



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: **SEP 19 2013** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

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 immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a Christian ministry. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a pastor. The director determined that the petitioner failed to establish how it intends to compensate the beneficiary.

On appeal, the petitioner submits a brief from counsel, a letter from the petitioner, a copy of the beneficiary's 2012 ' [REDACTED] ' report, a copy of a March 5, 2013 resolution by the petitioner's board of directors, a document entitled [REDACTED] [REDACTED] ' and a printout from the website of [REDACTED]

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

- (i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide non-profit, religious organization in the United States;
- (ii) seeks to enter the United States –
  - (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,
  - (II) before September 30, 2012, 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) before September 30, 2012, 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; and
- (iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The United States Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(10) states:

*Evidence relating to compensation.* Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence 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. If IRS documentation, such as IRS Form W-2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

Additionally, the USCIS regulation at 8 C.F.R. § 204.5(m)(7) requires the petitioner to specifically attest to statements which include the following:

(vi) The title of the position offered to the alien, the complete package of salaried or non-salaried compensation being offered, and a detailed description of the alien's proposed daily duties;

(xi) That the alien will not be engaged in secular employment, and any salaried or non-salaried compensation for the work will be paid to the alien by the attesting employer; and

(xii) That the prospective employer has the ability and intention to compensate the alien at a level which the alien and accompanying family members will not become public charges, and that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization.

On the Form I-360 petition, submitted on May 9, 2012 the petitioner stated the following regarding the proposed compensation for the beneficiary:

Beneficiary will be provided \$16,000 - \$18,000/year through donations and in addition will be provided housing and utilities. [REDACTED] receives donations and establishes a Missions Base Account (MBA process). The beneficiary receives support for his ministry through the MBA process. See attached letter of support.

In a letter accompanying the petition, the petitioner additionally stated:

In the [REDACTED] individuals and organizations from around the country and the world donate money and can designate gifts to support the missionary work of an individual, such as the ministry of Mr. [REDACTED]. We are in the process of converting to a new [REDACTED] compensation program; however, the conversion from the MBA system is not

complete. We have enclosed Mr. [REDACTED]'s most recent tax returns reflecting his income and recent MBA statement. Mr. [REDACTED] will receive approximately \$15,000 - \$18,000 per year. In addition to this income from giving, Mr. [REDACTED]'s housing will also be provided.

The petitioner submitted unaudited copies of its financial statements for the years 2010 and 2011. The petitioner also submitted a document entitled '[REDACTED]' for the period January 1 to February 24, 2012. The document included five "Income" entries of "Confidential Giving" or [REDACTED] for the beneficiary totaling \$2,010, and listed four checks issued to the beneficiary under "Expenses" totaling \$1,710, with a "Net Income" of \$300.

The petitioner submitted a copy of the beneficiary's 2011 Form 1099-MISC indicating that he received \$3,364 in income from the petitioner during that year. The petitioner also submitted an uncertified copy of the beneficiary's 2011 Form 1040 tax return listing \$3,364 in income from the petitioner as well as \$12,250 in additional business income, identified on the beneficiary's "Clergy Worksheet Page 1" as "Gross income received for weddings, baptisms, writing, lecturing, etc." Additionally, the petitioner submitted a copy of the beneficiary's 2010 Form 1040 tax return which indicated that he received \$16,950 in business income for the year, all of which was identified on the beneficiary's "Clergy Worksheet Page 1" as "Gross income received for weddings, baptisms, writing, lecturing, etc."

On May 17, 2012, USCIS issued a Notice of Intent to Deny the petition (NOID), noting that the petitioner failed to submit evidence to identify the source(s) of the beneficiary's total reported income for 2010 and 2011 in order to establish that the beneficiary was working continuously in a qualifying, compensated position and not engaging in unauthorized employment.

In an affidavit submitted in response to the NOID, the petitioner stated that "our compensation system does not provide for salaried W2/W4 type positions but provides a detailed financial support system allowing staff to raise support for their ministry role." The petitioner also stated:

In addition to WFM funds, Marcelo also received additional monetary benevolence (*not compensation for work performed*) as other ministerial organizations sought to support Marcelo in his position as Pastor and Minister at [REDACTED]. This benevolence was provided directly to [REDACTED] and not through the accounting...

(Bold and italics emphasis in original).

