U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-K-C-

DATE: SEPT. 15, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a school, seeks to employ the Beneficiary as a nonimmigrant religious worker to perform services as its Early Childhood Director. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(R), 8 U.S.C. § 1101(a)(15)(R). The Director, California Service Center, initially granted the petition, but subsequently revoked it after finding that the Petitioner knew it did not have tax-exempt status at the time it filed the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. RELEVANT LAW AND REGULATIONS

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
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> (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, 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
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> (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)(3) provides, in pertinent part, the following definitions:

> *Bona fide non-profit religious organization in the United States* means a religious organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the Internal Revenue Service (IRS) confirming such exemption.
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> *Bona fide organization which is affiliated with the religious denomination* means an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the IRS confirming such exemption.
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> . . . .
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> *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;
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> (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.
>
> . . . .
>
> *Tax-exempt organization* means 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 sections 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendments or equivalent sections of prior enactments of the Internal Revenue Code.

The regulation at 8 C.F.R. § 214.2(r)(9) states:

> *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
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> (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 Internal Revenue Code, 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.

The regulation at 8 C.F.R. § 214.2(r)(11) provides, in pertinent 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 [U.S. Citizenship and Immigration Services]. IRS documentation, such as IRS Form W-2 [Wage and Tax Statement] 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.

The regulation at 8 C.F.R. § 214.2(r)(18) addresses the revocation of approved petitions and states, in pertinent part:

> (i) Director discretion. The director may revoke a petition at any time, even after the expiration of the petition . . . .
>
> (iii) Revocation on notice –
>
> > (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
> >
> > . . . .

> (2) The statement of facts contained in the petition was not true and correct . . . .

II. PERTINENT FACTS AND PROCEDURAL HISTORY

The Petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, on February 14, 2013, seeking to classify the Beneficiary as an R-1 temporary, nonimmigrant religious worker from March 1, 2013, until June 1, 2015. On the Form I-129, the petitioning organization attested to being a bona fide non-profit religious organization, or a bona fide organization that is affiliated with the religious denomination, that is tax exempt pursuant to Internal Revenue Code section 501(c)(3). In support of the petition, the petitioning organization submitted a letter from the IRS, dated February 23, 2002, stating that its tax-exempt status was reinstated and that its exemption from September 1994 was still in effect.

On February 20, 2013, the Director issued a request for evidence (RFE) stating, among other things, that the prospective employer was not listed with the IRS as a current, religious, non-profit organization. In response to the RFE, the petitioning organization re-submitted the February 23, 2002, letter from the IRS. The petitioner also submitted another letter from the IRS, dated August 23, 2012, which stated that the Petitioner's application for reinstatement of tax-exempt status was currently pending. Furthermore, the petitioning organization submitted a Religious Denomination Certificate attesting to its affiliation with Congregation along with an IRS letter, dated March 18, 2011, indicating that Congregation is a 501(c)(3) tax-exempt religious organization. The Director approved the petition on March 15, 2013.

On October 17, 2014, the Director issued a notice of intent to revoke (NOIR) her prior approval of the petition following a review of the record at our request. We had advised the Director that the Petitioner's tax-exempt status was revoked in November of 2010, yet the petitioning organization continued to file petitions using a letter from the IRS dated February 23, 2002. The Director indicated in the NOIR that the Petitioner appeared to have misrepresented its tax-exempt status by providing a letter from the IRS that was dated prior to its most recent revocation in 2010.

The Petitioner responded to the NOIR asserting that its 501(c)(3) tax-exempt status was reinstated by the IRS on May 20, 2014. It submitted a copy of the letter which stated that the organization's tax-exempt status was retroactive to the date of revocation. Therefore, according to the Petitioner, its tax-exempt status had been continuously recognized by the IRS. The petitioning organization further stated that it had acted in good faith and at no time misrepresented its status because its accountant had assured the organization that its tax-exempt status would be reinstated back to the date of revocation.

On January 21, 2015, the Director revoked the petition. The Director concluded that the petitioning organization was aware of its lack of tax-exempt status when it filed the petition on February 14, 2013, as evidenced by its application to reinstate its status on August 23, 2012. Because the final decision on the Petitioner's status was pending until May 20, 2014, it did not have tax-exempt status at the time the petition was filed. The Director concluded that the Petitioner did not establish that it was a bona fide nonprofit religious organization that is exempt from taxation and revoked the petition accordingly.

On appeal, the Petitioner submits a brief and an undated letter from an attorney who states that the IRS revoked the Petitioner's tax-exempt certification because it did not file annual returns with the IRS "due to administrative confusion," and that the Petitioner was in the process of becoming reinstated pursuant to IRS regulation.

III. ANALYSIS

We conduct appellate review on a *de novo* basis. *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). The appeal will be dismissed for the following reasons.

A. Tax-Exempt Status

A petitioner must establish eligibility at the time of filing and each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). 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. at 249; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). 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).

