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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

B13

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 0 2 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:

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 $585. 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,

Mai Thurson

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 Protestant Christian church affiliated with a similarly-named "mother church" in Nigeria. It seeks to change the beneficiary's status to that of 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 failed to establish its ability to compensate the beneficiary.

On appeal, the petitioner submits a brief from counsel, witness statements, and various other exhibits.

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)(I) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii)(I), pertains to a nonimmigrant who seeks to enter the United States solely for the purpose of carrying on the vocation of a minister of that religious denomination.

U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 214.2(r)(1) state 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 petitioner filed the Form I-129 petition on June 30, 2008. The petitioner indicated that the beneficiary would receive $2,000 per month (equal to $24,000 per year). A "Financial Statement 2006/2007" indicated that the petitioner's income exceeded its expenses by $31,510. From the "2006/2007" date, it is not clear whether the statement covers both entire years or merely parts of them. The petitioner claimed no salary expenses, which is consistent with the petitioner's assertion on Form I-129 that it had no employees.

The petitioner's articles of incorporation identify the beneficiary as one of five incorporators, and early church documents from 2006/2007 show the beneficiary's then residential address as the church's business address. An Internal Revenue Service (IRS) determination letter indicated that, as a church, the petitioner is not required to file annual Form 990 returns.

On November 5, 2008, the director issued a request for evidence (RFE), instructing the petitioner to submit "a complete copy of the petitioner's most recent IRS Form 990, Return of Organization Exempt from Income Tax," and documentation to show the petitioner's intention and ability to meet the beneficiary's $2,000 monthly salary.

In response, [redacted], identified as a co-founder and director of the petitioning church, stated:

> The church now has 29 members regularly attending our Sunday worship services. . . .
>
> The church currently does not have paid employees. The Beneficiary . . . will be the first one upon approval of this I-129R petition. . . .
>
> The church's annual offering is less than $25,000. Enclosed please find a copy of IRS FORM 990-N which was filed with IRS.

The petitioner submitted a printout of an electronic mail message from the Urban Institute, indicating that the petitioner had electronically filed IRS Form 990-N on November 12, 2008 (a week after the director issued the RFE) via an "e-postcard." What appears to be a transcript of the "e-postcard" shows the petitioner's name and address, but no financial information.

The petitioner also submitted a copy of a bank statement covering the period from September 8 to November 13, 2008. According to the statement, the petitioner began that period with a balance of $13,988.20 and ended it with $15,081.69, a net increase of $1,093.49. During that time, the petitioner made nine deposits totaling $3,438.00. At that rate, the beneficiary's salary of $2,000 per month would exhaust the petitioner's bank balance faster than the income would replenish it. The balance figures also indicate that the petitioner, by late 2008, had already gone through most of the $31,510 that it claimed as of 2007.

[redacted] missionary director of the mother church in [redacted] stated: "we promise to fund and assist the new branch of our church at New Jersey to the tune of $2,000 per month until the church at New Jersey is mature enough to maintain itself."

The director denied the petition on March 26, 2009, stating that the petitioner had not shown that it is capable of paying the beneficiary $24,000 per year.

On appeal, [redacted] stated that the petitioner had previously submitted "pledges of financial support from the petitioning church's elders and the petitioning church's affiliated mother church." The petitioner submits copies of identical "form" letters signed by various church elders, pledging "to sustain the church financially and take care of the pastor." The letters include no contact information for the elders, and no financial documentation to show that the elders are in fact able to meet this obligation.

As for the "affiliated mother church" in Nigeria, the USCIS regulation at 8 C.F.R. § 214.2(r)(11) requires the petitioner to submit verifiable evidence explaining how the petitioner will compensate the alien. The petitioner is a 29-member church in New Jersey. The mother church in Nigeria is not the petitioner, and there is no evidence that the mother church is routinely financially responsible for individual congregations. The pledge of aid is based on the admission that the petitioner is not yet a self-sufficient congregation.

The petitioner has conceded that its income is not sufficient to cover the beneficiary's salary. [redacted] acknowledged that the church's annual income "is less than $25,000," which would make it difficult or impossible to pay the beneficiary $24,000 per year even if the church had no other expenses. Materials submitted on appeal indicate that the petitioner pays $850 per month in rent, a fixed expense that makes it mathematically impossible for the petitioner to pay the beneficiary's full salary while taking in "less than $25,000" per year.

Counsel asserts that the petitioner's "continuous growing . . . from its inception to the present time leads one to the conclusion that the petitioning church clearly can pay the offered wage." Counsel cites no actual figures to support this claim. 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).

