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

(b)(6)

DATE: JUN 14 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 Administrative Appeals Office (AAO) rejected the petitioner's appeal from that decision and dismissed a motion to reconsider. The AAO subsequently moved to reopen the petition, and will now affirm the denial of the petition.

According to its director, 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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(i), to perform services as an assistant rabbi. The director determined that the petitioner failed to provide sufficient evidence regarding the beneficiary's intended compensation, and that the petitioner had not successfully completed compliance review.

The petitioner filed the Form I-129 petition on November 9, 2010. The director initially denied the petition on November 20, 2011. 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 will now consider the matter on its merits.

The petitioner's latest submission includes copies of photographs and bank statements.

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;
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> (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 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 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." The petitioner did not specify the amount of the food allowance. [redacted] stated that

the petitioner had offered the beneficiary "a full time position (35-40 hours per week)." Under "Current Number of Employees," the petitioner stated "2."

The petitioner 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 director issued a notice of intent to deny the petition on September 28, 2011. The last two pages of the notice show a different petition receipt number, and mention the address of a different petitioner in Houston, Texas. The notice instructed the petitioner to submit various types of evidence, including IRS documentation of past salaries paid.

In response to the notice, counsel correctly noted that two pages of the notice showed a different receipt number and address. Counsel concluded that those pages "do not pertain to [the petitioner]," and therefore the petitioner did not submit any of the evidence requested on those pages.

In the November 30, 2011 denial notice, the director stated that the September 28, 2010 bank statement "is outdated and insufficient as evidence of how the petitioner intends to compensate the alien." The director erroneously cited the regulation at 8 C.F.R. § 204.5(m)(10), which pertains to special immigrant rather than nonimmigrant religious worker petitions, but its key provisions are similar to those of the applicable regulation at 8 C.F.R. § 214.2(r)(11). Elsewhere in the decision, the director erroneously stated that the petitioner had filed a Form I-360 special immigrant petition, rather than a Form I-129 nonimmigrant petition. This error, however, does not affect the substance of the decision.

The petitioner's 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.

The unidentified author of an accompanying statement indicated that the balance shown on the September 2010 bank statement "was set aside to cover the proffered wage of beneficiary of $10,000." The statement repeated the assertion that the last two pages of the September 2011 notice of intent to deny the petition, including the portion of the notice dealing with financial evidence, "did not pertain to our organization," and claimed that the petitioner would have responded to a notice that "included the correct pages pertaining to our Petitioner." A file copy of the September 2011 notice is identical to the notice that the petitioner received; there are no "correct pages pertaining to [the present] petitioner."

The motion did not address the regulatory requirement that the petitioner must either provide IRS documentation or account for its absence.

In the March 7, 2012 denial decision, the director quoted the USCIS regulation at 8 C.F.R. § 214.2(r)(11)(i), including the provision requiring submission of IRS documentation or an explanation for its absence. The director acknowledged the submission of a second bank statement, but concluded: "Commercial banking statements are merely snapshots in time and do not convey the financial health of an organization."

The petitioner appealed the decision and submitted another unsigned statement that read, in part:

> Approximately $50,000 have been set aside in the [petitioner's] bank account for the purposes of paying a salary to [the beneficiary], if he is approved.
>
> Since the Petitioner is a very small organization, it does not run a payroll. As a 501(c)(3) [tax exempt organization] it is not required to file IRS 990 Tax returns. Though a single Bank statement may be a snapshot in time, a series of consecutive bank account statements from the same account . . . serve as evidence of how the Petitioner intends to compensate the Beneficiary. Please see attached Bank Statements for 2011-2012.

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.

After the AAO rejected the appeal as untimely, the petitioner filed a motion to reconsider that focused on procedural issues. Counsel discussed previously submitted evidence but made no new claims. On April 24, 2013, the AAO moved to reopen the proceeding. As required by the USCIS regulation at 8 C.F.R. § 103.5(a)(5)(ii), the AAO granted the petitioner 30 days to supplement the record. The petitioner's response to that notice includes 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, because the beneficiary was not authorized to work for the petitioner during that period.

Counsel again requested the missing pages of the notice of intent to deny, but the record contains no such missing pages. USCIS has repeatedly advised the petitioner of the regulatory requirements relating to compensation, and has asserted that bank statements alone cannot suffice in this regard, but the petitioner has consistently responded by submitting more bank statements. The petitioner has not overcome this stated basis for denial of the petition, and the AAO will therefore affirm the denial on that basis.

