated the IRS letter into the record. Therefore, we must now take the petitioner's submission of the IRS letter into account when considering the evidence of record. When we take that letter into consideration, the sole stated ground for denial cannot stand, and we must therefore withdraw the director's decision.

At the same time, other disqualifying factors prevent the approval of the petition. Because we review the record on a *de novo* basis, we may identify additional grounds for denial beyond what the Service Center identified in the initial decision. *See Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

III. Compensation

The regulation at 8 C.F.R. § 214.2(r)(11) reads, in part:

Evidence relating to compensation. Initial evidence must state how the petitioner intends to compensate the alien, including specific monetary or in-kind compensation, or whether the alien intends to be self-supporting. In either case, the petitioner must submit verifiable evidence explaining how the petitioner will compensate the alien or how the alien will be self-supporting. Compensation may include:

(i) *Salaried or non-salaried compensation.* Evidence of compensation may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. IRS documentation, such as IRS Form W-2 or certified tax returns, must be submitted, if available. If IRS documentation is unavailable, the petitioner must submit an explanation for the absence of IRS documentation, along with comparable, verifiable documentation.

(ii) *Self support.* (A) If the alien will be self-supporting, the petitioner must submit documentation establishing that the position the alien will hold is part of an established program for temporary, uncompensated missionary work, which is part of a broader international program of missionary work sponsored by the denomination.

On Part 5 of Form I-129, the petitioner indicated that the beneficiary would receive no compensation, that the petitioning organization has no gross or net income, and that it is staffed entirely by volunteers. On line 5d of the accompanying employer attestation, the petitioner indicated that the beneficiary “will be compensated from member contributions and don[a]tions.” The petitioner provided no details about the amount of the beneficiary’s proposed compensation. Without this information, we cannot determine whether the petitioner’s finances are sufficient to cover the expenses of the beneficiary’s proposed employment.

Bank statements submitted with the initial filing showed that the petitioner’s “Business Basic Checking” account had a balance that varied from \$1,201.49 on January 1, 2010 to \$2,282.03 on March 31, 2010, and a “Public Fund Savings” account with a balance of \$42,199.18 on November 1, 2009, and \$42,812.04 on March 31, 2010. The bank statements offer a limited perspective on the petitioner’s finances, as they date from more than three years before the petition’s filing date.

In the RFE, the director noted that the petitioner’s “financial documentation . . . is dated 2010.” The director instructed the petitioner to submit “proof of past compensation for similar position(s),” “IRS documentation,” and other required evidence showing that the petitioner could and would compensate the beneficiary. The petitioner’s response to the RFE included additional copies of the same 2009-2010 bank statements submitted previously, but no new documentation relating to the petitioner’s intent to compensate the beneficiary.

IV. Compliance Review

The record does not show that USCIS has conducted a compliance review as described in the regulation at 8 C.F.R. § 214.2(r)(16), which allows verification of the petitioner’s supporting evidence 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.

V. Conclusion

For the reasons discussed above, the director’s decision cannot stand and we hereby withdraw that decision. At the same time, however, the record as it now stands does not permit approval of the petition. Therefore, we will remand this matter to the director. In visa petition proceedings, it is the

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petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

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.