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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: WAC 07 255 50791 Office: CALIFORNIA SERVICE CENTER Date: JUL 23 2009

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based nonimmigrant visa petition. The director reopened the matter on the petitioner's motion, and again denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, the AAO will remand the petition for further action and consideration.

The petitioner identifies itself as a member church of the Full Gospel Fellowship of Churches and Ministers (the Fellowship). The petitioner seeks to extend the beneficiary's existing R-1 nonimmigrant religious worker status under section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1). The petitioner asserts that the beneficiary will work for the petitioner as the senior pastor of Joint Heirs Assembly Church from September 1, 2007 to August 31, 2009. The director found that the beneficiary has engaged in disqualifying secular employment, and that the petitioner failed to establish that it qualifies as a tax-exempt non-profit religious organization. The director based both of these conclusions on inquiries conducted by officers of U.S. Citizenship and Immigration Services (USCIS).

We note that attorney Olusegun Asekun does not appear to have participated in the petitioner's most recent filings. We also note a 2008 submission from attorney Lisa Nosek of Reina & Bates Immigration Law Group. The record, however, does not contain Form G-28, Notice of Entry of Appearance as Attorney or Representative, designating Ms. Nosek as the petitioner's attorney of record. The record also does not contain any correspondence from Olusegun Asekun to indicate withdrawal of representation. Therefore, in the absence of notice of withdrawal or a superseding Form G-28, we must find that Olusegun Asekun remains the attorney of record in this proceeding.

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 director's denial of the petition rests on two stated grounds. First, we shall discuss the issue of the petitioner's status as a tax-exempt, non-profit church or religious organization. The petitioner claims coverage under a group tax exemption. For such organizations, 8 C.F.R. § 214.2(r)(9)(ii) requires the petitioner to submit a currently valid determination letter from the Internal Revenue Service (IRS) establishing that the group is tax-exempt.

The petitioner's initial submission included a copy of an April 12, 2003 letter from the IRS, indicating that the Fellowship has held a group exemption since 1964. A copy of a December 4, 2006 letter from [redacted], the Chief Financial Officer of the Fellowship, indicated that the petitioner "has been accepted as a subordinate member of this fellowship," covered by the Fellowship's group tax exemption.

In the October 2008 notice of intent to deny the petition, the director stated: [redacted] confirmed that the beneficiary's church [had been] a member of the [Fellowship], but they were no longer members." The record contains nothing in writing from [redacted], nor does it specify Ms. [redacted]s title or rank within the Fellowship.

In response, [redacted], the petitioner's Secretary and a member of its Board, stated: "We have been with the fellowship since [the petitioning entity] was founded, though our accountant is right now working on getting us our 501c independently. . . . [W]e have always been members though we were late with our fees last year when we were transitioning . . . to the new location."

In a copy of a letter dated September 17, 2008, [redacted] Business Administrator of the Fellowship, stated that the petitioner "is an active, current member of the Full Gospel Fellowship of Churches and Ministers International," and as such is covered by the Fellowship's group tax exemption. [redacted] added: "We will be mailing the 2008 list [of member churches] to the IRS in October of this year."

The director denied the petition on November 24, 2008. In the denial notice, the director repeated the allegations from the notice of intent to deny the petition, but the director did not address the petitioner's response to that notice with regard to the petitioner's tax-exempt status. The petitioner filed a motion to reopen and reconsider. On motion, [redacted] (who had signed the Form I-129 petition form as the petitioner's senior pastor, then left the petitioning church and later returned as its music pastor) stated: "We have never stopped being members [of the Fellowship] since December 2004 and hence are still covered under the group [exemption]." A copy of an IRS letter dated November 6, 2008 acknowledged that the petitioner had applied for recognition of tax-exempt status.

In the January 2009 denial notice, the director stated that "the petitioner has not provided an official directory showing that their church is covered under the Full Gospel Fellowship of Churches and Ministers International, Inc. group exemption." Prior to this decision, the director had never requested or instructed the petitioner to submit an official directory.

On appeal, the petitioner submits a copy of a letter from [redacted] The letter is nearly identical to [redacted] earlier letter, except for the date (December 10, 2008 instead of September 17, 2008). The new letter, like the old letter, states that the Fellowship will send a copy of its 2008 directory "to the IRS in October of this year," which means that the directory ought to have existed and been available for submission at the time of the appeal in January 2009.

All of the documentary and testimonial evidence submitted by the petitioner throughout this proceeding has been consistent with the assertion that the petitioner has continuously belonged to the Fellowship since 2004. [redacted] contrary oral assertion to USCIS officers is of concern, but this statement does not amount to irrefutable evidence of ineligibility. The letters submitted in rebuttal are not demonstrably lacking in credibility or otherwise problematic.

The director has not, up to this point, requested copies of the Fellowship's 2007 and 2008 directories, as submitted to the IRS. It would appear that these documents would settle the issue of the petitioner's membership in the Fellowship. Therefore, we instruct the director to request these materials.

