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OCT 15 2009

FILE: WAC 09 133 50442 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



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:



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.

Perry Rhew
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 AAO will withdraw the director's decision. Because the petition cannot be approved as it now stands, the AAO will remand the petition to the California Service Center for further consideration and action under new regulations.

The petitioner is an Islamic society that operates a mosque and related facilities. It seeks to classify the beneficiary as an R-1 nonimmigrant 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 an imam and resident scholar from March 31, 2009 to March 30, 2011. The director determined that the petitioner had not established that the beneficiary's position qualifies as a religious occupation; that the petitioner is able to compensate the beneficiary at the rate claimed; or that the beneficiary will not become a public charge or rely on secular employment to support himself.

On November 26, 2008, as required under section 2(b)(1) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008), U.S. Citizenship and Immigration Services promulgated a rule setting forth new regulations for nonimmigrant religious worker petitions. 73 Fed. Reg. 72276 (Nov. 26, 2008). The petitioner filed the petition on April 6, 2009, after the new regulations had taken effect.

Despite the issuance of new regulations (which superseded and replaced the old regulations), the director's July 25, 2009 decision relied significantly on the old regulations. Therefore, the director erroneously based the decision, in part, on obsolete regulations that were no longer in effect at the time of the decision.

Beyond the general issue of the director's use of outdated regulations, the director does not appear to have given full consideration to the nature of the beneficiary's intended employment. The petitioner has indicated that, as an imam, the beneficiary would be a "[r]eligious leader responsible for conducting religious services . . . conducting the Funeral Prayers" and other functions. It appears that the beneficiary's intended position is, essentially, that of a minister. Both the statute and regulations include provisions and requirements unique to ministers, such as 8 C.F.R. § 214.2(r)(10), and the director's decision must take these provisions into account.

In discussing the petitioner's finances and the proposed terms of compensation, the director did not discuss the regulation at 8 C.F.R. § 214.2(r)(11) or explain why the petitioner's submissions (including copies of uncertified quarterly tax returns and a copy of an Internal Revenue Service (IRS) Form W-3 Transmittal of Wage and Tax Statements for 2007) were not sufficient to meet the petitioner's burden of proof. Therefore, the petitioner did not have the opportunity to remedy any shortcomings on appeal.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority

has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Beyond the issues that the director raised, we take notice of the beneficiary's claimed prior employment. The petitioner claims that, before the petitioner filed the present petition, the beneficiary worked for another Islamic organization in Virginia under an R-1 visa issued April 2, 2007. 8 C.F.R. § 204.2(r)(12) states that any request for an extension of stay as an R-1 must include initial evidence of the previous R-1 employment. If the beneficiary:

- (i) Received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of filed income tax returns, reflecting such work and compensation for the preceding two years.
- (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available. If IRS documentation is unavailable, an explanation for the absence of IRS documentation must be provided, and the petitioner must provide verifiable evidence of all financial support, including stipends, room and board, or other support for the beneficiary by submitting a description of the location where the beneficiary lived, a lease to establish where the beneficiary lived, or other evidence acceptable to USCIS.
- (iii) Received no salary but provided for his or her own support, and that of any dependents, the petitioner must show how support was maintained by submitting with the petition verifiable documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other evidence acceptable to USCIS.

The beneficiary's résumé listed the beneficiary's employment experience from 1995 to 2007. The résumé did not mention the Virginia employer through whom the beneficiary first obtained his R-1 status (the résumé does show a Virginia area code (703) for the beneficiary's telephone number, which shows that he prepared the résumé after he arrived in the United States.) Instead, the beneficiary indicated that he worked as a "Lecturer of Critical thinking" at Al Khawarizmi International College in summer 2007, and as "Head of the Department of Islamic faculty" at Al Ain Junior School in the United Arab Emirates. Nevertheless, the petitioner specified that the beneficiary was in the United States as an R-1 nonimmigrant, and the petitioner filed the petition based on a "Change of Employer."

The beneficiary first entered the United States in August 2008, and subsequently re-entered in December 2008 and January 2009. He may have worked at a Virginia mosque during his time in the United States, but the record contains no documentary evidence of that employment. The petition cannot be approved until and unless the petitioner produces this evidence.

The director must issue a new decision based on the new regulations issued on November 26, 2008, taking into account the issues discussed above. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The matter is remanded to the director, California Service Center, for the issuance of a request for evidence (if necessary) and a new decision in accordance with the requirements of the new regulation published at 73 Fed. Reg. 72276 (Nov. 26, 2008). If the new decision is adverse to the petitioner, it shall be certified to the Administrative Appeals Office for review.