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:

> *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 a letter dated November 8, 2010, stated that the beneficiary would work in "a full time position (35-40 hours per week)," and that his duties would include "conducting daily religious services."

The initial filing included copies of four color photographs showing the interior of a wood-paneled room. Two photographs showed several unidentified men in traditional Orthodox garb; a third photograph showed various Hebrew-inscribed objects used in worship services; and the fourth photograph showed bookshelves and tables.

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.

In the September 28, 2011 notice of intent to deny the petition, the director advised the petitioner of the three unsuccessful attempts to visit the petitioning entity. The director noted that the petitioner had claimed that the petitioner offers "daily religious services," which is not consistent with the building being closed on three different weekdays.

In response to the notice, counsel stated:

> [O]n July 12, 2011, I, as the attorney of record, received a call from [a USCIS officer] . . . and was advised that [the officer] attempted the FIRST site visit on July 12, 2011 but was unable to reach as the synagogue was closed in the afternoon. No mention was made of any previous site visits in March, 2011.
>
> Following that call of July 12, I repeatedly attempted to reach [the officer] . . . on July 14, July 20, July 26, and July 27, but the Officer never returned my calls until August 3, 2011 – at which time she left me a message that she received all my messages.
>
> . . . I . . . once again called her back on August 5, 2011 – and again had no success in reaching her. . . .
>
> Following my last attempt to reach the Officer in August 2011 . . . , then advised me that he spoke with the inspecting officer via c[e]ll phone some time in the second week of August, when she paid another visit to [the petitioner's address].

> During the site visit in August, 2011 – one of congregants noticed that someone was attempting to enter the synagogue in the hours when no prayer services took place. He called on the cell phone and connected the inspecting officer with . During the conversation politely asked the officer to wait for 15 minutes to allow him to get to the synagogue so they could meet in person and complete the inspection, but the officer stated that she did not have the time to wait and will come on another day. gave her his cell phone but was never contacted again. . . . For security considerations, the synagogue is closed during the day, when there are no prayer services. . . .
>
> [The petitioner's] presence in the actual synagogue . . . [would be] only required for morning and afternoon/evening services, which take place early in the morning and at sundown. The rest of his work requires teaching religious subjects to children with learning difficulties as part of the ' ' project, which takes place on the second floor . . . above the synagogue. The inspecting officer never rang the bell to the second floor of the synagogue and therefore was not able to reach anyone upstairs. Moreover, in the summer the classes are not operating at the same capacity as during the school year, as most children are on summer vacation or in camps.
>
> . . . Kindly afford us another opportunity to undergo the site visit.

The inspecting officer's report is dated August 3, 2011, and therefore cannot document or corroborate any events said to have occurred after that date. The officer who attempted the July site visit is not the same inspector who attempted site visits in March. Thus, the July visit was that officer's first to the site, but not the first visit overall. The site inspectors reported unmarked doors at the petitioning site, with no signage identifying either the petitioning synagogue or .

Counsel submitted a copy of telephone records showing several calls to a particular number identified as belonging to the inspecting officer, but the site visit report does not include the officer's telephone number. The record, therefore, does not confirm that the number shown in the telephone records belongs to the inspecting officer.

With respect to counsel's request for a fifth site visit, at the time neither counsel nor the petitioner provided a sufficiently precise schedule to allow the inspector to know when to expect the site to be open and occupied. The terms "early in the morning and at sundown" are too imprecise to permit viable scheduling. (At least one of the unsuccessful site visits took place at 10:00 in the morning.) Instead of indicating when the petitioning entity would be open for business, with the beneficiary on site, the petitioner has offered explanations after the fact for each failed site visit.

The director's first denial notice, issued November 30, 2011, did not address the failed compliance review. The March 7, 2012 notice, however, raised the issue again. The director acknowledged counsel's request for "another opportunity to undergo the site visit," but stated that, based on the three unsuccessful visits in March and July 2011, "USCIS is unable to conclude that the petitioner has satisfactorily completed a compliance review site inspection."

On appeal from the March 2012 denial, counsel stated:

> The inspecting officer allegedly came on March 9 and 10, 2011, but made no effort to contact or [counsel] until July 12, 2011 – that was the first time she called the attorney. From her first call every effort was made to get in touch with her. In fact did speak with the officer on the phone during her July 2011 inspection and offered to come down to the synagogue within 10 minutes, but the officer did not wait.

