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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

D13

DATE: **JUN 07 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

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 Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter for a new decision. The director again denied the petition and certified the decision to the AAO for review. The AAO will affirm the decision to deny the petition.

In this decision, the term "prior counsel" shall refer to [REDACTED] who represented the petitioner at the time the petitioner filed the petition. The term "counsel" shall refer to the present attorney of record.

The petitioner is a Christian church that split off from the [REDACTED] in 2007. 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 an assistant pastor. The director determined that the petitioner had not established a valid full-time job offer or submitted sufficient evidence relating to the beneficiary's intended compensation.

In response to the certified decision, the petitioner submits a brief from counsel and supporting 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) 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 petitioner filed the Form I-129 petition on March 30, 2009. The director denied the petition on September 18, 2009, because the duties that the beneficiary was performing for the petitioner did not match the description in the petitioner's job offer letter. The AAO withdrew that decision, noting that the petitioner had not claimed that the beneficiary was already performing the duties of the offered position. At the time the petitioner filed the petition, the beneficiary was a TN-1 nonimmigrant, a classification limited to certain professionals listed under the USCIS regulation at 8 C.F.R. § 214.6(c). The petitioner argued that the beneficiary's TN-1 nonimmigrant classification did not permit him to work as an associate pastor.

In its remand order, the AAO raised two issues which the director pursued in the second denial decision. The first issue the AAO will consider concerns the credibility of the job offer. 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.

In the employer attestation that accompanied the Form I-129 petition, the petitioner claimed to have 150 members and three employees (“evangelist,” “editorial” and “support services”) at the locations where the beneficiary would work. The petitioner claimed locations in three Texas cities (Dallas, Austin and the petitioner’s headquarters in Tyler), and nine other locations in eight states and the Canadian province of Ontario. A job offer letter from [REDACTED] president and evangelist of the petitioning entity, lists the following duties and responsibilities:

1. Conduct Religious services in the Tyler, Dallas, and Austin Churches;
2. Based on a pre-arranged assignment schedule, visit and speak at the Church’s nine (9) congregations, in the United States and Canada;
3. Assist the Pastor in periodic Bible studies;
4. Instruct and encourage the members in the teachings of the Bible;
5. Conduct and assist in counseling sessions with the members to assist them in applying these Biblical teachings in a practical way in their daily Christian lives;
6. Set up appointments to visit the members at their homes; the elderly and the shut-ins; and anoint the sick;
7. Respond to correspondence and communications received from the general public, who show and interest in the doctrines and teachings of the Church;
8. Baptize those individuals who, after counsel, evaluation and consultation with the pastor, are deemed to have displayed the fruits worthy of repentance;
9. Perform and officiate at weddings and funerals without charge;
10. Oversee and supervise official Church social activities and functions;
11. Give sermons during the weekly Sabbath as well as the annual holy days; and,
12. Write articles and booklets on doctrine, prophecy and Christian living for posting on the Church’s official web site and distribution to those who request them.

In a separate letter, [REDACTED] stated that, as of the filing date, the beneficiary “is a retained, independent contractor serving as a consultant, overseeing the media operations of the Church.”

An organizational chart shows three branches under the overall control of the “President & Evangelist”:

- Church Administration
 - Area Pastors
 - Associate Pastor
 - Local Elder
 - Deacon(s)
 - Congregation Members
- Editorial
 - Media Consultant

Web Services and Design
Sermon Production
Broadcast Production
Business Office
Finance
Member Services
Mail Processing

On April 22, 2009, two USCIS officers visited the petitioner's headquarters location in Tyler, Texas. The officers described the location as "an unmarked office in a strip-mall" with no exterior signs identifying the site as a church. In an attempt to show that the location was a church, the beneficiary "pointed to a podium and a few chairs that were in a closet." When the officers arrived for the visit, the beneficiary was duplicating compact discs and packaging them for mailing. The beneficiary stated that the discs contained recordings of sermons. The beneficiary stated that there were four employees at the location – himself, [REDACTED] spouse and son.

On July 21, 2009, the director issued a notice of intent to deny the petition, based on the information from the site inspection and interview. In response, [REDACTED] stated:

We employ 3 full-time ministers and an office staff at our Tyler headquarters.

. . . Our Tyler headquarters also functions as the meeting place of the Tyler congregation on the weekly Sabbath. With 9 members regularly attending, our office premises are suitable enough to comfortably accommodate us all, without incurring an additional expense.

[REDACTED] added that the petitioner occasionally rents larger spaces for visitors from the petitioner's satellite congregations. The petitioner documented its rental of hotel conference rooms.

Regarding the beneficiary's duties, [REDACTED] stated:

[The beneficiary] is currently holding a TN professional visa. He has been retained by the Church as an independent consultant to initiate, develop and oversee its media operations. It would be a violation of the terms of his TN visa to function actively in an Associate Pastor capacity.

