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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

[redacted]

DATE: DEC 3 1 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 director reopened the petition on the petitioner's motion and again denied the petition. The AAO rejected the petitioner's appeal from that decision and dismissed a motion to reconsider. The AAO then reopened the petition on its own motion, and affirmed the denial of the petition. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will grant the motion to reopen, dismiss the motion to reconsider, and affirm the denial of the petition.

According to its director, Rabbi the petitioner "is a Jewish Orthodox Synagogue . . . affiliated with the denomination of Orthodox Judaism." It seeks to classify the beneficiary as a nonimmigrant religious worker under section 101(a)(15)(R) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R), to perform services as an assistant rabbi.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 9, 2010. The director initially denied the petition on November 20, 2011, having determined that the petitioner failed to provide sufficient evidence regarding the beneficiary's intended compensation, and that the petitioner had not successfully completed a compliance review. The petitioner filed a motion to reopen on December 28, 2011. The director granted that motion, and denied the petition for the second time on March 7, 2012. The petitioner appealed that motion decision but, owing to incorrect instructions on how to file an appeal, the appeal was untimely filed and the AAO rejected the appeal on November 15, 2012. The petitioner filed a motion to reconsider, which the AAO dismissed on February 21, 2013. Following further review of the record, the AAO moved to reopen the petition on April 24, 2013, and considered the petition on its merits. The AAO affirmed the denial of the petition on June 14, 2013, with an additional finding that the petitioner had not established that the beneficiary's intended position qualifies as a religious occupation.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The purpose of a motion to reconsider is to contest the correctness of the original decision based on the previously established factual record. A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied. *See Matter of Medrano*, 20 I&N Dec. 216, 219-20 (BIA 1990, 1991). The "reasons for reconsideration" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached by the AAO in its decision that the party could not have been addressed previously. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* at 58. Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

According to the above case law, the petitioner's motion to reconsider is not simply a review of the previous decision, or an opportunity for the petitioner to elaborate on past claims or make new assertions that the petitioner could have made previously. A motion to reconsider is limited to a demonstration that the AAO previously made an incorrect decision based on the evidence before the AAO at the time of that decision.

The AAO will grant the motion to reopen in order to consider relevant new evidence, but will dismiss the motion to reconsider as the petitioner has not established that the AAO previously made an incorrect decision based on the evidence in the record at the time of the decision.

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,
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> (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
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> (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) 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.

On the Form I-129 petition, the petitioner indicated that it had two employees, and that the beneficiary "will receive $10,000 per annum for his duties as an Assistant Rabbi. He will also be provided a food allowance in the form of parsonage." At various points in the proceeding, the petitioner submitted copies of bank statements showing balances between $39,000 and $51,000. In its June 2013 notice, the AAO stated:

> The submitted bank statements show an overall pattern of growth in the account, but they are not sufficient to meet the plain language of the regulation at 8 C.F.R. § 214.2(r)(11). At the time of filing the petition, the petitioner claimed two employees, who presumably would have been subject to IRS income reporting requirements. The record, however, contains neither IRS documentation nor any explanation for its absence. Furthermore, the petitioner has provided no details about the food allowance that it claims the beneficiary will receive (such as whether the documented bank balance would cover that expense). The director already advised the petitioner that bank statements, presented without context, cannot suffice to meet the regulatory

requirements. The petitioner cannot adequately address this deficiency by submitting more bank statements.

On motion, Rabbi asserts that there are no IRS documents relating to compensation because he and his spouse are the two employees claimed previously, and that they both "work for the organization on [a] volunteer basis. . . . the organization does not maintain a payroll."