The above account does not match counsel's earlier version of events, in which counsel claimed the inspecting officer spoke to not in July 2011, but during a claimed fourth visit in August of that year. The assertions of counsel do not constitute evidence. *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). In this instance, counsel's unsupported claims contradict one another.

In the December 2012 motion, counsel reverted to the claim that the inspecting officer spoke to in August 2011, rather than in July 2011, and that the officer had declined to wait 15 minutes rather than 10 minutes. Counsel did not acknowledge having made two different claims, explain the discrepancies, or offer evidence in support of either version of events.

Following the February 2013 reopening of the proceeding, the petitioner submitted what counsel called "Current Color Photographs of the organization." Several of the photographs submitted are copies of those submitted previously. Some of the photographs show the wood-paneled room depicted in earlier photographs, while others show a white-walled room or rooms. A printout from the petitioner's web site includes other photographs showing white walls.

The undated interior photographs do not show where or when they were taken. Such evidence cannot suffice to overcome the specific finding that USCIS inspectors repeatedly found the petitioner's door locked during numerous site visit attempts. USCIS attempted at least three site visits; counsel described a fourth claimed visit. USCIS is not required to keep the proceeding open indefinitely for even more such attempts in the future. Furthermore, because the failed compliance review is not the only stated ground for denial, resolution of the issue would not result in approval of the petition. The director correctly found that the petitioner had failed compliance review as a result of several unsuccessful site visits.

Review of the record reveals another potential basis for denial. The AAO may deny an application or petition that fails to comply with the technical requirements of the law 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).

It is not immediately apparent whether the petitioner seeks to classify the beneficiary as a minister or as a worker in a religious occupation. Either way, the intended work must be primarily religious in nature. The USCIS regulation at 8 C.F.R. § 214.2(r)(3) defines a "minister" as one who performs activities with a rational relationship to the religious calling of the minister, and works solely as a

minister which may include administrative duties incidental to the duties of a minister. The same regulation requires that the duties of a religious occupation must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination, and must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.

On Form I-129, the petitioner indicated that the beneficiary "will conduct religious services on a daily basis and on Sabbath and Holidays; will engage in one-on-one tutoring of religious subjects for children with special needs." Asked to "[p]rovide a summary of the type of responsibilities of those employees who work at the same location where the beneficiary will be employed," the petitioner stated that the director "[o]versees operations of the organization and develops community programs geared to foster Jewish identity, Jewish customs and traditions." The petitioner indicated that the religious teacher "[c]onducts classes on Jewish Laws, Jewish Customs and Traditions for Jewish adults; conducts one-on-one tutoring for Jewish children who have special needs and require assistance in learning of Jewish subjects in addition to regular schooling."

in his November 8, 2010 letter, stated:

> We currently have an opening for an assistant rabbi, whose 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.

In a statement submitted with the April 2012 appeal, counsel stated: "During the day, is occupied with performing ritual circumcisions. Since he himself cannot run the program, he submitted this Petition to hire [the beneficiary] for full time position of a Rabbi."

The petitioner has submitted promotional materials about , sometimes hyphenated as " " A brochure showed several photographs, all showing white walls rather than the wood-paneled walls visible in the photographs described earlier. The petitioner submitted a printout from web site which read, in part:

> was founded in 2005 by to help people—especially children and teenagers—overcome learning weaknesses. . . .
>
> Our professional staff identifies the specific source of the weakness and implements a unique program designed to rehabilitate and correct the problem. We help students ages 6 and up overcome challenges in reading, writing, comprehension and math.

The web site printout indicated that the " " involves nutritional supplements, exercise, and "colored glasses" among other things. As described, the program appears to be secular in nature. Asked in a promotional interview whether the program focused on "issues from modern orthodox and some of the more frum [*i.e.*, devout] communities," responded "really, it applies to everyone," although some aspects were of particular value for "the Jewish People."

The record further shows that is not a side venture that operates separately from the petitioning synagogue. Rather, a Certificate of Assumed Name specifies that " is "the assumed name of the [petitioning] corporation." The promotional materials provide the petitioner's address as the address for . According to the record, employees are the petitioner's employees, at the same address where the petitioner intends to employ the beneficiary. The petitioner has indicated that the synagogue operates for only a few hours a day in the early morning and at sunset, which indicates that the bulk of the beneficiary's full-time schedule would have to be devoted to instead of the synagogue.

The petitioner has not shown that acting as an instructor or tutor for a " " 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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed.