(b)(6)

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

[redacted]

DATE: DEC 0 2 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based nonimmigrant visa petition. The AAO withdrew the director's decision and remanded the matter for a new decision. The director again denied the petition and certified the matter to the AAO for review. The AAO will affirm the director's decision. The petition remains denied.

The petitioner is a Christian church of the It seeks classification of the beneficiary as a nonimmigrant religious worker pursuant to section 101(a)(15)(R)(1) of the Act to perform services as a priest. The director found that the petitioner had not: (1) established how it will compensate the beneficiary; (2) successfully completed the compliance review process; and (3) established that the beneficiary would work full time as initially claimed.

Under the regulation at 8 C.F.R. § 103.4(a)(2), the director allowed the petitioner 30 days to respond to the certified decision. The petitioner's response includes a brief from counsel, a statement from a church trustee, and background information about the petitioner's religious denomination.

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.

Intended Compensation

The first issue 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. 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 filed Form I-129, Petition for a Nonimmigrant Worker, on November 18, 2011. On Part 5 of that form, the petitioner provided the following information:

8. Wages per week or per year:	[blank]
* * *	
13. Current Number of Employees in the U.S.:	2
14. Gross Annual Income:	$201,464.75
15. Net Annual Income:	$58,195.14

In the accompanying employer attestation, the petitioner stated: "The church will fully support the alien by covering all the alien's medical expenses, provide for food, room, place of w[or]ship, all necessities for any work to be done, as well as any personal needs."

In a request for evidence dated November 22, 2011, the director instructed the petitioner to submit evidence to meet the regulatory requirement at 8 C.F.R. § 214.2(r)(11)(i), along with an employee

list and "copies of the petitioner's Quarterly Wage Reports for all employees for the last two (2) quarters." In response, [redacted] board member of the petitioning church, stated: "there is no one employed at [the petitioning] Church except [the beneficiary]." The petitioner submitted a profit and loss statement for 2010, including the following information:

Income	
Tithes/Offerings	
Charity Fund – Egypt	$91,453.00
Restricted Offerings	$12,467.00
Tithes/Offerings – Other	$201,464.75
Total Tithes/Offerings	$305,384.75
[net other income]	$13,192.46
Gross profit	$318,577.21
Expenses	
Ministry Expenses	
Clergy Services	$79,123.29
Temporary Priest's Salaries	$20,680.00
Travel Expense	$1,025.13
Books and Teaching Materials	$4,670.57
Total Ministry Expenses	$105,498.99
Other Salaries	$22,200.00
Total Expenses	$260,382.07
Net Income	$58,195.14

The petitioner did not explain who received "other salaries" if the beneficiary was the petitioner's only employee. The petitioner did not submit IRS documentation of salaries paid, or account for the absence of that evidence.

The beneficiary's compensation did not figure into the original denial of the petition on June 2, 2012, and therefore the petitioner did not address the issue on appeal from that decision.

In its January 31, 2013 remand order, the AAO noted that the petitioner's response to the director's December 2011 request for evidence did not include the required evidence to meet the regulatory requirements at 8 C.F.R. § 214.2(r)(11)(i) regarding the beneficiary's intended compensation. The AAO acknowledged the submission of "an unaudited copy of [the petitioner's] 'Profit & Loss' statement for January through December 2010," but found that the petitioner "submitted no supporting documentation to confirm the validity of the figures" on that statement.

The director issued a notice of intent to deny the petition on February 22, 2013. Among other issues, the director repeated the regulatory language at 8 C.F.R. § 214.2(r)(11)(i) and stated that the

petitioner's prior submissions have not met the stated requirements. The petitioner's response included a profit and loss statement for 2011, including the following information:

Gross profit	$390,446.93
Expenses	
Ministry Expenses	
Temporary Priest's Salaries	$3,600.00
Ministry Expenses – other	$36,832.04
Total Ministry Expenses	$40,432.04
Other Salaries	$24,541.00
Total Expenses	$293,001.21
Total Income minus Expenses	$97,445.72
Reserved for Clergy Services	$96,949.98
Net Income	$495.74

The petitioner submitted partial copies of several bank statements issued between November 2011 and February 2013. The earliest statement, from the month that the petitioner filed the petition, showed an average balance of $51.402.61. The petitioner's average bank balance on the most recent statement was $164,296.25. These figures establish overall growth in the petitioner's finances subsequent to the filing date, but the relevant figures pertain to the filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1). A benefit request shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the benefit request was filed. 8 C.F.R. § 103.2(b)(12). 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'l Comm'r 1978).