The petitioner submitted a copy of its "Sabbath Service Schedule" for July-September 2009, indicating that the beneficiary would deliver the "Sermon" on August 15 and September 26, deliver the "Sermonette" on July 18, August 29, and September 12, and serve as "Song Leader" every other week from July 11 through September 5. The schedule indicated that Charles Bryce would deliver the "Sermonette" on August 8, but the petitioner submitted what it claimed is a photograph of the beneficiary delivering the "Sermonette" on that date.

██████████ claimed that the beneficiary was not yet serving as an associate pastor because his TN-1 nonimmigrant status only authorized him to serve as a media operations consultant, but nevertheless the petitioner claims that the beneficiary has been leading worship services. Upon re-examining the record, the AAO notes that, on his 2008 income tax return, the beneficiary identified his occupation as “minister” and appears to have claimed a housing deduction that is only available to members of the clergy. The petitioner has presented contradictory claims as to whether or not the beneficiary has begun performing ministerial duties. 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.

If the beneficiary was not yet working for the petitioner as a minister, he would, upon approval of the petition, become the fourth full-time minister serving a congregation of nine people (including the beneficiary and his family). If the beneficiary was one of the three existing ministers, then this contradicts the claim that the beneficiary had not yet assumed pastoral duties.

The issue of the job offer did not figure in the director’s September 18, 2009 denial, but the AAO, in its September 22, 2010 remand order, instructed the director to “address whether the petitioner has established that the beneficiary will work at least 20 hours per week” as required by the regulation at 8 C.F.R. § 214.2(r)(1)(ii).

On January 4, 2011, the director issued a request for evidence, noting the size of the petitioner’s home congregation and stating that “the petitioner must establish that the beneficiary will be engaged in qualified employment for at least 20 hours weekly.” In response, counsel states that “the Church’s steadily increasing stream of public interest” requires the beneficiary’s work “in the capacity as Associate Pastor, to assist with the ministerial duties in the Texas congregations.” Counsel then repeated the list of duties that accompanied the initial filing of the petition.

The petitioner submitted the following “Detailed Job Description for Associate Pastor”:

Associate Pastor’s Duties and Responsibilities	Hours Worked Weekly
Conduct religious services in the Tyler, Dallas and Austin churches	4
Continue to serve as the Minister of the Ohio, Pennsylvania and Ontario (Canada) congregations	4
Act as a traveling minister from Headquarters and devise a travel and visiting schedule to speak at the Church’s (9) congregations throughout the United States and Canada (travel frequency estimated at every 8 weeks)	Based on travel schedule
Give sermons during the weekly Sabbath as well as the annual holy days (including planning, research and preparation)	6

Instruct and encourage the members in the teachings of the Bible	5
Perform counseling sessions with the members to assist them in applying these Biblical teachings in a practical way in their daily Christian lives	5
Set up appointments to visit the members at their homes, the elderly and shut-ins (includes travel time)	5
Anoint the sick	As needed
Respond to correspondence and communications received from individuals who show an interest in the doctrines and teachings of the Church (includes research and response)	4
Baptize those individuals who, after counsel, evaluation and consultation with the pastor, are deemed to have displayed the fruits worthy of repentance	As needed
Perform and officiate at weddings and funerals without charge	As needed
Oversee and supervise official Church social activities and functions	As needed
Assist the Pastor in conducting periodic Bible studies	2
Write articles and booklets on doctrine, prophecy and Christian living for the Church's web site and magazine (includes topic selection, research and final submission)	5
TOTAL NUMBER OF HOURS PER WEEK	40

The above description appears to include redundant listings. For instance, it has separate listings for weekly religious services and for giving sermons. The petitioner does not explain when the beneficiary would deliver sermons, if not during weekly religious services. Similarly, there are separate entries for "conducting . . . Bible studies" and "[i]nstruct[ing] . . . members in the teachings of the Bible," both of which appear to describe the same activity.

██████████ stated: "There are currently 35 members regularly attending the Texas congregations," with the number in Tyler having grown from nine to 13. He also stated that the beneficiary is "currently serving as the Minister of the Church's Ontario (Canada) congregation." It appears that the beneficiary was in Ontario at the time ██████████ made this claim (counsel says as much in his latest communication). ██████████ stated that the beneficiary's "main purpose is to provide religious services to the Texas congregations while continuing his previous duties at the Ontario (Canada) congregation," but he did not explain how exactly the beneficiary could simultaneously serve congregations separated by many hundreds of miles and an international border.

The director again denied the petition on April 6, 2011, and certified the decision to the AAO for review. In the decision, the director found: "The petitioner has failed to establish a growing following that requires full time ministerial services of the beneficiary." In response to the decision, counsel describes previously submitted evidence and states that the evidence shows that the petitioner requires the beneficiary's full-time services as claimed. As before, counsel relies on vague and unsupported assertions about the "steadily increasing stream of public interest" in the petitioning

church. 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 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

Counsel's arguments on appeal contain no mention of [REDACTED] earlier claim that the beneficiary serves the Ontario congregation while working in Texas. The earlier schedule, indicating that the beneficiary would "continue" to serve congregations in Ohio and Pennsylvania, implied that the beneficiary was already serving those congregations as well. The petitioner's inconsistent claims (and omissions) in this area undermine the petitioner's overall credibility, under *Matter of Ho*. The observation that members of various congregations occasionally gather in one place does not establish a credible need for the beneficiary's full-time services, especially when headquartered at a very small congregation that supposedly already has three ministers.

