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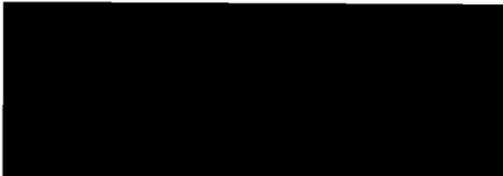
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE: WAC 07 165 51207 Office: CALIFORNIA SERVICE CENTER Date: **SEP 03 2009**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

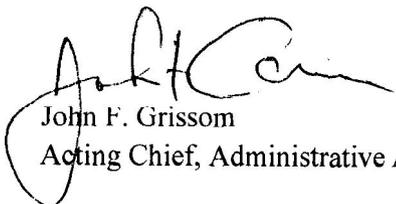
PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Lutheran church. It seeks to change the beneficiary's nonimmigrant status from H-4 (family member of an H-1B nonimmigrant) to R-1 religious worker under section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1), to perform services as a ministry assistant and translator from June 1, 2007 to June 1, 2010. The director determined that the petitioner had misrepresented elements of the job offer, and that the beneficiary is not eligible to change status because she violated her prior H-4 nonimmigrant status.

On appeal, counsel indicates that a brief will be forthcoming within 30 days. To date, roughly seven months after the filing of the appeal, the record contains no further substantive submission from the petitioner. We therefore consider the record to be complete as it now stands.

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.

U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 214.2(r) set forth the various requirements for R-1 nonimmigrant religious worker petitions.

The first issue concerns the petitioner's statements regarding the terms of the beneficiary's employment. The petitioner filed the petition on May 7, 2007. On the Form I-129 petition, asked whether the

position offered to the beneficiary was full-time, the petitioner answered “Yes” and stated that the petitioner would pay the beneficiary \$3,000 per month. Also on Form I-129, the petitioner indicated that it had two employees.

In an attestation accompanying the initial filing of the petition, [REDACTED] President of the petitioning church, stated that the beneficiary’s “position . . . requires at least 20 hours per week of compensated service.” The attestation follows the format set forth in a proposed rule published shortly before the petition’s filing date at 72 Fed. Reg. 20442, 20455 (Apr. 25, 2007). The reference to “at least 20 hours per week” comes directly from the language of the proposed rule; it is not a passage inserted by the petitioner to specify that the position would be part-time rather than full-time.

The beneficiary’s “Working and Training Schedule” listed 40 hours of weekly itemized duties from Tuesday through Sunday, not including translation. As for the petitioner’s translation work on Mondays, the schedule indicated: “Time Varies; usually 3-4 hours per day. When there are no scheduled activities, [the beneficiary] would spen[d] anywhere from 4-8 hours per day translating.”

Subsequently, in response to a July 24, 2007 request for evidence, the petitioner submitted another copy of the beneficiary’s work schedule, along with an October 4, 2007 letter in which [REDACTED] asserted that the beneficiary “is expected to work for the congregation 40 hours a week.”

In an effort to verify the petitioner’s claims, an Immigration Officer (IO) called [REDACTED] and [REDACTED] of Mt. Olive Lutheran Church (which rents space to the petitioning church). The IO’s report indicates that [REDACTED] did not recognize the beneficiary’s name. The IO also spoke to [REDACTED], Pastor of the petitioning church. Originally, asked to name the petitioner’s employees, [REDACTED] did not mention the beneficiary. When asked specifically about the beneficiary, however, [REDACTED] “stated that [the beneficiary] was a part-time employee.” The IO further reported:

Approximately 10 months ago, [the beneficiary] started being paid by the church as a translator. . . [REDACTED] stated [the beneficiary] is paid approximately \$700 per month by check, once a month. [REDACTED] stated that [the beneficiary] works about 20 to 30 hours a week. This differs greatly from the petition, which states that [the beneficiary] is full-time and receives \$3000 per month.

On October 31, 2008, the director issued a notice of intent to deny (NOID), based in part on the discrepancies between the petitioner’s initial claims and the information from the site visit. The director named [REDACTED] (*sic*) and [REDACTED] and stated: “Initially, none of these individuals knew who the beneficiary . . . was.” We note that the IO’s original Compliance Review Worksheet does not show that the IO asked [REDACTED] about the petitioner, or that [REDACTED] did not recognize the beneficiary’s name. Instead, the worksheet indicates that [REDACTED] “did not recognize the name [REDACTED]” While [REDACTED] did not name the beneficiary when asked to identify the petitioner’s employees, there is no indication that he had to be reminded who the beneficiary is.

In response to the notice, the petitioner submitted a December 8, 2008 affidavit from [REDACTED] who stated:

[REDACTED] is in charge of *170 different congregations* in our district. He does not have any direct relationship with [the beneficiary]. It will be amazing if he knows all the ordained pastors of these congregations, let alone [the beneficiary]. [REDACTED] [*sic*] is in charge of Mount Olive Church, our host institution. He does not have much interaction with the staff, volunteers of the [petitioning] Church and so it is not surprising that he didn't know [the beneficiary].

