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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 08 203 51328 Office: CALIFORNIA SERVICE CENTER Date: FEB 25 2010

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 AAO will dismiss the appeal.

The petitioner is a Christian church. It seeks to extend the beneficiary's status 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 missionary. The director determined that the petitioner had failed to establish its ability to compensate the beneficiary.

On appeal, the petitioner submits arguments from counsel, a declaration from church officials, and copies of bank statements.

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 U.S. Citizenship and Immigration Services (USCIS) 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

(v) Not work in the United States in any other capacity, except as provided in paragraph (r)(2) of this section.

The USCIS regulation at 8 C.F.R. § 214.2(r)(11) reads, 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. IRS [Internal Revenue Service] 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 USCIS regulation at 8 C.F.R. § 214.2(r)(16) reads:

Inspections, evaluations, verifications, and compliance reviews. The supporting evidence submitted may be verified by USCIS 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. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

On the Form I-129 petition, the petitioner indicated that the beneficiary would receive $24,000 per year. The petitioner submitted copies of bank statements, showing that the petitioner's daily bank balance varied between $207.70 and $24,565.51 during the first six months of 2008. On June 24, 2008, the latest date shown, the petitioner's bank balance was $10,984.34. Each of the 2008 bank statements shows a check for $2,000. Photocopies of checks with matching numbers show that these checks were paid to the beneficiary.

On March 12, 2008, a USCIS immigration officer (IO) visited the petitioning church to verify the information in two petitions filed by the petitioner (including the present petition). The IO spoke to [redacted] who stated that the two beneficiaries were not at the church because one beneficiary [redacted] was ill, and the other (the beneficiary in the present proceeding) had been injured in an automobile accident. [redacted] was unable to produce the petitioner's financial documentation on request. The IO spoke to a neighbor, who stated that "people are at the church for early Morning Prayer and on Sundays. The neighbor sees the minister come and go during the day, but that's the only person."

On March 12, 2008, the IO interviewed the beneficiaries of the two petitions. The present beneficiary "claimed that he works at the church Monday – Friday from 9:00 am – 5:00 pm." [redacted] "admitted that she has not been paid a salary for two years because the church has had financial problems, and that she sometimes works with her husband at his mini-market."

On December 12, 2008, the director informed the petitioner of the director's intent to deny the petition based on the above information. The director stated: "USCIS has determined that there are no religious activities at the religious entity, and the religious entity does not [have] the funds to pay the proffered wage."

In response to the notice, [redacted] stated that the beneficiary sometimes had to modify his work hours to accommodate his rehabilitation following his injury in late 2007. Regarding the other allegations, [redacted] asserted that the statements from an unnamed "neighbor" were too vague for comment, and stated: "I do not wish to speculate upon the motive or reason for [redacted] statements or her allegations that she was not paid."

The petitioner submitted copies of additional bank statements from January 2007 through November 2008, and copies of medical documentation relating to the beneficiary's broken foot. Each of the bank statements shows a $2,000 check, consistent with the beneficiary's salary, but with no new evidence to show that the beneficiary received those checks. The petitioner submitted no evidence to identify payments to [redacted] Thus, the petitioner disputed [redacted] claims, but did not refute them.

The director submitted a list of church members, but this does not show that the church engages in religious activity apart from "early Morning Prayer and on Sundays."

The director denied the petition on January 27, 2009, stating that the petitioner had not sufficiently overcome the concerns raised during the IO's March 2008 visit. The director noted that the petitioner had not submitted IRS documentation of the beneficiary's salary or explained the absence of such documentation. The director cited 8 C.F.R. § 214.2(r)(11)(i), and stated: "Without evidence such as IRS documentation, such as IRS Form W-2 or certified tax returns, the banks [*sic*] statements alone are not sufficient in demonstrating that the petitioner has the ability to pay the beneficiary the proffered wages."

Counsel states:

> The Service also points out the issue created by the statements of [redacted] who claimed that she was not given wages by Petitioner for her services because of Petitioner's poor financial position. In reality, [redacted] was motivated by the desire to protect her own immigration interests and therefore made unsubstantiated statements regarding affairs she was not privy to, including actual knowledge of Petitioner's financial position.

The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel condemns [redacted] for making "unsubstantiated statements regarding affairs she was not privy to," but, in the same sentence, claims to know what "motivated" [redacted] "[i]n reality." Counsel does not identify the source of this insight into [redacted] mental state, nor does counsel explain how it would be in [redacted] "own immigration interests" to claim, falsely, that the entity petitioning for her could not afford to pay her salary.

The petitioner submits a declaration from [redacted], pastor emeritus of the petitioning church, who states:

> [redacted] began working as an employee of [the petitioner] in 2002. In November 2005, [redacted] underwent an immigration inspection and was told that she would receive her permanent resident card within four weeks. When she was notified of her impending Permanent Residence status, [redacted] felt such gratitude to [the petitioner] that starting November 2005 she became [a church] volunteer. [redacted] reasoned that since her husband's business generated enough income for the family, she no longer required a salary from [the petitioner].
>
> The USCIS states that [redacted] was not paid because of [the petitioner's] poor financial status. However, this is untrue. Firstly, [redacted] did not know [the petitioner's]

> financial condition. . . . In truth, [redacted] was not paid for her services for the last two years because she, on her own volition, became [a church] volunteer.

[redacted] co-signed the declaration quoted above. The declaration repeatedly indicates that [redacted] was unpaid after 2005. Previously, however, [redacted] did not state that [redacted] was an unpaid volunteer. Instead, he dismissed her "allegations that she was not paid," stating: "I do not wish to speculate upon the motive or reason for [redacted] statements." Thus, the two statements are in conflict, and appear to contradict one another. If [redacted] was unpaid, as the petitioner now concedes, then her statement "that she was not paid" is a fact, not an "allegation" to be waved off. The petitioner's officials appear, therefore, to be tailoring their statements as new information emerges.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 582, 591-92.

In an effort to establish its ability to compensate the beneficiary, the petitioner submits copies of additional bank statements. The petitioner did not explain the absence of IRS documentation. The director denied the petition in part because "bank[] statements alone are not sufficient"; the petitioner cannot resolve this issue by submitting more bank statements. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The lack of evidence relates to another issue, not raised by the director. 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, the petitioner seeks to extend the beneficiary's prior R-1 status. 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. 8 C.F.R. § 214.2(r)(12)(i). The petitioner submitted only an uncertified copy of the beneficiary's unsigned 2007 income tax return and "certificates" prepared after the fact to attest to the beneficiary's employment and compensation.

The petitioner's direct evidence of the beneficiary's past compensation is limited to six paychecks from the first half of 2008. Other payments might be inferred from the other bank statements, but there is no documentary evidence that the payments listed on those bank statements went to the beneficiary. Because the petitioner's contradictory statements regarding [redacted]

compensation call the petitioner's overall credibility into question, we will not accept the petitioner's unsupported claim that these other payments went to the beneficiary. The petitioner has not submitted evidence of the beneficiary's past employment required under 8 C.F.R. § 214.2(r)(12)(i), and this omission warrants denial of the petition.

Also, the USCIS regulation at 8 C.F.R. § 214.2(r)(8) requires an authorized official of the prospective employer of an R-1 alien to complete, sign and date an attestation providing information about the petitioner, the beneficiary, and matters material to the petition. The record contains no such attestation, and the petition cannot lawfully be approved without it. This is another ground for denial.

The AAO will dismiss the appeal for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. The petitioner has not met that burden.

ORDER: The appeal is dismissed.