The director reissued the notice of intent to deny the petition April 10, 2013, to correct an error in the earlier notice. In response, a regional official of the petitioner's denomination, stated: "We have the financial ability to pay the offered salary of $66,000 to him." The petitioner submitted a profit and loss statement for 2012 that included the following information:

Gross profit	$535,796.83
Expenses	
Ministry Expenses	
Clergy Services	$85,303.19
Travel Expense	$5,363.20
Total Ministry Expenses	$90,666.39

Other Salaries	$12,150.00
Total Expenses (+ "Other Expense")	$381,645.07
Net Income	$154,151.76

In the certified denial decision on June 25, 2013, the director stated that the petitioner did not submit sufficient verifiable evidence, as described in the regulation at 8 C.F.R. § 214.2(r)(11)(i), to establish how it will compensate the beneficiary. The director also noted that the petitioner's net income for 2010, as reported on the profit and loss statement, was less than the beneficiary's intended annual salary.

In response to the certified decision, counsel states: "The cited case law in the denial is simply not applicable to an R-1, non-immigrant religious worker visa because it not only preceded this regulation, the cases do not involve religious worker visa petitions." Counsel refers to a paragraph on pages 2-3 of the certified decision, in which the director cited six precedent decisions issued between 1978 and 1998.

The precedent decisions concerned different immigrant and nonimmigrant classifications, but the director cited them because they articulated general principles that apply broadly across different classifications. Most of the cited decisions, such as *Matter of Michelin Tire Corp.*, concern the requirement that the petition must be approvable at the time of filing. This requirement also exists in the regulations at 8 C.F.R. §§ 103.2(b)(1) and (12), and applies to nonimmigrant religious worker petitions.

The director also cited *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), which indicated that the petitioner does not have unlimited opportunities to supplement the record of proceeding by submitting evidence that the petitioner could or should have submitted previously. In that decision, the Board of Immigration Appeals held:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director. . . . In such a case, if the petitioner desires further consideration, he or she must file a new visa petition.

Id. at 766. *Soriano* did not involve an R-1 nonimmigrant petition, but its relevant principles apply to many types of petitions. Furthermore, the cited case law predates the latest regulations regarding R-1 nonimmigrant petitions, but counsel does not identify any part of the regulations that supersedes or nullifies any of the cited case law.

Counsel asserts that the regulation at 8 C.F.R. § 204.5(g)(2), which requires employers to establish their ability to pay foreign workers, does not apply to religious worker petitions. That regulation

lists several specific types of required evidence, which would not be available to many religious organizations. The director, however, did not cite that regulation in the denial notice.

Counsel quotes the regulation at 8 C.F.R. § 214.2(r)(11), and notes: "The regulation even permits self-supporting beneficiaries and non-salaried compensation in order to qualify for the R-1 visa petition." In this instance, the petitioner has indicated that the beneficiary would receive salaried compensation. The clauses regarding self-support and non-salaried compensation are, therefore, not relevant to the matter at hand. For salaried employees, the cited regulation does not include the exact phrase "ability to pay," but it requires the petitioner to submit IRS documentation or "comparable, verifiable documentation." The petitioner must submit specified evidence to show its intent and ability to compensate the beneficiary. The director, in the denial notice, stated that the petitioner's financial "data is not supported by any IRS documentation that may show wages may have been paid to employees." The director, therefore, correctly relied on applicable regulations in reaching the decision.

Counsel asserts that the regulatory language is flexible, and that the petitioner has offered the beneficiary a salary well above both poverty guidelines and the prevailing wage for clergy. Counsel does not establish the relevance of these assertions. Counsel quotes the regulatory language requiring submission of "IRS documentation" or comparable evidence, but does not address the petitioner's failure to meet this requirement or provide any reason why the petitioner should receive an exemption from it.

Counsel states:

> The standard of review when adjudicating an I-129, Nonimmigrant Petition for Religious Worker is a "preponderance of evidence." The preponderance of evidence is "more likely than not that the evidence supports approval" which demands only a 51% certainty. . . . If the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the petitioner has satisfied the standard of proof.

The above passage accurately describes the "preponderance of evidence" standard of proof, but this standard does not relieve the petitioner of its responsibility to submit required evidence, such as the IRS documentation or comparable, verifiable documentation required by 8 C.F.R. § 214.2(r)(11)(i).

In a separate statement, trustee of the petitioning entity, asserts that the petitioner's mid-November 2011 bank balance was nearly sufficient to cover a year's salary for the beneficiary, and that the petitioner's earlier expenses for that year included payments to temporary ministers whom the beneficiary would replace. The record contains no direct evidence of that earlier compensation. Mr. does not state whether the petitioner complied with IRS income reporting requirements relating to the temporary ministers' compensation.

The petitioner claims to have paid salaries in 2010 and 2011, which would have been subject to IRS reporting requirements. The director instructed the petitioner to submit the required IRS documentation or account for its absence, and the petitioner failed to do so.