The petitioner submitted an affidavit from Reverend [REDACTED] of [REDACTED] IA, a nonprofit organization, stating the following:

For the years 2010 and 2011 we have financially supported [REDACTED]. More specifically, we provide financial support for Pastor [REDACTED]'s ministry work at [REDACTED] through monthly love offerings. This support was provided exclusively for his work at [REDACTED] and we certify under penalty of perjury that the offerings were not given in exchange for any good, service, labor or work for our benefit.

The petitioner submitted [REDACTED] reports showing "Love Offerings" to the beneficiary totaling \$16,000 for 2010 and \$12,250 for 2011. The petitioner also submitted internal reports showing support received by the petitioner and checks disbursed to the beneficiary totaling \$950 for 2010 and \$3,364 for 2011. Counsel for the petitioner noted that these amounts together account for the income listed on the beneficiary's tax returns. Although the petitioner and [REDACTED] both asserted that the support from [REDACTED] was not compensation for work performed, no explanation was provided as to why the beneficiary listed the support on his tax returns as business income "for weddings, baptisms, writing, lecturing, etc." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner submitted an internal report listing \$9,285 in support received and paid to the beneficiary for the period January 1 to August 21, 2012. Additionally, the petitioner submitted an unsigned, uncertified copy of its 2011 Form 990 Tax Return, which listed \$2,235,586 in net assets and no employees for the year.

On October 23, 2012, USCIS issued a second NOID, in part again based on inconsistencies in the petitioner's evidence of past compensation. The notice stated that the petitioner failed to submit verifiable evidence in support of its explanation regarding the beneficiary's income amounts, and did not submit sufficient evidence to establish the beneficiary's compensated employment for the petitioner in 2010 and his continuous compensated employment for the petitioner in 2011.

In response, the petitioner submitted copies of processed checks issued to the beneficiary by [REDACTED] during 2010 and 2011 in total amounts corresponding to those listed in the previously submitted "Love Offerings" reports.

On February 13, 2013, the director denied the petition based on the petitioner's failure to establish how it intends to compensate the beneficiary. The director noted that, although the petitioner proposed to compensate the beneficiary with \$16,000 to \$18,000 per year plus housing, the evidence indicated that the petitioner provided only "a fraction of the beneficiary's compensation." The director also noted that, while the regulation at 8 C.F.R. § 204.5(m)(2) requires the beneficiary to be coming to work in a compensated position, the evidence indicated that support received by the beneficiary would not be a "salary or compensation" from the petitioner, but the beneficiary would instead "be compensated through other individuals and organizations."

On appeal, the petitioner asserts that [REDACTED] gave its support directly to the beneficiary “without running the funding through our [REDACTED]” because it was already a tax exempt organization and “did not need tax deductibility reporting for their love gifts.” The petitioner states in part:

Had they [REDACTED] given through the [REDACTED] as other supporters do, then all support monies would have been indicated as a single number on tax records and the total amount given would have exceeded the anticipated annual funding amount.

To remedy the confusion:

1. the Board of Directors of the [REDACTED] has established a dedicated fund for Pastor [REDACTED] that will be utilized for donations and funds raised through the [REDACTED]
2. In addition, the [REDACTED] Base Board of Directors has authorized his [REDACTED] [REDACTED] to be **pre-funded for 2013** in excess of the \$15,000 to \$18,000 anticipated compensation level.

A copy of the Board of Directors Resolution, dated March 5, 2013, provides for the establishment of a [REDACTED] Individual Account: [REDACTED] as follows:

- i. Due to USCIS requirements for R1 Visa status for Pastor [REDACTED] [REDACTED] will utilize bank account registry [REDACTED] to be dedicated for the reservation of funds sufficient to meet the annual expectation set forth by the R1 Visa.
- ii. [REDACTED] will maintain fund availability within this account suitable to cover and provide for annual [REDACTED] disbursement levels in accordance with the expectations set forth in [REDACTED]
- iii. Input to this fund shall be way of internal transfer from the [REDACTED] General Fund following the accounting of all donations [REDACTED] support for tax deductible reasons.
- iv. This account will be debited/credited by way of transfers to and from the [REDACTED] General fund for the purposes and deposits and credits into the [REDACTED] by the program administrator. All funds considered to be donations in support of participant [REDACTED] will utilize this account for all donations in support of the R1 Visa requirements.
- vi. All donations for the remainder of the program period designated for Pastor [REDACTED]

1. will be written or assigned to [REDACTED] Missions Base and
  2. have the [REDACTED] detailed for the donation.
- vii. [REDACTED] participant [REDACTED] will insure compliance with all R1 Visa requirements or this [REDACTED] participation will be halted immediately.

