

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

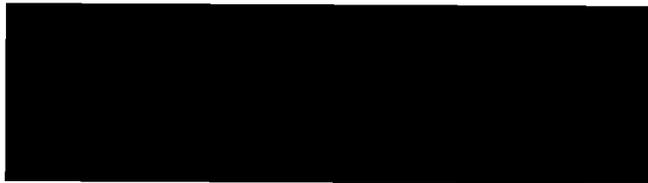
PUBLIC COPY

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
and Immigration
Services**

D13



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER

Date: **AUG 20 2010**

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:

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 petitioner filed a motion to reopen and reconsider the decision. The director denied the motion. 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 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 assistant imam. The director determined that the petitioner had not established that the beneficiary's position qualifies him as a nonimmigrant religious worker, or that the petitioner is able to compensate the beneficiary.

On appeal, the petitioner submits a brief from counsel and several exhibits, most 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.

U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 214.2(r)(1) state 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 first issue concerns the nature of the beneficiary's intended position as an assistant imam. The petitioner filed the Form I-129 petition on December 15, 2008. On that form, the petitioner indicated that the beneficiary's duties would consist of "leading daily prayers and teaching holy Quran." [REDACTED] president of the petitioning entity, stated: "An Imam is a member of the clergy of the Islamic faith." This assertion makes the beneficiary subject to the regulation at 8 C.F.R. § 214.2(r)(10):

Evidence relating to the qualifications of a minister. If the alien is a minister, the petitioner must submit the following:

- (i) A copy of the alien's certificate of ordination or similar documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination; and
- (ii) Documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination, as well as evidence that the alien has completed any course of prescribed theological education at an accredited theological institution normally required or recognized by that religious denomination, including transcripts, curriculum, and documentation that establishes that the theological education is accredited by the denomination, or
- (iii) For denominations that do not require a prescribed theological education, evidence of:
 - (A) The denomination's requirements for ordination to minister;
 - (B) The duties allowed to be performed by virtue of ordination;

(C) The denomination's levels of ordination, if any; and

(D) The alien's completion of the denomination's requirements for ordination.

Regarding the beneficiary's qualifications, [REDACTED] stated: "There is no formal system of organization in Islam. Imams are selected and qualified based on their educational qualifications, the knowledge of Quran and experience." Regarding the beneficiary's qualifications, [REDACTED] stated:

[The beneficiary] studied Islamic education at the Jamiatul Islamia Madinatul Munawara, [Saudi] Arabia. He studied his Qira'at Course with Tajweed from Jamia Madintul-Ilm, Faisalabad, Pakistan in 1989. He also studied Alim Course, which included Arabic language, Grammar, Hadith and Fiqah from 1960 to 1969. He got his graduation for Memorization of the Quran . . . in 1960 in Pakistan. . . .

[The beneficiary] is fully qualified to work as an Assistant Imam and Quranic Teacher, as he has taken a religious vow to Islamic religious life.

In an attestation accompanying Form I-129, instructed to provide a "[d]escription of the alien's qualifications for the position offered," the petitioner stated:

The alien has devoted himself to the study and prop[a]gation of sound Islamic theology since childhood. He has obtained certification from Jamia Madina-Tul-Ilm, Faisalabad, Pakistan in 1989. He has been employed as an assistant imam and Quranic teacher since 02/02/2006 and has been teaching Quranic studies and performing religious services since 1993.

The petitioner submitted copies of the beneficiary's certificates for "Tajweed Completion" and "Islamic and Arabic Studies," and a letter from [REDACTED] attesting to the beneficiary's employment "as an Imam and senior teacher of Qura'an for the last twenty years."

[T]here is no formal ordination in Islam. Any person who has sufficient knowledge of Qur'an, which means he knows tajweed [which is the] science and rules of Qur'anic recitation, understands the meaning of the Qur'an, knows the tradition of the Prophet of Islam Muhammad and well verse[d] in at least one of the four schools of fiqh (Islamic law) qualifies to perform the duties of Imam.

[REDACTED] imam of [REDACTED] agreed that "there is no formal ordination requirement for a person to be Imam. Anybody with sufficient knowledge and experience

can be an Imam.” Both of the above witnesses attested that the beneficiary is highly qualified to serve as an Imam.