A partial response to a notice of intent to deny will be considered a request for a decision on the record. 8 C.F.R. § 103.2(b)(11). Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request. 8 C.F.R. § 103.2(b)(14). Under these regulations, the petitioner's failure to submit evidence specifically required under the regulations, and specifically requested by the director, is grounds for denial of the petition. The petitioner has not overcome this basis for denial of the petition.

Compliance Review

The second stated ground for denial concerns the compliance review process. The USCIS regulation at 8 C.F.R. § 214.2(r)(16) provides:

> *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.

The petitioner's initial submission included utility bills, mortgage documents, and other materials linking the petitioner to the Maryland address shown on the Form I-129 petition. The petitioner also submitted printouts from the church's web site, [redacted] A calendar on that web site referred to "planned events" every Sunday, Wednesday, Friday, and Saturday.

At 11:49 a.m. on Wednesday, January 25, 2012, an immigration officer (IO) visited the petitioner's premises as part of the compliance review process. In a March 2, 2012 notice of intent to deny the petition, the director reported the results of the site inspection:

> A sign for the church is posted at the entrance of an unmarked visitor parking lot and the exterior of the building is unkempt. Also, some of the doorways and windows have been boarded.

> No personnel could be seen and no lighting or power seemed to be turned on. The front door and all other entrances to the building were locked. . . . The officer called the two telephone numbers listed on the petitioner's website and both times the calls were forwarded to the same automated recording which stated that the voice mailbox was full and no message could be left.
>
> On Thursday, January 26, 2012 the Officer contacted . . . who . . . stated that . . . there [are] only two employees at the location where the beneficiary will work; the beneficiary and and except for late evenings, the church is open all day.
>
> . . . The investigating officer noted that re[f]used to comply with a request for employment documentation. Given the total lack of cooperation from the petitioner and its attorney of record, the investigating officer issued a failed compliance review.

In response to the notice, the petitioner submitted additional documentation of its use of the property, including further utility bills, photographs of activities at the church, and schedules showing that the regularly scheduled Wednesday activities at the church consist of early morning liturgical services and evening Bible classes. The petitioner's then-attorney of record, stated that is responsible for several churches and, during the telephone call, incorrectly "assumed [the beneficiary previously] was granted R-1 status."

The compliance review report provided much of the basis for the director's first denial of the petition, on June 2, 2012. On appeal from that decision, counsel asserted that the director had selectively considered the evidence of record, and that the IO and misunderstood one another during their telephone conversation.

The AAO withdrew the initial denial in a remand order dated January 31, 2013, stating that some of the stated grounds for denial were either resolved or not proper grounds for denial. (The director has not repeated those grounds for denial, and therefore they require no further discussion here.) Regarding the compliance review, the AAO stated: "The record sufficiently establishes that the petitioner operates in some capacity," but the AAO acknowledged that questions remain. The AAO observed, for instance, that counsel offered possible explanations as to why the church was dark, locked, and unoccupied at noon on a Wednesday, but counsel provided no corroboration from the petitioner. 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).

The AAO did not find that the petitioner had satisfactorily completed compliance review, and the AAO did not require the director to conduct a second site inspection. Instead, the AAO stated: "the matter is remanded to the director to determine if another onsite inspection of the petitioner's premises is appropriate."

In response to the director's April 2013 notice of intent to deny the petition, [redacted] asserted that the church's membership and income had grown significantly "during the past 2 years." He added that the petitioner had boarded some of its windows "because there are icons and other symbols used in worship rituals covering the windows," and that an exterior photograph of the church "shows that the church is not 'unkempt'" as described by the inspecting officer.

In the June 2013 certified decision, the director stated:

> The petitioner was advised that previously a site inspection had been conducted on January 25, 2012, and the result of that site inspection was unsatisfactory. Therefore, the petitioner did not meet a prerequisite for an approval. This issue as reviewed by the AAO and the petition was remanded to the Director to determine if another onsite inspection was warranted. Although the petitioner has responded to that issue, USCIS's policy does not allow for a site inspection unless the petition appears to be approvable. Since the petitioner did not establish how it will compensate the alien, the petition is not approvable and therefore a new site inspection will not be conducted and the previous failed site inspections will remain unchanged.

In response, [redacted] states: "The denial says that a new site inspector would be sent out, but the USCIS believes that the church does not meet our financial ability to pay. . . . We are pleased to welcome a new site inspection." The petitioner has not overcome the finding relating to the beneficiary's compensation, and therefore the director correctly found that a second site inspection would not change the outcome of the proceeding. The director's finding remains undisturbed.

Full Time Employment

The USCIS regulation at 8 C.F.R. § 214.2(r)(1)(ii) requires the beneficiary to work, on average, at least 20 hours per week. The regulation at 8 C.F.R. § 214.2(r)(8)(ix) requires the petitioner to attest to that effect. Part 5, line 7 of the Form I-129 petition asks whether the position is full-time. The petitioner answered "Yes." The director concluded that the submitted evidence did not support that claim.

In the March 2, 2012 notice of intent to deny the petition, the director stated that [redacted] had informed the inspecting IO that the church is open all day. The petitioner's response to that notice included several schedules: a "Set Weekend Schedule for March," a schedule of "First Saturday of the Month Activity (3/3/12)," a "Holy Lent Weekday Schedule, March 1st to April 6th," and a schedule with the heading "Conclusion of Lent and Holy Week 2012" but which shows all of April 2012. These schedules show extra activities in the weeks leading up to Easter, followed by diminished activity. The schedules, where they overlap (the first six days of April), do not show all the same items. For example, the "Holy Lent Weekday Schedule" shows a "Hymns and Rituals Class" from 8:00 p.m. to 9:00 p.m. on Fridays, but the "Conclusion of Lent" schedule shows no activities after 6:30 p.m. on the last Friday in Lent. The schedules also show simultaneous activities, such as "Sunday School" and "Agape Meal (in the House)," both beginning at 11:30 a.m. on Sundays. The only item on the schedule to identify the beneficiary by name is a two-hour "Arabic Bible Study" class that the beneficiary taught

on some (but not all) Tuesday evenings from 7:00 to 9:00. Owing to these factors, the schedules do not readily indicate the average number of hours the beneficiary works per week.

In the April 10, 2013 notice of intent to deny the petition, the director stated:

> The record contains schedules and makes reference to the petitioner's website that shows its current schedule of meetings. However, a review of that data does not account for more tha[n] seventeen (17) hours of religious activity per week. Furthermore, it can not be concluded that these hours are all dedicated to work which is to be performed by the [beneficiary], since the petitioner already has two employees.

The director did not elaborate as to the source of the "17 hours" figure.

In response to the notice, the petitioner submitted its "current schedule of meetings" from its web site. Like the prior submission, the submission actually included several schedules, including one that reflected numerous additional activities for Lent. Two schedules focused on the period after Lent:

Regular Weekday Schedule May

Wednesday	Divine Liturgy	6:00 a.m.-7:30 a.m.
	English Bible Study (led by Fr. John)	7:15 p.m.-9:00 p.m.
Friday	Divine Liturgy	10:00 a.m.-11:30 a.m.
	Servants Meeting	7:00 p.m.-8:00 p.m.
	Hymns & Rituals Class	8:00 p.m.-9:00 p.m.

Regular Weekend Schedule May

Sunday	Divine Liturgy	8:30 a.m.-11:30 a.m.
	Sunday School	11:30 a.m.-12:30 p.m.
	Arabic Bible Study	11:30 a.m.-12:30 p.m.
	English for Beginners	11:30 a.m.-12:30 p.m.
	Agape Meal (in the House)	11:30 a.m.-1:00 p.m.
Saturday	Vespers	7:00 p.m.-7:30 p.m.

The above schedules showed ten hours of non-overlapping activity, not including the English Bible Study class led by someone other than the beneficiary. Four different activities occur at the same time at midday on Sunday, and the beneficiary could not fully participate in all of them. Therefore, parts of the schedule do not relate to the beneficiary's own activities.

In an April 29, 2013 letter, stated that the beneficiary would be "taking care of priestly duties at least 40 hours per week." An accompanying schedule specified, for the first time, the beneficiary's duties (as opposed to church meeting times). The schedule indicated that the beneficiary works eight hours or more, six days a week (with Thursdays off), and occasional additional hours for

event-specific sacraments and travel "to attend youth conventions throughout the United States." This schedule, unlike prior submissions, included "administrative work," "acceptance of confessions," and "visitations."

In the June 2013 certified decision, the director stated that the newest version of the schedule greatly increased the beneficiary's claimed work hours, amounting to "what appears to be a material change[] in the work schedule." In response to that decision, stated that the newly specified duties "are required of every priest who serves within . . . Copies of background materials provide further information about the duties of priests in the petitioner's denomination.

The previous submissions were not schedules of the beneficiary's priestly duties. Rather, they were schedules of church activities in which parishioners were able to participate, such as liturgical services and classes, and included only the times for the events themselves rather than preparatory time and other related activities. The past schedules did not list other ministerial functions such as visitations. Also, the past schedules derived from the petitioner's web site, and as such their purpose was to inform prospective attendees of church events, rather than to account for all of one worker's routine duties.

While the schedules show seasonal variations, such as special observances during Lent, the record does not show an attempt by the petitioner to conceal, misrepresent, or artificially inflate the beneficiary's work hours. The AAO withdraws the director's finding regarding the beneficiary's work schedule.

The AAO affirms the other stated grounds for denial of the petition, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The director's June 5, 2013 decision is affirmed. The petition remains denied.