The second and final issue in the director's decision concerns the nature of the beneficiary's work in the United States. The USCIS regulation at 8 C.F.R. § 214.2(r)(1) requires that the beneficiary must:

> (iii) Be coming solely as a minister . . . ;
>
> (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 [which concerns the filing of additional petitions by other employers].

The petitioner's initial submission included copies of quarterly wage tables, showing salary payments from the petitioner to the beneficiary in 2005 and 2006, as well as photographs depicting the beneficiary at religious services, copies of ordination documents, and related materials.

A letter from [redacted] is on letterhead printed with the petitioning entity's name and an address on [redacted] Other materials in the record identify the [redacted] site as the beneficiary's home address.

On September 10, 2008, the director advised the petitioner of the director's intent to deny the petition. The director stated:

> On July 9, 2008 the USCIS conducted a site check at [redacted] [the street address for the petitioner specified on the Form I-129 petition]. It was an office building in a medical center with a note on the door indicat[ing] that Tynet Billing Solutions had moved. The [USCIS] officers then went to . . . Tynet Billing Solution's [*sic*] new offices. The receptionist stated that both the beneficiary and his wife worked [at T]ynet Billing Solution[s]. She stated that they both probably put in more than forty hours per week with Tynet Billing Solution[s]. . . .
>
> The beneficiary does not appear to be working as a minister, instead, it appears that he and his wife are running at least one business that handles Medicaid billing for doctors.

In response, [redacted] stated: "our church uses the facilities in Tynet. . . . Tynet Billing has never been owned by [the beneficiary]. . . . Also to our knowledge, [the beneficiary] was separated and divorced from his wife . . . and therefore [they] cannot be running or owning anything together."

[redacted] referred to "a lease agreement (attach[ed] with this letter)," but the record contains no formal lease agreement. The record instead includes secondary documents that refer to a lease agreement. Secondary documents such as invoices also refer to $500 weekly rent charges, paid monthly by check or in cash, and indicate that the petitioner began leasing space from Tynet in May 2008. The September 1, 2008 invoice refers to check number [redacted] in the amount of $2,000, and the petitioner submitted a photocopy of check number [redacted] in that amount, payable to Tynet and dated October 1, 2008. The check was issued after the most recent bank statement reproduced in the record, and there are no markings to show that the check was processed for payment. The bank statements for May, July and August 2008 are inconclusive, because the petitioner is said to have paid its rent in cash for those months, and a bank statement would not necessarily reflect a cash withdrawal in the exact amount of the rent payment. The record does not appear to contain the bank statement for June 2008.

In a sworn affidavit, [redacted] Office Manager of Tynet Billing Solutions, Inc., stated:

> On July 9, 2008 two immigration officers came to our office. . . . They asked if [the beneficiary] was employed by Tynet Billing Solutions to which I responded that to the best of my knowledge he has never been employed by the firm neither has he ever been a part of the business.
>
> Officers asked whether [the beneficiary] worked for forty hours per week to which I responded that he was probably employed for forty hours per week. However, the only reason I could possibly know this was because I saw [the beneficiary] every day in the building. . . . [The petitioner] rents office space and [a] conference center from us.
>
> . . . Our payroll specialist confirmed that [the beneficiary] has never been paid by Tynet.

In denying the petition in November 2008, the director stated that the results from the July 2008 site visit called the petitioner's credibility into question. On motion, [redacted] asserted that the beneficiary has worked full time for the petitioner and "[h]as never been under the employment of any company" during that time.

The director granted the petitioner's motion, but denied the petition again on January 5, 2009. The second decision largely repeated the language of the first decision, with the substitution of new regulatory language that had come into effect on November 26, 2008.

On appeal from the second decision, the petitioner submitted copies of IRS Forms W-2 reflecting the petitioner's employment of the beneficiary in 2006-2008. [redacted] states that there is no evidence that the beneficiary worked for any other employer during those years.

The petitioner has submitted extensive and facially credible evidence that it employed the beneficiary during the years discussed. Also, the one named source of information at Tynet, [redacted] has apparently provided an affidavit repudiating the assertions in the USCIS officer's site visit report. If the church rents space from Tynet, then it is plausible that a Tynet employee would indicate that the beneficiary works "at" Tynet in the sense that he works within Tynet's physical premises. The site visit report contains nothing in writing from [redacted], and the officer only paraphrased [redacted] oral statements, rather than provide exact quotations. The evidence is, at best, inconclusive.

We note one factor of potential concern, not previously mentioned by the director in correspondence with the petitioner. The site visit report linked "six businesses" with the residential address shared by the beneficiary and [redacted]r, identified as the beneficiary's then spouse. The report only identified one of those businesses, specifically Tynet Billing Solutions.

Corporate registration records available from the Texas Comptroller of Public Accounts, available from a searchable database at http://ecpa.cpa.state.tx.us/coa/Index.html, identify [redacted] as a director of Tynet Billing Solutions, as well as that company's agent for service of process.[1] This information indisputably links [redacted] to Tynet, but it does not link the beneficiary himself to that company.