In this case, we find no error with the Director's revocation of her approval of the Form I-129. As specified in 8 C.F.R. § 214.2(r)(18)(iii)(2), the Director may revoke a petition at any time if she finds that the statement of facts contained in the petition was not true and correct. In this case, it is uncontested that at the time the petition was filed on February 14, 2013, the petitioning organization did not possess a "currently valid determination letter from the IRS showing that the organization is a tax-exempt organization." *See* 8 C.F.R. § 214.2(r)(9). In addition, the regulation at 8 C.F.R. § 214.2(r)(9) specifies that evidence regarding tax-exempt status shall be included with the initial evidence. In the instant case, the Petitioner was aware that the IRS letter it submitted with its initial evidence was no longer in effect. The fact that its tax-exempt status was later reinstated, retroactive to the date it was initially granted exemption, does not cure the petition's initial deficiency. Therefore, the Petitioner has not established it was a bona fide non-profit religious organization at the time it filed its petition.

B. Religious Occupation

Beyond the Director's decision, we find that the record does not establish that the proffered position of Early Childhood Director meets the regulatory definition of a religious occupation. On the Form I-129, the Petitioner described the duties of the proffered position as follows:

> Utilize talent and experience in every subject to develop innovative programming and curriculum teaching different ages in an early childhood setting through Hebrew arts

> immersion. Activities and projects will be customized to the changing environment of the classroom and adaptive to the needs of each child for success in the immersion program. Apply religious and traditional experiences received in Israeli schools.

Documents submitted with the petition described the petitioning organization as "a unique pre-school and after school program of Jewish learning." It stated it had 75 children enrolled in the pre-school program and 90 children in its after school program which meets on Tuesdays and Thursdays.[1] It identified four positions currently employed by the prospective employer: Teacher, Director, Bookkeeper, and Office Manager. A list of teaching staff indicated the organization employs 12 teachers, two maintenance staff, the Director of Education, an Office Manager, and an employee for accounting.

The record does not establish that the proffered position clearly involves inculcating or carrying out the religious creed and beliefs of the Petitioner's denomination. The Petitioner did not submit, for example, a job description or other documentation explaining the specific requirements for the job or the number of hours per week the Beneficiary would be expected to work performing those duties. Letters from the Director of Education, described the Beneficiary's unique qualifications, her work experience in Israel, her knowledge of Jewish traditions and prayers, and her proficiency in the Hebrew language. also described the growth of the organization's Hebrew immersion program for pre-schoolers and its after school program. However, her letters did not address how the proffered position primarily relates to a traditional religious function or clearly involves inculcating or carrying out the religious creed and beliefs of the denomination.

Furthermore, the record contains no evidence, and the Petitioner does not contend, that the proposed position of Early Childhood Director is recognized as a religious occupation within the denomination pursuant to 8 C.F.R § 214.2(r)(3)(A). Although the record includes a list of congregations in the Midwest Region, there is no indication any of these congregations recognize the position of Early Childhood Director as a religious occupation or employ Early Childhood Directors. There is no other relevant evidence in the record addressing whether the proffered position qualifies as a religious occupation under the Act. Therefore, the Petitioner has not established that the proffered position is a religious occupation as defined in 8 C.F.R. § 214.2(r)(3).

C. Compensation

Also beyond the Director's decision, the record does not establish the petitioning organization's intent to compensate the Beneficiary as claimed. On the Form I-129, the Petitioner stated it would compensate the Beneficiary $65,000 per year. It indicated that it had ten employees and listed its

[1] According to the list of students submitted with the petition, 48 students were enrolled in the after school program on Tuesdays and 30 students were enrolled on Thursdays. The registration form in the record indicates that the after school program ran from September 11, 2012, until May 23, 2013, from 4:00-5:30 p.m. with the exception that for third through eight graders, the program ran until 6:00 p.m. on Tuesdays.

federal employer identification number (EIN) as The IRS letters in the record show this same EIN. However, copies of IRS Form 1099-MISC, Miscellaneous Income, indicate a different EIN, Copies of IRS Form 941, Employer's Quarterly Federal Tax Return, also list the petitioning organization's EIN as . There is no explanation for why the Petitioner's EIN on the Form I-129 and IRS letters is different than the EIN it used to pay its employees. The record does not sufficiently establish that the Forms 1099-MISC and 941 reflect payments made by the petitioning organization.

In addition, even if the Petitioner establishes that it is responsible for the payments indicated on the submitted IRS documentation, according to the Form 941, during the first quarter of 2012, the Petitioner compensated only two employees for a total of $13,260. During the second and third quarters of 2013, the Petitioner compensated only four employees for a total of $12,235 and one employee $11,503, respectively. This IRS documentation conflicts with the prospective employer's assertion on the Form I-129 that it employs ten individuals and casts doubt on its claim that it will compensate the Beneficiary $65,000 annually, significantly more than any other employee. Although the record includes a copy of the Petitioner's 2012-2013 budget and balance sheets as of June 30, 2011, and June 30, 2012, these documents have not been audited and there is no other evidence in the record to corroborate the figures reported. Considering the record in its totality, the Petitioner has not met its burden of establishing by a preponderance of the evidence its intent to compensate the Beneficiary as stated.

IV. CONCLUSION

The Petitioner did not submit the evidence required to establish that it qualifies as a bona fide nonprofit religious organization. In addition, the Petitioner did not establish that the proffered position meets the regulatory definition of a religious occupation or its intent to compensate the Beneficiary as claimed.

In visa petition proceedings, it is the 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). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of M-K-C-*, ID# 13830 (AAO Sept. 15, 2015)