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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



**U.S. Citizenship
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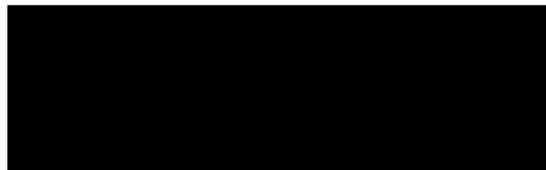


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 20 2010**

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:



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.

Thank you,

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 record, as it now stands, does not support approval of the petition, the AAO will remand the petition for further action and consideration.

The petitioner is a Sunni Islamic center and mosque. It seeks to classify the beneficiary as a nonimmigrant religious worker pursuant to section 101(a)(15)(R)(1) of the Act, to perform services as an imam. The director determined that the petitioner had not established that the beneficiary's position constitutes qualifying religious employment, or that the petitioner is able to compensate the beneficiary.

On appeal, the petitioner submits arguments from counsel and various exhibits, some of them copies of prior submissions.

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;
- (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.

THE PROPOSED POSITION

The first issue under discussion concerns the beneficiary's duties and qualifications for his intended position as an imam. The USCIS regulation at 8 C.F.R. § 214.2(r)(3) contains the following relevant definitions:

Minister means an individual who:

- (A) Is fully authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct religious worship and perform other duties usually performed by authorized members of the clergy of that denomination;
- (B) Is not a lay preacher or a person not authorized to perform duties usually performed by clergy;
- (C) Performs activities with a rational relationship to the religious calling of the minister; and
- (D) Works solely as a minister in the United States which may include administrative duties incidental to the duties of a minister.

Religious occupation means an occupation that meets all of the following requirements:

(A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination;

(B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination;

(C) The duties do not include positions which are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible; and

(D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

Religious vocation means a formal lifetime commitment, through vows, investitures, ceremonies, or similar indicia, to a religious way of life. The religious denomination must have a class of individuals whose lives are dedicated to religious practices and functions, as distinguished from the secular members of the religion. Examples of vocations include nuns, monks, and religious brothers and sisters.

The petitioner filed the Form I-129 on August 22, 2007. In a letter accompanying the initial filing, counsel stated:

The position of Imam requires that [the beneficiary]:

1. Lead prayers five times a day;
2. Deliver sermons prior to prayers;
3. Teach Quran recitation;
4. Teach Religious classes;
5. Advise and counsel members of the congregation;
6. Living a life consistent [with] Islamic princip[les] in order to set an example of appropriate Islamic behavior to Muslims in the community.

[The beneficiary] is highly qualified for this position. [The beneficiary] has an associate degree in Islamic studies, professional diploma in English teaching methodology from Egypt and is currently working on his PhD. in Islamic studies. . . . He has also received special recitation recognition which is the highest degree of Quran recitation from Mass Quran Institute in Michigan. . . . He also has several teaching licenses from prominent Muslim Scholars to teach Quran, and Tajweek Ijaza (certificate of memorization and modulation of Quran), such licenses are rare and require that one studies Islamic theology for several years.

The unsupported assertions of counsel do not constitute evidence. See *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). Therefore, we must consider how well the evidence of record supports counsel's claims.

Various letters and certificates attested to the beneficiary's academic degrees and ongoing doctoral studies. A certificate from the Iqraa Society indicated that the beneficiary "was responsible for all activities of the Society's mosque including leading prayers, delivering lectures and the Friday Sermons, and teaching classes of Qur'an in the period of August 2001 to August 2005."

On January 30, 2009, the director issued a request for evidence (RFE), instructing the petitioner to submit evidence to show that the beneficiary's intended position meets the regulatory definitions of a minister, religious occupation, or religious vocation.

In response, [REDACTED] interim director of the petitioner's executive committee, stated:

[The beneficiary] has about five years experience as a volunteering Imam and more than ten years experience as a teacher overseas. . . .

His duties include leading the five daily prayers, giving the Friday Sermons and running the Sunday school. He also serves as our representative in Interfaith Groups that promote interaction between community members of different faiths.