The director denied the petition on July 13, 2009. In denying the petition, the director quoted the regulatory definition of “religious worker” from 8 C.F.R. § 214.2(r)(3): “an individual engaged in and, according to the denomination’s standards, qualified for a religious occupation or vocation, whether or not in a professional capacity, or as a minister.” This definition implies deference to “the denomination’s standards.” The regulations do not establish any minimum level for those qualifications, or permit the director to find that a given position requires so little training or preparation that it cannot qualify as religious work.

The director concluded: “The petitioner has not established that the beneficiary’s activities for the petitioner would require any religious training or qualifications. . . . So, it appears to be there is no special requirement to become an Imam.” The director also, however, found: “The petitioner has not established that the beneficiary is qualified for a religious worker position within the religious organization.” These two findings contradict each other. If it is the director’s conclusion that the petitioner has no minimum standards for the beneficiary’s position, then it defies logic to find that the beneficiary does not meet those (nonexistent) standards.

On August 14, 2009, the petitioner filed a motion to reopen and reconsider the director’s decision. At that time, counsel stated: “we submit that the motion . . . should be granted or in the alternative to forward it to the AAO as an appeal.” While the regulation at 8 C.F.R. § 103.3(a)(2)(iii) permits an appeal to be treated as a motion under certain circumstances, there exists no regulation to permit a motion to be treated as an appeal. Therefore, the director did not err by failing to forward the motion to the AAO as though it were an appeal.

On motion, the petitioner submitted copies of previously submitted exhibits, showing that the beneficiary has worked for years as an imam in the past. The beneficiary would not have been able to hold such employment if he were not qualified to serve as an imam.

The petitioner submitted a copy of an “Imam Search Ad” from *Al Jumuah* magazine, indicating: “The candidate must be a Hafiz-Ul-Qur’an, hold a degree in Islamic studies, be fluent in both Arabic and English languages, adhere to the Qur’an and Sunnah, and preferably have some experience in Islamic centers management.”

The director denied the petitioner’s motion, stating: “It is an established rule that USCIS does not consider new evidence where the petitioner was put on notice of evidentiary requirements and given a reasonable opportunity to provide it for the record before the petition was adjudicated by USCIS. Matter of Soriano, 19 I. & N. Dec. 764 (BIA 1988).” In that cited decision, the Board of Immigration Appeals held that consideration of the new evidence is in order “[w]here a visa petition is denied based on a deficiency of proof, the petitioner was not put on notice of the deficiency and given a reasonable opportunity to address it before the denial, and the petitioner proffers additional evidence addressing the deficiency with the appeal.” In this instance, the petitioner was never “put on notice of the deficiency

and given a reasonable opportunity to address it before the denial.” The director simply denied the petition without prior notice. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) permits denial without prior notice, but under such circumstances, the appeal or motion represents the petitioner’s first opportunity to address the deficiency.

Furthermore, the initial submission did not lack evidence of the requirements for the position or the beneficiary’s qualifications for that position. The petitioner had submitted such evidence; the director simply found that evidence to be insufficient. We will, therefore, consider the petitioner’s evidentiary submissions here.

The petitioner appealed the denial of the motion on September 21, 2009. On appeal, counsel argues that the petitioner has submitted consistent and credible evidence that the beneficiary qualifies as an imam. We agree with the petitioner on this point, and we note that the director has given no indication as to (1) why the beneficiary’s evidence was insufficient, or (2) what evidence the director would recognize as sufficient to establish the qualifications of an imam and that the beneficiary meets those qualifications.

The director simply asserted that a “USCIS search indicates that to become an Imam ‘one may merely need to be an adult male.’” The record contains no further documentation of this “USCIS search” and no identification of the source of this information. Furthermore, if it were, in fact, true that every adult Sunni Muslim male qualifies to be an Imam, then the logical conclusion would have to be that the beneficiary, an adult Sunni Muslim male, obviously qualifies for the position. The director’s unsupported and logically untenable decision – that the beneficiary cannot qualify as an imam because it is too easy to qualify as an imam – cannot stand, and we will withdraw that finding.

The second and final stated basis for denial concerns the beneficiary’s intended compensation. Under the regulation at 8 C.F.R. § 214.2(r)(11)(i), the petitioner’s initial evidence must state how the petitioner intends to compensate the alien, including specific monetary or in-kind compensation. The petitioner must submit verifiable evidence explaining how the petitioner will compensate the alien. 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. Internal Revenue Service (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 Form I-129, the petitioner indicated that the beneficiary would receive \$3,500 per month, and that the beneficiary was one of two employees. The petitioner claimed gross annual income of \$200,000, but did not state its net annual income. In a separate letter, [REDACTED] stated that the beneficiary “will be paid a salary [of] \$3,500.00 per month plus a rent free lodging.” The monthly salary of \$3,500 equals \$42,000 per year.

The petitioner’s initial submission did not contain any financial documentation or other evidence of the petitioner’s capacity or intention to compensate the beneficiary at the stated rate. In denying the petition

on July 13, 2009, the director did not cite the applicable regulation at 8 C.F.R. § 214.2(r)(11)(i). Instead, the director cited other regulations not directly related to compensation, and the U.S. Department of State's *Foreign Affairs Manual*, before finding:

[T]he evidence contained in the record does not provide a complete picture of the petitioner's financial status. The petitioner does not indicate how many families [it] services. Based on the information provided, the petitioner[']s annual income is \$200,000.00. It appears to be the petitioner doesn't have the capacity to of hiring [sic] two Imams for a salary of \$3500.00 a month. 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. Consequently, the petitioner has not shown that it can remunerate the beneficiary with the proffered wage.

The director did not explain why the petitioner's claimed annual income of \$200,000 is not sufficient to cover the beneficiary's salary of \$42,000 per year.

On motion, the petitioner submitted a copy of IRS Form W-2, Wage and Tax Statement, showing that the petitioner paid the beneficiary \$43,000 in 2008. This amount is \$1,000 more than the annual salary described in the petitioner's initial submission. Copies of pay receipts from May, June and July 2009 show that the petitioner had increased the beneficiary's salary to \$4,000 per month, or \$48,000 per year.

A statement of "Income & Expenses" indicated that the petitioner's annual expenses, including two salaries, amount to \$109,330 per year, leaving more than 45% of the petitioner's claimed annual income of \$200,000. The petitioner also submitted documentation showing that it had fully paid off the cost of its property.

After the director denied the petitioner's motion without discussing the evidence submitted with that motion, the petitioner appealed the decision. Counsel states: "the employer . . . has been already paying the beneficiary the salary for the preceding two years and . . . the petitioner has no debt as the property it owns is fully-paid." The petitioner submits "Profit & Loss" statements showing that, in calendar year 2008, the petitioner took in \$507,366.29, with \$251,475.86 net income after expenses. The expenses included \$97,898.00 in salaries. In the first eight months of 2009, the petitioner kept \$49,972.49 out of \$228,904.00 in income, and paid \$68,000.00 in salaries.

The petitioner has submitted the required IRS documentation of its salary paid to the beneficiary. Because the petitioner has, in fact, paid the beneficiary more than the stated salary, we must conclude that the petitioner has been able and willing to do so.

A related issue that the director has not directly addressed concerns another aspect of the beneficiary's compensation. [REDACTED] had stated that the petitioner would provide "\$3,500.00 per month plus a rent free lodging." With respect to this type of non-salaried compensation, the regulation at 8 C.F.R.

§ 214.2(r)(11)(i) calls for “verifiable documentation that room and board will be provided.” The record, as it now stands, contains no documentation to show the circumstances under which the petitioner will provide such lodging. For example, the petitioner has not specified whether it owns the premises; holds the lease on a particular property; or reimburses the beneficiary for rent paid. We note that, on Form I-129, the petitioner provides an address for the beneficiary that is different from the petitioner’s address, which indicates that the beneficiary does not reside at the petitioning mosque itself. Therefore, documentation that the petitioner owns the mosque itself is not evidence that the petitioner owns the beneficiary’s residence.

The director’s findings regarding the beneficiary’s compensation cannot stand, for reasons we have explained. At the same time, we cannot definitively find that the petitioner has met its burden of proof relating to that compensation, because the record does not contain sufficient information and documentation regarding the beneficiary’s housing as non-salaried compensation. The director must afford the petitioner a meaningful opportunity to provide this required evidence.

There remains another issue beyond the director’s decision. The AAO may take note of issues that the Service Center failed to identify 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)(16) reads:

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 AAO can find no evidence of a compliance review of the petitioning organization on [REDACTED]. There is evidence of a review of other area addresses in 2005, several years before the petitioner filed this petition, but it is unclear to what extent this information relates to the present petition. Further investigation and compliance review may be necessary in this instance. If any such inspection should produce evidence that the petition should not be approved, then the director may use that information as a factor in a future decision.

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.