Divorce documentation in the record, dated May 19, 2008, identified the beneficiary's employer as the petitioning entity, and indicated that [redacted] is unemployed (showing "N/A," meaning "not applicable," under "Name of employer"). [redacted] operation of one or more businesses while apparently lacking immigration status to permit such activity may well have significant consequences for [redacted], but it does not necessarily follow that her former spouse was also engaged in this business activity. The director must ascertain whether the businesses registered at the beneficiary's home address are tied directly to the beneficiary, or only to his former spouse. The director must also add to the record any documentation showing such connections; it cannot suffice to simply state, in a report, that the beneficiary is linked to unnamed businesses at his home address.

[1] The AAO has made printouts from this database on July 22, 2009, and added them to the record.

The record also shows that the petitioner used to employ [redacted] but quarterly wage reports do not reflect any wages paid to her after the first quarter of 2006. (That being said, bank statements in the record appear to indicate that [redacted] had access to the petitioner's account as recently as May 28, 2008.)

Beyond the above discussion, review of the record reveals further areas of potential concern. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

As noted previously, USCIS issued new regulations pertaining to immigrant and nonimmigrant religious workers in November 2008. Supplementary information published with the new rule specified: "All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

In this instance, the director did not issue a request for evidence after the issuance of the new regulation. The director simply repeated previously stated grounds for denial, quoting the new regulations instead of the old regulations. Review of the new regulations, however, shows two areas of some concern.

Under 8 C.F.R. § 214.2(r)(8), an authorized official of the prospective employer of an R-1 alien must complete, sign and date an attestation prescribed by USCIS and submit it along with the petition. The prospective employer must specifically attest to all of the following:

> (i) That the prospective employer is a bona fide non-profit religious organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation;
>
> (ii) That the alien has been a member of the denomination for at least two years and that the alien is otherwise qualified for the position offered;
>
> (iii) The number of members of the prospective employer's organization;
>
> (iv) The number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion;

(v) The number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years by the prospective employer's organization;

(vi) The number of special immigrant religious worker and nonimmigrant religious worker petitions and applications filed by or on behalf of any aliens for employment by the prospective employer in the past five years;

(vii) The title of the position offered to the alien and a detailed description of the alien's proposed daily duties;

(viii) Whether the alien will receive salaried or non-salaried compensation and the details of such compensation;

(ix) That the alien will be employed at least 20 hours per week;

(x) The specific location(s) of the proposed employment; and

(xi) That the alien will not be engaged in secular employment.

The petitioner has provided much, but not all, of the information required in the above regulation.

Another issue relates to the beneficiary's past employment. Under 8 C.F.R. § 214.2(r)(12)(i), any request for an extension of stay as an R-1 must include initial evidence of the previous R-1 employment. If the beneficiary received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of filed income tax returns, reflecting such work and compensation for the preceding two years.

The petitioner has submitted the beneficiary's IRS Forms W-2 for 2006-2008 and other documentation of the beneficiary's R-1 work, but these documents raise questions about the beneficiary's work. The forms indicate that the petitioner paid the beneficiary $18,585.31 in 2006, $12,000.00 (plus $18,000 in housing) in 2007 and $36,000.00 (plus $36,000 in housing) in 2008.

Quarterly wage reports (addressed to [redacted] at the beneficiary's residential address) reflect the following payments to the beneficiary:

Quarter	Wages	Quarter	Wages
1st 2005	$3,500.00	1st 2006	$2,000.00
2nd 2005	4,000.00	2nd 2006	6,000.00
3rd 2005	1,000.00	3rd 2006	0
4th 2005	0	4th 2006	10,585.31

The petitioner's salary payments to the beneficiary (or at least the reporting thereof) varied widely, with significant gaps. The petitioner must explain these erratic payments, as well as the claimed variation in the beneficiary's payment from $8,500 in 2005 to a total value of $72,000 in 2008. The petitioner must also document and justify the amounts listed as "housing" on the Forms W-2, for example by providing objective documentary evidence that the beneficiary spent at least $36,000 on housing expenses in 2008. We note that, while a minister's housing expenses can be deducted from the minister's taxable income, the amount claimed as housing expenses cannot exceed the actual cost of the minister's housing (including furnishings and utilities). *See* IRS Publication 517, Social Security and Other Information for Members of the Clergy and Religious Workers, available online at http://www.irs.gov/publications/p517/index.html (relevant excerpt added to the record July 22, 2009). While USCIS has no jurisdiction over the taxation of the beneficiary's compensation, the significant fluctuation in that compensation is relevant to the broader issue of the credibility of the petitioner's statements and documents.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The record, however, does not currently establish that the petition is approvable. The petition is therefore remanded to the director for further action in accordance with the foregoing and entry of a new decision which, regardless of the outcome, is to be certified to the Administrative Appeals Office for review.