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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:

DEC 22 2010

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

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Perry Rhew
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 is a church. It seeks to classify the beneficiary as a nonimmigrant religious worker under section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1), to perform services as a pastor. The director determined that the petitioner had not established that it has the ability to remunerate the beneficiary.

On appeal, counsel asserts that the petitioner had intended to pay the beneficiary an annual salary of \$35,000; however, “unforeseen circumstances, including the economic downturn . . . have caused the [petitioner] to reevaluate its ability to remunerate” the beneficiary and that it now offers to pay the beneficiary a salary of \$24,000 per year. The petitioner submits 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 director denied the petition based on the provision of 8 C.F.R. § 214.2(r)(3), which was superseded by new regulations on November 26, 2008. The director further relied upon provisions of the Foreign Affairs Manual (FAM). However, the FAM, which the United States Department of State uses to administer consular visa processing, is not binding on the U.S. Citizenship and Immigration Services (USCIS) in the administration of the Act.

Nonetheless, the regulation at 8 C.F.R. § 214.2(r)(11) provides:

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.

The petitioner is located [REDACTED]. However, it seeks to hire the beneficiary as pastor of its church [REDACTED]. The petitioner indicated on the Form I-129, Petition for Nonimmigrant Worker, that it would pay the beneficiary a salary of \$35,000 and housing and medical expenses. In addition, on the Form I-129 supplement, statement 7, the petitioner certified that it was "willing and able to provide salaried compensation" to the beneficiary, which was again stated as \$35,000 per year in section 5 of the supplement. The petitioner submitted no verifiable documentary evidence with the petition to establish how it intended to compensate the beneficiary in accordance with the terms stated.

In a November 19, 2008 request for evidence (RFE), the director instructed the petitioner to:

Submit financial information including bank letters; recent audits; the organization's membership figures, the number of employees currently receiving compensation; federal tax return for the most recent fiscal year; annual reports, audited financial statements.

In response, the petitioner submitted partial copies of its monthly bank statements for December 2005, October 2006, December 2007 and December 2008, reflecting ending balances ranging from \$6,011 to \$12,416. The petitioner also submitted a copy of its "Statement of Financial Position" for the years ending 2005, 2006 and 2007, a letter from its bank indicating that the petitioner had maintained a business relationship with the bank since 1982, a list of its paid employees and a membership list. The unaudited financial statements reflect a net income of \$15,992 in 2005, \$35,508 in 2006 and \$16,981 in 2007. In response to the director's April 29, 2010 Notice of Intent to Deny (NOID) the petition, the petitioner provided partial copies of its bank statements for November and December of 2009, and February and March of 2010. These bank statements range from a low balance of \$1,963 to a high balance of \$2,093. A statement for

a separate account shows a balance of \$334 for November 2009. In an October 19, 2009 affidavit, submitted in response to the director's September 14, 2009 RFE, the petitioner stated that there were no paid employees at the Lanham branch and that its bishop had served that ministry until May 4, 2008, when he appointed the beneficiary as overseer.

In denying the petition, the director noted that the petitioner's ending monthly bank balances did not indicate that it had the ability to pay the beneficiary \$35,000 per year. On appeal, the petitioner submits copies of additional bank statements for months in 2010. However, these statements are after the filing date of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petition was filed on May 20, 2008. Accordingly, documentation of the petitioner's financial status in 2010 does not provide evidence of its ability to compensate the beneficiary in 2008, when the petition was filed. The petitioner also submitted a copy of a statement indicating that it has \$200,542 in a certificate of deposit, which it opened in December 2007.

Of more concern is the undated statement submitted on appeal, from [REDACTED] the petitioner's pastor, who stated that while the petitioner initially offered to compensate the beneficiary in the amount of \$35,000 per year, "in light of unforeseen events, it "is only able to pay [him] \$24,000 per year with any additional remuneration to be provided directly by the ministry" in Lanham, Maryland. [REDACTED] also stated that the petitioner was willing to incur penalties by the early withdrawal of funds from its certificate of deposit in order to pay the beneficiary. Prior to this appeal, the petitioner submitted no evidence of its certificate of deposit or give any indication that it was willing to use the certificate to provide the beneficiary's compensation. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The director's November 19, 2008 RFE and April 29, 2010 NOID both gave notice to the petitioner of the deficiency in the evidence regarding its ability to compensate the beneficiary and specifically requested the petitioner to submit additional evidence regarding this issue. 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). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Regardless, it appears that the petitioner is attempting, at this late date, to modify the terms on which it initially indicated it intended to employ the beneficiary in order to avoid having to establish its ability to compensate him as originally claimed. We will not accept this late and fundamental change to the petition. A petitioner must establish eligibility at the time of filing. 8

C.F.R. §§ 103.2(b)(1), (12); *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998). At the time of filing, the petitioner clearly stated that the beneficiary would receive \$35,000 per year in salary. If the petitioner cannot meet this obligation, then the petition cannot be approved. The petitioner cannot remedy this deficiency by changing the terms of proposed employment. Accordingly, we find the petitioner failed to establish, through competent and verifiable documentation, of how it intends to compensate the beneficiary for the salary claimed.

Beyond the decision of the director, we find an additional issue that precludes approval of the petitioner: specifically, the relationship between the petitioning church and the [REDACTED] is of concern. Although the petitioner claims that the Maryland church is a “subsidiary branch” of the petitioning church, that the beneficiary will work in Maryland and that the Maryland church will pay the beneficiary’s additional salary, the petitioner has failed to adequately establish that these churches are part of a single organization. Rather, they appear to be separate and independent from one another, have separate names and separate Boards of Trustees. As it relates to the Maryland church’s 501(c)(3) status, the petitioner has failed to demonstrate that the Maryland church is a tax-exempt organization, much less that it is covered under a group-exemption granted to the petitioner pursuant to the regulation at 8 C.F.R. § 214.2(r)(9). Such facts call into question whether the beneficiary is coming “at the request of the petitioner to work for the petitioner” as required under 8 C.F.R. § 214.2(r)(1)(iv).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.