Newspaper articles about the interfaith activities show the beneficiary alongside ministers and rabbis, consistent with the assertion that the beneficiary's role is essentially that of a minister. Local Christian pastors attest, in letters, to this role as well. Article VIII, Section 1 of the petitioner's constitution authorizes the executive committee to "appoint a resident Imam." The petitioner also submitted additional copies of the beneficiary's previously submitted credentials.

The director denied the petition on July 17, 2009. In the decision, the director "concluded that the terms of the beneficiary's service . . . do not rise to the level of a religious vocation." The petitioner had not claimed otherwise.

The director stated: "Because the petitioner has asserted that the beneficiary's professional knowledge and career qualify the beneficiary for this religious position in a professional capacity, USCIS must look to the regulatory requirement for religious professions." The director did not specify what that "regulatory requirement" is. In any event, while the obsolete regulations contained provisions specifically with regard to professional occupations, the current regulations in effect since November 26, 2008 contain no such provisions. While the underlying statute contains the word "professional," the statute does not distinguish between professional and non-professional religious workers in terms of benefits available to those workers. Therefore, any regulatory distinction between professional and non-professional religious workers would serve no practical purpose.

The director also concluded that the petitioner “has not established that the beneficiary’s activities for the petitioner would require any religious training or qualification,” or “that the beneficiary is performing duties above and beyond those of a caring member of the denomination.” In reaching these conclusions, the director did not explain why the beneficiary’s duties did not constitute qualifying religious work; the director simply declared the beneficiary’s work to be non-qualifying.

On appeal, counsel asserts: “An imam is a minister by definition.” The petitioner submits copies of letters from officials of the Mas Quran Institute; the North American Imams Federation; the Islamic Society of North America; the Islamic Learning Foundation; the Islamic Circle of North America; and the Assembly of Muslim Jurists at America, all attesting that the beneficiary possesses the necessary qualifications to work as an imam.

The record indicates that the beneficiary possesses extensive theological training that is not only consistent with the pursuit of the ministry, but which has little evident application outside of that field of endeavor. The petitioner has shown that the beneficiary’s recognition as a member of the clergy extends to other faith leaders in the community. The director has not directly addressed any of this evidence, or explained what, in the record, leads to a finding that the beneficiary is not qualified to serve as an imam, or that employment as an imam is not qualifying religious work for immigration purposes.

The new evidence submitted on appeal serves to support the conclusion that the beneficiary possesses the necessary qualifications to work as an imam, and that many of the core duties of an imam are ministerial in nature. We will withdraw the director’s finding in this regard.

INTENDED COMPENSATION

The second and final stated basis for denial concerns the beneficiary’s compensation. At the time the petitioner filed the petition, the USCIS regulation at 8 C.F.R. § 214.2(r)(3)(ii)(D) required the petitioner to describe the arrangements made, if any, for remuneration for services to be rendered by the alien, including the amount and source of any salary, a description of any other types of remuneration to be received (including housing, food, clothing, and any other benefits to which a monetary value may be affixed), and a statement whether such remuneration shall be in exchange for services rendered.

On Form I-129, the petitioner indicated that it intended to pay the beneficiary \$40,000 per year, and that the petitioner had nine employees at the time. The petitioner submitted a “Statement of Income for the Year to Date Period Ending 05/31/07,” containing the following information:

Total income	\$30,512.15	Salaries	\$15,042.34
Total expenses	29,043.86	Net income	1,468.29

The petitioner submitted copies of bank documents, showing deposits into the beneficiary’s bank account in amounts of \$2,873.33 in June 2007 and \$2,736.33 in July 2007. These amounts appear to be consistent with a \$40,000 annual salary (after tax withholding).

On November 26, 2008, while the petition was pending, USCIS published a rule setting forth new regulations for special immigrant religious worker petitions. Supplementary information published with the new rule specified: "All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

In the January 2009 RFE, the petitioner advised the petitioner of new requirements found at 8 C.F.R. § 214.2(r)(11):

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.

In response, counsel stated: "Due to the small size of the congregation [the beneficiary] is the only employee of the center." This is consistent with the statement of income, showing a total salary figure that is close to the beneficiary's salary, but it contradicts the assertion on Form I-129 (which counsel prepared) indicating that the petitioner had nine employees.

The petitioner submitted a copy of the beneficiary's IRS Form W-2 Wage and Tax Statement for 2008, showing that the petitioner paid the beneficiary \$44,400 – an amount well in excess of the proposed annual salary of \$40,000 per year. Copies of pay statements for the earliest months of 2009 show monthly payments of \$3,700 before taxes, consistent with a pre-tax salary of \$44,400 per year. The pay statements indicate that the petitioner deducts the cost of housing from the beneficiary's salary. These deductions could explain why the beneficiary's salary in the first five months of 2007, as reported on the statement of income, was somewhat less than the roughly \$16,667 that we would expect to see based on an annual salary of \$40,000. Also, the petitioner did not claim that the beneficiary's salary was already \$40,000 per year at the time of filing; the petitioner indicated only that the beneficiary's salary would be at that level in the future.

A bank statement indicates that the petitioner had a checking account balance of \$186,329 as of December 31, 2008. The statement reflects no credits or debits to the account, indicating that payments to the beneficiary must have come from a different account.

In denying the petition, the director stated:

[T]he evidence contained in the record does not provide a complete picture of the petitioner's financial status. No further evidence of the petitioner's financial status, or its ability to pay the beneficiary the proffered wage, is included in the record. The record does not establish that the petitioner had the ability [to] remunerate any wages to the beneficiary at the time of the filing of the petition or thereafter.

The director did not cite the new regulation at 8 C.F.R. § 214.2(r)(11)(i), or explain how the petitioner had failed to meet the requirements of that regulation. The director relied instead the *Foreign Affairs Manual* published by the Department of State, which, in turn, was evidently based on regulations in effect before November 26, 2008.

On appeal, the petitioner submitted additional bank statements showing that the petitioner's checking account carried a balance of nearly \$200,000 in early 2009. As with the previously submitted statement, these statements do not show any checks or withdrawals from the account. The petitioner has, however, documented prior payments to the beneficiary. Therefore, this account must represent a reserve fund over and above the source of the beneficiary's salary.

The regulations now in effect give considerable weight to IRS documentation of salary payments. The petitioner has submitted such evidence, along with credible documentation of significant cash reserves. The petitioner has documented the beneficiary's receipt of a salary in excess of the offered rate. The director did not explain how the petitioner's evidence fails to satisfy the regulatory requirements of 8 C.F.R. § 214.2(r)(11)(i). Indeed, the director did not mention the new regulations at all, relying instead on factors outside of the regulations. We will withdraw the director's findings regarding the beneficiary's compensation.

While the petitioner has overcome the director's stated grounds for denial, other issues remain that the petitioner must resolve before the petition can rightly be approved. The AAO can address eligibility issues 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).

The regulation at 8 C.F.R. § 214.2(r)(8) requires that an authorized official of the prospective employer of an R-1 alien must complete, sign and date an attestation prescribed by USCIS and submit it along with the petition. The prospective employer must specifically attest to all of the following:

- (i) That the prospective employer is a bona fide non-profit religious organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation;

- (ii) That the alien has been a member of the denomination for at least two years and that the alien is otherwise qualified for the position offered;
- (iii) The number of members of the prospective employer's organization;
- (iv) The number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion;
- (v) The number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years by the prospective employer's organization;
- (vi) The number of special immigrant religious worker and nonimmigrant religious worker petitions and applications filed by or on behalf of any aliens for employment by the prospective employer in the past five years;
- (vii) The title of the position offered to the alien and a detailed description of the alien's proposed daily duties;
- (viii) Whether the alien will receive salaried or non-salaried compensation and the details of such compensation;
- (ix) That the alien will be employed at least 20 hours per week;
- (x) The specific location(s) of the proposed employment; and
- (xi) That the alien will not be engaged in secular employment.

The petitioner's statements in the record address some, but not all, of the above assertions. The petitioner has not submitted (and the director has, so far, not requested) the required attestation.

We note that any future submission by the petitioner must address the contradictory claims that the petitioner has nine employees, and that the beneficiary is the petitioner's only employee.

Finally, the USCIS regulation at 8 C.F.R. § 214.2(r)(16) reads as follows:

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.

The record contains no evidence that the director has satisfactorily addressed this requirement.

For the reasons discussed above, the director's decision cannot stand and we hereby withdraw that decision. At the same time, however, the record as it now stands does not permit approval of the petition. Therefore, the AAO will remand this matter to the director. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. 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 director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.