. . . Beneficiary . . . is and always has been doing a variety of volunteer ministry work for [the petitioning] Church. . . . She has never received payment for this work. The congregation recently decided . . . to REIMBURSE her for her various expenses and give her monthly stipends as a GIFT for her voluntary contributions. The reimbursements, stipends and gifts amount to approximately \$700 a month.

. . . [Y]our NOID completely misrepres[n]ts the petition for R-1 by stating that the petition says [the beneficiary] is a "full-time" employee with a "\$3000 a month" salary. . . . The reference to \$3000 in the petition is NOT what the beneficiary is paid; it is what the church is committed to and able to pay her for full-time work IF and when her R-1 visa is approved.

The director denied the petition on January 17, 2009. The director acknowledged the petitioner's submission of the above affidavits, but found them to be insufficient "absent the requested evidence." The director did not identify or describe "the requested evidence." In the NOID, the director did not request any specific evidence. Rather, the director simply stated that there were discrepancies in the petitioner's claims.

On appeal, counsel requests "a complete copy of [the] report" that led to the denial of the petition. 8 C.F.R. § 103.2(b)(16) reads, in part:

Inspection of evidence. An applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as provided in the following paragraphs.

- (i) *Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered. . . . Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

The above regulation requires USCIS to advise the petitioner of derogatory information obtained during a compliance review or investigation, but it does not require USCIS to provide copies of the investigation materials themselves. The director, in the NOID, quoted directly and at some length from the IO's report. We see no significant findings in the report that the director failed to bring to the petitioner's attention. Therefore, withholding a complete copy of the decision has not compromised the petitioner's ability to respond to the NOID or to mount a substantive appeal. We find that the director acted in compliance with 8 C.F.R. § 103.2(b)(16)(i).

Counsel argues that the petition relates to "a *prospective* position" that "the beneficiary will fill upon approval of the petition" (counsel's emphasis). We agree with this assertion. The record consistently refers to the beneficiary's full-time employment and salary in the future tense; the petitioner has described terms of a job offer, rather than circumstances of existing employment. The information obtained during the compliance review does not support the conclusion that the petitioner has provided false information about work schedules, compensation, or any other intended terms of employment. We hereby withdraw the director's finding to that effect.

The second and final issue concerns the beneficiary's asserted failure to maintain status as an H-4 nonimmigrant. An employer seeking the services of an alien as an R-1 nonimmigrant must, where the alien is already in the U.S. and does not currently hold such status, apply for a change of status on Form I-129. 8 C.F.R. § 248.3(a). A change of status may not be approved for an alien who failed to maintain the previously accorded status. 8 C.F.R. § 248.1(b). Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act. 8 C.F.R. § 214.1(e).

The record shows that the beneficiary was an H-4 nonimmigrant at the time the petition was filed in May 2007, having received that status from January 1, 2005 through December 31, 2007. H-4 nonimmigrant status does not authorize employment. The petitioner does not claim that the beneficiary has been authorized to work while under H-4 nonimmigrant status.

In the October 2008 NOID, the director noted the IO's finding that the petitioner regularly paid the beneficiary. The director stated: "the fact that the beneficiary has sought employment and received payment for employment establishes that the beneficiary has violated the terms and conditions of his [*sic*] current nonimmigrant status and he [*sic*] is therefore not eligible for the change of status request."

The petitioner's response to the NOID included arguments from counsel. The director did not address these arguments directly. Counsel repeats these unrebutted arguments on appeal, and we will consider them in that context.

In his December 8, 2008 affidavit, [REDACTED] stated: "we would like to reiterate, [the] beneficiary . . . is NOT working as our employee. We fully understand and acknowledge that the beneficiary . . . does not have work authorization under her current H-4 status." As noted above, he stated that the beneficiary is a volunteer who "has never received payment for this work. The

congregation recently decided . . . to REIMBURSE her for her various expenses and give her monthly stipends as a GIFT for her voluntary contributions.”

In another affidavit, [REDACTED] a member of the petitioner’s church council, claimed to have been in [REDACTED]’s office when the pastor spoke to the IO on the telephone. [REDACTED] stated that, during that conversation, [REDACTED] identified the beneficiary as a “volunteer” who received “gifts” rather than a salary.

The director denied the petition, in part based on a finding that the beneficiary engaged in unauthorized employment. On appeal, counsel cites case law:

In . . . *Matter of Hall*, the Board of Immigration Appeals (BIA) clarified what ‘employed’ meant with respect to 8 U.S.C. § 1255(c)(2), they said:

Where the respondent receives full support in return for his missionary duties, he is not an unpaid volunteer in the service of the Church even though he receives no fixed salary or remuneration in an amount proportional to his success in his work.

18 I&N Dec. 203 (BIA 1982).

In the above case, the BIA found that the Respondent received payment for his services because he was provided “the wherewithal to cover both necessary and nonessential expenses, such as entertainment and recreation.” In addition, the BIA found that “the respondent’s relationship with the Church in effect guarantees him a standard of living similar to that of many moderate-income wage earners.” *Id.* at 206.