Rabbi claims: "we continually submitted Bank Statements of the organization . . . to demonstrate that over a three year period the organization maintained a balance that would cover [the beneficiary's] salary. The bank statements covering a period of three years serve[] as a solid verifiable evidence of the Petitioner's ability to compensate the Beneficiary." The petitioner provides the following figures:

Projected Expenses	
Utilities	$6,000 per year
Maintenance	$2,000 per year
The beneficiary's salary	$10,000 per year
The beneficiary's food allowance	$5,000 per year
Total projected expenses	$23,000 per year

Projected Revenues	
tuition	$14,000 per year
Tithe from congregants	$20,000 per year
Total projected revenues	$34,000 per year

When the petitioner filed the Form I-129 petition, the petitioner claimed "Gross Annual Income" of "~$50,000," with no figure provided for "Net Annual Income." The newly claimed figures show gross annual income of $34,000 per year, substantially lower than the figure claimed initially. 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.

proprietor of the New York, states in a newly submitted letter that the restaurant and the petitioner "agreed that [the beneficiary] will be provided with food in the amount of $500 per month, should [the beneficiary] start his employment with [the petitioner]. No food has been provided to [the beneficiary] to date, as his employment with [the petitioner] did not commence yet." Five hundred dollars per month would add up to $6,000 per year, rather than the "$5,000 per year" listed among the petitioner's "Projected Expenses."

The plain language of 8 C.F.R. § 214.2(r)(11)(i) requires the petitioner to submit "budgets" and "an explanation for the absence of IRS documentation" as initial evidence. The petitioner did not provide this evidence at the time of filing or in subsequent submissions. The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether

eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). Here, the petitioner failed to submit required and requested evidence until the third motion.

The AAO's June 2013 decision included the following passages:

> The petitioner [initially] submitted a copy of a bank statement for the month ending September 28, 2010, indicating a balance of $39,058.68. The only transaction shown for the month was the deposit of $6.63 in interest. Utility bills in the record show that the petitioner has monthly expenses, but the bank statement does not show how the petitioner meets those expenses. . . .
>
> The petitioner's [December 2011] motion to reopen included a copy of a bank statement dated October 28, 2011. This statement showed an opening balance of $46,268.76 and a closing balance of $50,229.96, after $5,000.00 in withdrawals, $8,950.00 in deposits, and $11.20 in interest. . . .
>
> [In May 2013, the petitioner submitted] copies of further bank statements, showing that the balance in the account had dropped to $37,165.96 as of March 28, 2013, with no deposits (apart from interest payments) after November 28, 2012, and $11,000 withdrawn since that date. These withdrawals demonstrate that the funds were not set aside exclusively to pay the beneficiary's salary. . . .

On motion, Rabbi states:

> The AAO admits . . . that the submitted bank statements reflect withdrawals on at least two occasions: October 2011 statement reflects withdrawals in the amount of $5000, and November 2012 statement reflects withdrawals of $11,000. These withdrawals were made to cover the operational costs of the organization, which include utilities and maintenance as well as purchases of equipment for the program.

The November 2012 statement does not reflect $11,000 in withdrawals. The June 2013 decision described a total of $11,000 in withdrawals since November 2012 (the month of the last non-interest deposit). The bank statements from the 14-month period from March 2012 through April 2013 show $28,900 in non-interest deposits, $5,100 less than the "Projected Revenues" of $34,000 per year and well below the initial claim of $50,000 per year.

The petitioner, in the latest motion, claims "Projected Expenses" of $23,000 per year, $15,000 of which represents compensation that the beneficiary has not yet received. Therefore, the petitioner's

existing expenses amount to approximately $8,000 per year. The petitioner's March 2012-April 2013 withdrawals add up to $39,810, nearly five times that number. The petitioner does not acknowledge or explain this discrepancy.

The director previously advised the petitioner that bank statements, presented without context, cannot suffice to meet the regulatory requirements. The petitioner's latest motion does not overcome the conclusions expressed in earlier decisions. The petitioner has not established its prior submission of required evidence at the time of filing or upon a subsequent request, and the petitioner has not shown how it would compensate the beneficiary at the stated rate based on its finances at the time of filing. The petitioner has not overcome this stated ground for denial.

Compliance Review

The second stated ground for denial concerns the compliance review process, including site visit inspections. The USCIS regulation at 8 C.F.R. § 214.2(r)(16) states, in part:

> *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. . . . 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 Wednesday, March 9, 2011; Thursday, March 10, 2011; and Tuesday, July 12, 2011, USCIS attempted site inspections of the petitioning entity, but no one was present at the site on any of those occasions. A USCIS officer reported having left telephone messages for counsel, but claimed to have received no response as of August 3, 2011. Counsel and the petitioner referred to a fourth visit later in August 2011, during which a member of the congregation purportedly contacted Rabbi by telephone, but the inspecting officer did not wait for Rabbi to arrive. The inspector's report mentions no fourth visit.