It could be argued that, if the petitioner's growth continues, the petitioner will eventually be able to pay the beneficiary's salary, but this is speculation. The regulation at 8 C.F.R. § 103.2(b)(1) requires the petitioner to establish eligibility as of the time of filing; it cannot suffice for the petitioner to expect that qualifying conditions will eventually come into existence. As late as the RFE response, the petitioner submitted evidence to show that its monthly income was less than the beneficiary's monthly salary, and the petitioner's mother church claimed that it would shoulder the financial burden until the petitioner is able to do so on its own.

New materials submitted on appeal do not show that the church is self-sufficient to a degree that it can pay the beneficiary $2,000 per month. Rather, the petitioner shows only that a variety of witnesses in the United States and Nigeria have pledged to meet obligations that the petitioner cannot meet by itself. These materials support, rather than refute, the director's finding that the petitioner is unable to compensate the beneficiary. Because the petitioner must establish the petitioner's ability to compensate the beneficiary, rather than simply identify third parties willing to do so, the petitioner cannot meet this burden by claiming that outside help is available.

In a new declaration, the beneficiary states "I can be self-supporting in my missionary work in planting churches." It appears that the beneficiary makes this statement in an attempt to satisfy the USCIS regulation at 8 C.F.R. § 214.2(r)(11)(ii), which permits R-1 nonimmigrants to support themselves. The full text of the regulation, however, makes it clear that the regulation does not apply in this instance:

> (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.
>
> (B) An established program for temporary, uncompensated work is defined to be a missionary program in which:
>
> (1) Foreign workers, whether compensated or uncompensated, have previously participated in R-1 status;
>
> (2) Missionary workers are traditionally uncompensated;
>
> (3) The organization provides formal training for missionaries; and
>
> (4) Participation in such missionary work is an established element of religious development in that denomination.
>
> (C) The petitioner must submit evidence demonstrating:
>
> (1) That the organization has an established program for temporary, uncompensated missionary work;
>
> (2) That the denomination maintains missionary programs both in the United states and abroad;
>
> (3) The religious worker's acceptance into the missionary program;
>
> (4) The religious duties and responsibilities associated with the traditionally uncompensated missionary work; and

> (5) Copies of the alien's bank records, budgets documenting the sources of self-support (including personal or family savings, room and board with host families in the United States, donations from the denomination's churches), or other verifiable evidence acceptable to USCIS.

The petitioner has not shown the existence of "an established program for temporary, uncompensated missionary work, which is part of a broader international program of missionary work sponsored by the denomination," nor has the petitioner met numerous other requirements in the cited regulation.

Furthermore, the petitioner had previously described the beneficiary solely as a pastor. It appears that the petitioner is attempting, at this late date, to re-classify the beneficiary as a self-supporting missionary in order to avoid having to establish its ability to compensate him. We will not accept this late and fundamental change to the petition. 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 a monthly $2,000 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.

We note that, in the denial notice, the director stated: "[t]he alleged Form 990-N that the petitioner enclosed with their response [to the RFE] is nowhere to be found. More concerning, IRS does not have an IRS Form 990-N."

In the decision, the director cited no source to support the claim that the "IRS does not have an IRS Form 990-N." The IRS's web site, at http://www.irs.gov/charities/article/0,,id=169250,00.html (printout added to record May 21, 2010), provides information about the Form 990-N (a return for small organizations with income of less than $25,000 per year). This is an electronic form, and therefore would not appear on any list of paper IRS forms or database of downloadable forms.

According to http://www.irs.gov/charities/article/0,,id=177785,00.html (printout added to record May 21, 2010), churches are not required to file Form 990-N. The petitioner's IRS determination letter, previously submitted, indicated that, as a church, the petitioner is not required to file a Form 990 return. Because IRS does not require the petitioner to file Forms 990 or 990-N, it is understandable that the petitioner did not file any such form until after the director requested it.

Notwithstanding the director's incorrect finding that IRS Form 990-N does not exist, we agree with the overall finding that the petitioner has not established that it can compensate the beneficiary as claimed. This finding, by itself, is sufficient to warrant denial of the petition and dismissal of the appeal.

Review of the record shows an additional issue of concern. 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).

The USCIS regulation at 8 C.F.R. § 214.2(r)(16) reads as follows:

> *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.

A USCIS officer conducted a compliance review, including a site visit, on February 13, 2009. As part of the compliance review, the officer contacted the beneficiary and [redacted] The petitioner acknowledges that the compliance review took place; counsel discusses the review in the appellate brief. Available information indicates that the petitioner failed the compliance review, in part because the USCIS officer observed no activity at the church site, and was unable to verify that religious services regularly took place there. The officer, noting that several principals (including [redacted] reside several hours away from the church, also concluded that "the Petitioning entity appears to have been created for the purpose of [filing] the petition for the beneficiary" (who was one of the founders of the petitioning church).

The unsatisfactory results of the compliance review present an additional basis for denial of the petition.

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

ORDER: The appeal is dismissed.