

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

D13

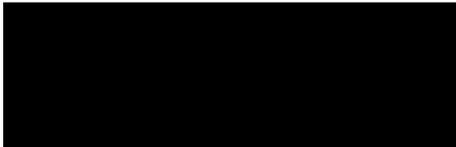


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 23 2010**

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 \$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,


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 graphic designer. The director determined that the petitioner had not established that the position qualifies as that of a religious occupation.

The director also determined that the beneficiary had engaged in unlawful employment with the petitioning organization. Citing 8 C.F.R. § 214.2(r)(13), the director concluded that, since the beneficiary had been hired by the petitioning organization prior to approval of the instant petition, the beneficiary had engaged in unlawful employment that barred him from future adjustment of status.

The record reflects that the beneficiary was present in the United States pursuant to an F-1, nonimmigrant student visa. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 248.3(a) provides that an employer seeking the services of an alien as an R-1 nonimmigrant religious worker, must, where the alien is already in the United States and does not currently hold such status, apply for a change of status on Form I-129, Petition for a Nonimmigrant Worker. Thus, the petition form is also the application form for change of status, but the petition and the application are separate proceedings. While the determination regarding an alien's eligibility may be appealed, there is no appeal from the denial of an application for a change of status filed on Form I-129. 8 C.F.R. § 248.3(g). Because the beneficiary's past employment is a change of status issue, rather than a petition eligibility issue, the AAO lacks authority to decide this question.

The remaining issue on appeal is whether the petitioner has established that the proffered position qualifies as that of a religious occupation or vocation. On appeal, counsel asserts that the proffered position "relates to a direct position the church has been using for years." Counsel submits a brief and 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 regulation at 8 C.F.R. § 214.2(3) provides that a:

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;
- (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.

The petitioner stated in an August 12, 2008 letter submitted with the petition that the beneficiary “has been hired as a full time employee” as the organization’s graphic designer, and that the position “includes the design and production of our print, video, and website materials for our ministries.” The petitioner indicated that the beneficiary’s salary was \$35,000 annually.

The director denied the petition, determining that graphic design “is considered an essentially secular occupation” and that the petitioner had not submitted evidence that the position relates to a traditional religious function within the petitioner’s organization.

On appeal, the petitioner states in an April 1, 2009 letter that individuals in the position “must be a professing Christian, espousing the beliefs and Values that are core to” the petitioning organization. The petitioner also states:

This position further requires that the employee be actively involved in the ministry of the church, requiring the understanding of Christian Doctrine, Beliefs and Values, and communicating those Beliefs and Values through Graphic Arts, to provide a clearer understanding and deeper growth of those we minister to.

The petitioner provided a copy of its mission statement; however, it provided no documentation to corroborate any of the statements quoted above. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel asserts that the beneficiary "creates products for instruction to the youth." However, this statement is not supported by the evidence of record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner provided no official documents from its denomination regarding the requirements of the position and no documentation to establish that the position is a traditional religious function, that the position is recognized as a religious occupation within the petitioner's denomination, and that the duties of the position are primarily related to, and clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination. While counsel asserts that the position has been "a traditional religious function of the church and has been even before the beneficiary was offered the position," no evidence of record supports counsel's argument. A position is not a religious occupation simply because an individual works for a religious organization. Further, the regulation requires the petitioner to establish that the proffered position is recognized as a religious occupation within its denomination. The petitioner has submitted no documentation from its denomination in support of the petition.

The petitioner has failed to establish that the position of graphic designer is a religious occupation within the meaning of the regulation.

Beyond the decision of the director, the petitioner has failed to establish how it intends to compensate the beneficiary. 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 [U.S. Citizenship and Immigration Services], 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 petitioner stated that the beneficiary would receive an annual salary of \$35,000. However, it submitted no verifiable documentation to establish how it intends to compensate the beneficiary.

The petitioner has also failed to establish that it is a bona fide nonprofit religious organization. The regulation at 8 C.F.R. § 214.2(r)(3) defines a tax-exempt organization as “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 section[] 501(c)(3) of the Internal Revenue Code” (IRC). The regulation at 8 C.F.R. § 214.2(r)(9) provides:

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

(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 [IRC], 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 petitioner submitted a copy of a June 28, 1979 letter from the IRS to the ██████████ ██████████ in the U.S.A. in ██████████ Pennsylvania, granting the organization a group exemption for its subordinates as tax exempt organizations under section 501(c)(3), 509(a)(1) and 170(b)(1)(A)(i) of the IRC. The letter instructed the organization to annually provide a list of its subordinates units that were to be added to the list. The petitioner was incorporated in 1985. It submitted no documentation to establish that it was covered under the group exemption granted to the ██████████ ██████████ in the U.S.A.

Additionally, the petitioner has failed to submit the attestation required by the regulation at 8 C.F.R. § 214.2(r)(8).

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 petition will be denied 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.