The petitioner submitted a "Program Worksheet" for the beneficiary's account indicating \$18,000 "Total Committed Annual" and \$15,000 "Funded Account [REDACTED]". The petitioner also submitted a printout from [REDACTED] website with information on account [REDACTED] - Savings Acct" with the listed account owner [REDACTED]. The printout listed a "Balance As Of 03/10/2013" of \$5.00 and an "Available Balance" of \$15,000.00.

With regard to the monetary "income" received by the beneficiary, the USCIS regulation at 8 C.F.R. § 204.5(m)(10) requires the petitioner to submit detailed financial documentation showing "how the petitioner intends to compensate the alien," and the regulation at 8 C.F.R. § 204.5(m)(7)(vi) requires the petitioning employer to attest to "the complete package of salaried or non-salaried compensation being offered." Further, 8 C.F.R. § 204.5(m)(7)(xi) requires the petitioning employer to attest to the statement that "any salaried or non-salaried compensation for the work will be paid to the alien by the attesting employer," and 8 C.F.R. § 204.5(m)(7)(xii) requires "that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization." The petitioner has not submitted sufficient evidence to show that the amounts from the petitioner reflected on the beneficiary's tax documents were paid by the petitioning organization as compensation for work performed. Prior to the instant appeal, the petitioner did not make any assertions or submit any evidence demonstrating that the petitioning organization contributed in the past or prospectively planned to contribute any money to the beneficiary's income. Rather, the evidence submitted suggests that the beneficiary received no salary from the petitioner except what he collected on his own behalf from dedicated donors some of which was processed through the petitioning organization for purposes of tax deductibility for the donors.

In every important respect, the beneficiary was self-supporting, obtaining his own earmarked third-party support rather than receiving compensation from the petitioner for work performed. Although USCIS regulations allow temporary self-support for nonimmigrant employees of missionary organizations, there is no comparable provision for permanent, ongoing employment by special immigrant religious workers.

On appeal, the petitioner attempts to "remedy" the compensation issues by committing \$18,000 to a pre-funded account. The March 5, 2013 Board of Directors resolution suggests that the account will be reimbursed as donations from individuals and organizations are made to support

the beneficiary's ministry, so it is not clear how much, if any, of the beneficiary's proposed monetary compensation will be paid by the petitioning organization itself. To the extent that the petitioner now proposes to create a salaried position for the beneficiary to be paid from its own funds, this proposal is materially different from the position as described by the petitioner at the time of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Furthermore, the petitioner has not submitted sufficient evidence under 8 C.F.R. § 204.5(m)(10) to establish its ability to provide the proffered compensation as indicated in the petition. At the time of filing, the petitioner listed proposed compensation of \$16,000 to \$18,000 annually, as well as housing and utilities. The regulation at 8 C.F.R. § 204.5(m)(10) requires "IRS documentation, such as IRS Form W-2 or certified tax returns" or "an explanation for its absence ... along with comparable, verifiable documentation." The only IRS documentation provided by the petitioner consisted of a Form 1099-MISC for \$3,364 and unsigned, uncertified tax returns, with no explanation as to why certified copies were not submitted. Further, no documentary evidence was submitted to demonstrate the petitioner's intent to provide the beneficiary's housing and utilities as proposed in the petition.

For the reasons discussed above, the petitioner has not established how it intends to compensate the beneficiary.

Counsel for the petitioner argues on appeal that the petitioner "was not given adequate notice or information to respond to the ground of denial in violation of 8 C.F.R. § 103.2(a)(8)(iv) [sic]." The regulation at 8 C.F.R. § 103.2(b)(8) provides in pertinent part:

(ii) Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

(iii) Other evidence. If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

A review of the record reflects that the director adjudicated the petition based on the evidence submitted. The director did not deny the petition because initial evidence was missing; rather the submitted evidence failed to establish eligibility for the benefit. In denying the petition, the director complied with 8 C.F.R. §§ 103.2(b)(8). Furthermore, the regulations at 8 C.F.R. §§ 103.2(b)(8)(ii) and (iii) provide for discretionary authority to request additional evidence, provide notice of the director's intent to deny the application or petition, or deny the petition or application. In this case, the director exercised her discretionary authority and denied the petition based on the evidence submitted by the petitioner not establishing eligibility for the benefit. Although 8 C.F.R. § 104.2(b)(8)(iv), referred to by counsel, does require a request for evidence or notice of intent to deny to provide adequate notice and sufficient information for the petitioner to respond, that regulation does not require the director to issue such a notice. Regardless, even if the director had committed a procedural error by failing to adequately notify the petitioner, no harm has been demonstrated as the petitioner had the opportunity to address the issue on appeal and the petitioner's additional evidence and arguments have now been considered.

Additionally, counsel and the petitioner argue that "the form of compensating the beneficiary was approved by USCIS when it investigated and approved its R-1 petition," and that the petitioner "relied on the USCIS approval." USCIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). Agencies need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, counsel argues on appeal that the denial of the petition violates the Religious Freedom Restoration Act (RFRA) and the constitutional rights of the petitioner and beneficiary "because it is restricting petitioner's and the beneficiary's free exercise of religion." USCIS anticipated this argument in the preamble to the latest version of the religious worker regulations:

USCIS disagrees with the specific notion that the [regulations] violate[s] the RFRA. The RFRA provides:

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except \* \* \* if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

Public Law 103–141, sec. 3, 42 U.S.C. 2000bb–1. The final rule is intended to permit religious organizations to petition for admission of religious workers under restrictions that have less than a substantial impact on the individual’s or an organization’s exercise of religion. A petitioner’s rights under RFRA are not impaired unless the organization can establish that a specific provision of the rule imposes a significant burden on the organization’s religious beliefs or exercise. Further, this rule is not the sole means by which an organization or individual may obtain admission to the United States for religious purposes, and DHS believes that the regulation, and other provisions of the INA and implementing regulations, can be administered within the confines of the RFRA. An organization or individual who believes that the RFRA may require specific relief from any provision of this regulation may assert such a claim at the time they petition for benefits under the regulation.

Nor does this final rule impose a “categorical bar” to any religious organization’s petition for a visa or alien’s application for admission. Instead, the rule sets forth the evidentiary standards by which USCIS will adjudicate nonimmigrant and immigrant petitions.

73 Fed. Reg. 72276, 72283-84 (November 26, 2008). With respect to the provision that “[a]n organization or individual who believes that the RFRA may require specific relief from any provision of this regulation may assert such a claim at the time they petition for benefits under the regulation,” we note that the petitioner raised no RFRA concerns until the appellate stage. Also, the above language does not require USCIS to comply with every request for relief under RFRA.

USCIS revised its regulations under express instructions from Congress. Section 2(b)(1) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391 (Oct. 10, 2008), required the Department of Homeland Security to “issue final regulations to eliminate or reduce fraud” related to religious worker petitions. The October 2008 legislation extended the special immigrant nonminister religious program only until March 5, 2009. From the wording of the statute, it is clear that this extension was so short precisely because Congress sought to learn the effect of the new regulations before granting a longer extension. Congress has since extended the life of the program four times.<sup>[1]</sup> On any of those occasions, Congress could have made substantive changes in response to the regulations they ordered USCIS to publish, but Congress did

---

<sup>[1]</sup> P.L. No. 111-9 § 1 (March 20, 2009) extended the program to September 29, 2009. Pub. L. No. 111-68 § 133 (October 1, 2009) extended the program to October 30, 2009. Pub. L. No. 111-83 § 568(a)(1) (October 28, 2009) extended the program to September 29, 2012. Pub. L. No. 112-176 § 3245 (September 28, 2012) extended the program to September 30, 2015.

not do so. Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). We may therefore presume that Congress has no objection to the new regulations as published, or to USCIS's interpretation and application of those regulations.

The petitioner cites no judicial finding that any of the current regulations violate RFRA or the United States Constitution. Absent such a finding, the regulations remain binding on all USCIS employees, and neither the director nor the AAO has any discretion to set aside any provision of those regulations:

It is well settled that the regulations which the Service [now USCIS] promulgates have the force and effect of law and are binding on the Service. *Bridges v. Wixon*, 326 U.S. 135, 153 (1945); *Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923); *Matter of A-*, 3 I&N Dec. 714 (BIA 1949); cf. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984); *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980).

*Matter of L-*, 20 I&N Dec. 553, 556 (BIA 1992). See also *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). An agency is not entitled to deference if it fails to follow its own regulations. *U.S. v. Heffner*, 420 F.2d 809, (C.A. Md. 1969) (government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down); *Morton v. Ruiz*, 415 U.S. 199 (1974) (where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures).

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, that burden has not been met.

**ORDER:** The appeal is dismissed.