The petitioner and counsel have asserted that all of the site visits took place when the first-floor synagogue was closed, and that the site inspectors did not ring the bell for the second floor, where the petitioner conducts classes (described in the AAO's June 2013 decision). The site inspector indicated that counsel failed to return telephone calls, whereas counsel claimed to have left several unanswered messages for the inspector. Rabbi repeats these claims on motion, and requests "another opportunity for a site visit."

The petitioner, on motion, provides a weekly schedule indicating that the synagogue's morning and evening hours vary over the course of the year, to correspond with seasonal changes of sunrise and sunset. When Rabbi wrote his statement on motion in July 2013, those hours were:

Day of the Week	Morning	Evening
Sunday-Thursday:	7:00 a.m.-9:00 a.m.	8:15 p.m.-9:30 p.m.

Friday:	7:00 a.m.-9:00 a.m.	8:00 p.m.-9:30 p.m.
Saturday:	8:30 a.m.-11:30 a.m.	8:00 p.m.-9:30 p.m.

Rabbi states:

> Please note that the classes are scheduled by appointment only and take place on the second floor of the facility. The facility is closed at all other times for security considerations. Regretfully, the inspecting officers who arrived at 10 am and in late afternoon during summer hours found the premises locked. However, our organization operates at the hours stated above and I will gladly comply with site visits if I will be contacted by an inspecting officer.

The petitioner's key assertions are sufficient to overcome the previously stated concerns, but USCIS still cannot approve the petition without satisfactory completion of a pre-approval inspection. 8 C.F.R. § 214.2(r)(16). The lack of a successful compliance review site inspection is not the sole basis for denial of the petition. As previously discussed, an unrelated ground for denial still stands, and the petitioner would not secure approval of the petition even with a new site inspection.

Religious Occupation

The AAO's June 2013 decision raised a third issue not previously discussed. Rabbi in a November 8, 2010 letter, stated that the beneficiary's "duties will include: 1) conducting daily religious services; 2) conducting Sabbath and Holiday services; 3) teaching Jewish subjects such as Chumash, Torah, Chassidic Philosophy and Prayers, to children with Learning Impairments through the program." The petitioner submitted web site printouts that appeared to emphasize secular aspects of The AAO concluded:

> The petitioner has not shown that acting as an instructor or tutor for a "Learning Skills Development Program" qualifies as a religious occupation or has a rational relationship to the calling of a minister. The program, as described by the petitioner in its own submissions, includes religious elements but appears to be fundamentally and predominantly secular. Therefore, it is not evident that the position offered to the beneficiary qualifies him for classification as a nonimmigrant religious worker.

On motion, the petitioner submits a copy of the beneficiary's ordination certificate from October 2010, shortly before the petition's filing date. Rabbi states:

> Most of his duties will center on conducting daily and Sabbath prayer services. Though some of his duties will entail teaching for the Program, he will strictly teach those students who require assistance in Jewish subjects and will not engage in any secular subject training. . . .
>
> [The beneficiary] will lead prayer services in the capacity of an Assistant Rabbi for all scheduled prayer sessions including Sabbath and Holiday prayers. He will also assist congregants during daily classes in Judaism that take place Sunday – Friday from 8 am

> until 9 am. Finally, [the beneficiary] will lead the Communal Festive Meal every Sabbath (28-32 hours per week).
>
> [The beneficiary] will also teach Chumash, Torah, Chassidic Philosophy and Prayers to students enrolled in the [redacted] Program (10 hours).

Materials submitted on motion satisfactorily establish the religious nature of the beneficiary's intended duties with the [redacted] program. The AAO withdraws this ground for denial, but the other stated grounds remain undisturbed.

The AAO will affirm the denial of the petition for the above stated reasons, 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 AAO's decision of June 14, 2013, is affirmed. The petition remains denied.