This case is drastically different. . . . The congregation recently decided to REIMBURSE Beneficiary for her various expenses and periodically give her stipends or GIFTS. These REIMBURSEMENT expenses include: gas and parking reimbursements, printing, internet access for translations, teaching Chinese to Pastors, etc. (Attached see affidavits from [REDACTED] and Church Council Member [REDACTED] regarding specific details of Beneficiary’s expenses.)

The appeal includes no new affidavits from the named witnesses. Counsel appears simply to have copied this passage from his previous letter, which accompanied the December 2008 affidavits. Those affidavits, however, do not provide any “specific details of Beneficiary’s expenses.” [REDACTED] referred simply to “various expenses” and [REDACTED] equally vaguely, referred to “expenses incurred during the missionary work.”

It is true that reimbursement for expenses is not the same thing as payment for services, but the record contains no documentation to establish that the beneficiary incurred anything approaching \$700 per month in expenses on behalf of the church. Most of the items listed (without proof) by counsel appear

to be incidental expenses. Counsel has not explained how payment for “teaching Chinese to Pastors” is reimbursement for an expense, rather than compensation for a service. The petitioner has not shown that the very act of “teaching Chinese to Pastors” somehow costs the beneficiary a specific amount of money, which the petitioner then repays. More fundamentally, the petitioner has not claimed that its payments to the beneficiary consist mostly, or entirely, of reimbursements for expenses. The petitioner has indicated that the beneficiary also receives “gifts” or “stipends.”

Counsel claims that the BIA considered the alien in *Matter of Hall* to be employed only because his earnings were sufficient to “guarantee[] him a standard of living similar to that of many moderate-income wage earners.” Counsel argues that *Hall* cannot apply to the beneficiary because she received smaller payments that, by themselves, “CANNOT be considered full support . . . they do not qualify as any kind of guarantee for a standard of living” (counsel’s emphasis).

We do not share counsel’s interpretation of *Hall*. Counsel bases that interpretation on two sentences, read in isolation. A fuller reading of the relevant passage is instructive:

The respondent’s contention that he is an unpaid volunteer in the service of the Church is not persuasive. He clearly receives compensation in return for his efforts on behalf of the Church. By his own account, he is provided the wherewithal to cover both necessary and nonessential expenses, such as entertainment and recreation. He is, in addition, given discretionary funds as needed. The respondent’s relationship with the Church in effect guarantees him a standard of living similar to that of many moderate-income wage earners. The fact that he receives no fixed salary or remuneration in an amount proportional to his success as a fund-raiser is, in our view, immaterial.

Id. at 205-206. When the passage is read in context, it is clear that the deciding factor was not that the alien received full material support, but rather that he “receives compensation in return for his efforts.” In this light, the subsequent references to “necessary and nonessential expenses” and “standard of living” are merely commentaries on the scope of that compensation, rather than a legal threshold for how much compensation one must receive before one is truly “employed.” The BIA clearly found that an alien who “receives compensation in return for his efforts” cannot rightly claim to be “an unpaid volunteer.”

If a United States company hires aliens who lack employment authorization, that company is in violation of the law. If the company pays those same aliens so little that they cannot support themselves, then the company commits an additional offense by violating minimum wage laws. But if that company calls these workers “volunteers” who receive “gifts,” then by counsel’s reasoning, those aliens are not “employed” under *Hall*. This absurd result, in which two violations effectively cancel each other out, demonstrates that counsel’s interpretation is untenable.¹

¹ We stress that we do not claim that the petitioner deliberately set out to thwart immigration and labor laws in this way. We simply offer a generic, hypothetical example in order to illustrate the logical consequences of counsel’s overreliance on the “full support” language in *Hall*.

Apart from reimbursement for expenses, the petitioner has claimed that it provides “gifts” and a “stipend” to the beneficiary. The petitioner has not shown or claimed that it makes comparable “gifts” to other members of the congregation who do not perform services for the church. The record, therefore, indicates that these payments are directly contingent on services rendered. The beneficiary receives compensation for her efforts on behalf of the church, which is *de facto* employment. The petitioner cannot escape this conclusion merely by calling the payments “stipends” or “gifts” instead of “wages” or “salary.” We further note that these payments were not occasional or incidental, but rather substantial and regular. (Seven hundred dollars per month may not be a grand sum, but neither is it a trivial or negligible amount.)

From the above discussion, we must conclude that the beneficiary violated her H-4 status by accepting compensation (under whatever name) in return for her efforts on behalf of the petitioning church. Under 8 C.F.R. § 248.1(b), the change of status cannot be approved. The regulation is binding on USCIS employees in their administration of the Act, and neither the director nor the AAO has discretion to disregard it. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C., 1986) (an agency must adhere to its own rules and regulations; *ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned). We therefore affirm the director’s finding that the beneficiary failed to maintain H-4 status and is therefore ineligible to change to R-1 status.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.