The petitioner has not overcome the credibility issues that the director and the AAO have raised at various points in this proceeding. The AAO therefore agrees with the director's finding that the petitioner has not demonstrated a credible offer of full-time employment.

The second and final issue raised in the denial notice concerns the beneficiary's intended compensation. The USCIS regulation at 8 C.F.R. § 214.2(r)(11)(i) requires the petitioner to submit verifiable evidence explaining how the petitioner will compensate the alien. 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. Internal Revenue Service (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.

In the employer attestation, the petitioner stated: "The salary for this full time position is \$36,670.08 per year." A balance sheet indicated that the petitioner had \$25,418.87 in checking and savings accounts as of December 31, 2008. The petitioner claimed, on an accompanying profit and loss statement, \$341,530.51 in income and \$347,210.08 in expenses, leaving a net loss of \$5,392.92. The petitioner's itemized list of expenses listed only three items:

Preaching the Gospel	\$35,678.16
Feeding the Flock	202,550.15
Administration	108,981.77

The vague terminology sheds little light on the exact nature of the activities that incurred the above expenses.

Prior counsel stated that the petitioner has employed the beneficiary "as a TN-1 Nonimmigrant since May 23, 2007," during which time the petitioner "has paid a salary to" the beneficiary. The petitioner submitted copies of an IRS Form W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary \$12,500.61 in 2007, and an IRS Form 1099-MISC Miscellaneous Income statement showing that the petitioner paid the beneficiary \$18,422.10 in 2008. Thus, in 2008, the petitioner paid the beneficiary barely half of the intended salary, while posting a loss in excess of \$5,000. Given these figures, it is not readily apparent that the petitioner can pay the beneficiary the stated annual salary of \$36,670.08.

The beneficiary's compensation was not a factor in the director's first decision, but the AAO, in its September 2010 remand order, found that "[t]he petitioner submitted insufficient documentation to establish how it intends to pay the beneficiary the proffered salary." The director repeated this concern in the January 2011 request for evidence.

In response, the petitioner submitted a copy of an IRS 1099-MISC, indicating that the petitioner paid the beneficiary \$37,790.94 in 2010. (The document shows a Texas address for the beneficiary, despite counsel's assertion that the beneficiary received that pay for serving as a minister in Canada.) The petitioner noted that this amount exceeds the stated salary, and thus proves the petitioner's ability to pay the beneficiary at that rate. The petitioner also, however, submitted a profit and loss statement for 2010 showing that the petitioner's expenses exceeded its income by \$23,419.57 that year.

The director, in the April 2011 certified denial notice, stated: "although the petitioner was in fact able to compensate the beneficiary for 2010, the petitioning organization is operating beyond what it can afford." The director found that the petitioner had not submitted verifiable documentation to establish its ongoing ability to compensate the beneficiary. The director added that, while the petitioner has repeatedly claimed that growing public interest is increasing demands on the church staff, the petitioner has submitted minimal evidence in this regard. Anecdotal evidence, in the form of individual letters and the like, does not establish the growth of the church beyond the individuals writing those letters.

In response, the petitioner submits photocopied bank statements, many showing balances in the low five figures, from 2010 and early 2011. Counsel cites a memorandum from [REDACTED], *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 4, 2004). Counsel observes that, according to the memorandum, USCIS "should make a positive ability to pay determination" if "[t]he record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

Counsel's reliance on this memorandum is problematic for several reasons. The regulation at 8 C.F.R. § 204.5(g)(2) applies to immigrant petitions, whereas the present proceeding involves a nonimmigrant petition. Furthermore, that regulation limits the types of acceptable initial evidence of a petitioner's ability to pay a beneficiary. The evidence must take the form of annual reports, federal tax returns, or audited financial statements. According to the memorandum that counsel cites,

evidence of the beneficiary's employment at the proffered rate of compensation is dispositive only "[i]f the record is complete with respect to all of the required evidence." Here, the petitioner has not submitted annual reports, federal tax returns, or audited financial statements, and therefore the petitioner has not submitted the initial evidence that would be required if 8 C.F.R. § 204.5(g)(2) applied here.

Also, the USCIS regulation at 8 C.F.R. § 103.2(b)(1) requires the petitioner to establish eligibility as of the petition's filing date, in this instance March 30, 2009. *See also*, 8 C.F.R. § 103.2(b)(12). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The record shows that the petitioner lost over \$5,000 in 2009, while paying the beneficiary only about half of the offered salary. After filing, the petitioner did pay the full salary in 2010, but, as the director noted, the petitioner lost even more money that year. The petitioner has not shown that it would be able to sustain full salary payments to the beneficiary over the term of the nonimmigrant visa. Claims of major growth cannot suffice in this regard. The AAO agrees with the director's finding that the petitioner has not submitted sufficient evidence relating to the beneficiary's intended compensation.

The AAO will affirm the certified denial 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 director's decision of April 6, 2011 is affirmed. The petition is denied.