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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
and Immigration
Services**

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 23 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:

[REDACTED]

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

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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, described as an "Islamic congregation and school," 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 a religious teacher. The director determined that the petitioner had not established that the beneficiary's position qualifies as a religious occupation, or that the petitioner had adequately documented that it will pay the beneficiary a living wage.

On appeal, the petitioner submits a brief from counsel.

The petitioner filed the Form I-129 petition on January 28, 2008. While the petition was pending, new regulations went into effect on November 26, 2008. On appeal, counsel claims that the new regulations "were not retroactive in nature, so the I-129 should have been adjudicated under the prior provisions." It is ironic that counsel makes this argument on appeal, because the petitioner's right to appeal the decision is found only in the new regulations (at 8 C.F.R. § 214.2(r)(17)). The prior regulations in effect at the time of filing did not provide for the appeal of the denial of an R-1 petition.

More substantively, counsel fails to take into account supplementary information published with the new regulations, which 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). Thus, the new regulations did, in fact, apply retroactively to petitions that were pending at the time of enactment.

The wording of the relevant legislation demonstrates Congress' interest in the regulations. Section 2(b) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391 (Oct. 10, 2008), reads, in pertinent part:

Regulations – Not later than 30 days after the date of the enactment of this Act, the Secretary of Homeland Security shall –

- (1) issue final regulations to eliminate or reduce fraud related to the granting of special immigrant status for special immigrants described in subclause (II) or (III) of section 101(a)(27)(C)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(C)(ii))

Furthermore, 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 three times.¹ On any of those occasions, Congress could have made substantive changes in response to the new regulations, but Congress did 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 U.S. Citizenship and Immigration Services' (USCIS) interpretation and application of those regulations.

For the above reasons, we reject counsel's argument that the new regulations should not apply retroactively to the present petition. At the same time, however, we cannot ignore another instruction found in the supplementary information published with the new regulations: "If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information." *Id.* at 72285.

In this instance, the director did not allow the petitioner that opportunity. The director simply denied the petition without prior notice, relying on a combination of old regulations, new regulations, and other sources such as the *Foreign Affairs Manual* published by the Department of State.

Later in this decision, we will discuss newly required evidence that the petitioner has not yet submitted, and which the director must allow the petitioner an opportunity to provide. First, however, we will examine the grounds for denial stated by the director.

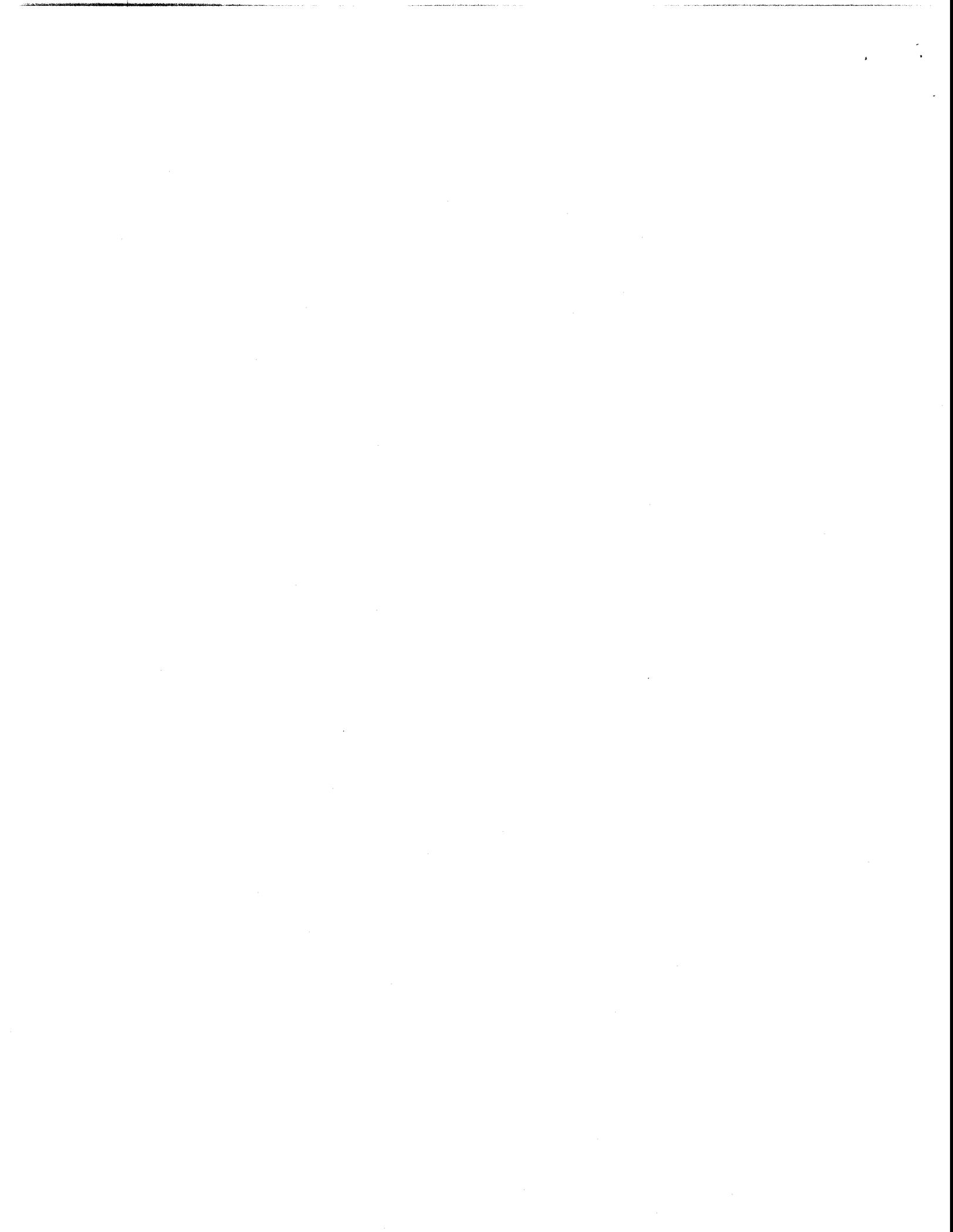
Section 101(a)(15)(R) of the Act pertains to an alien who:

- (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

¹ 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.



(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.

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:

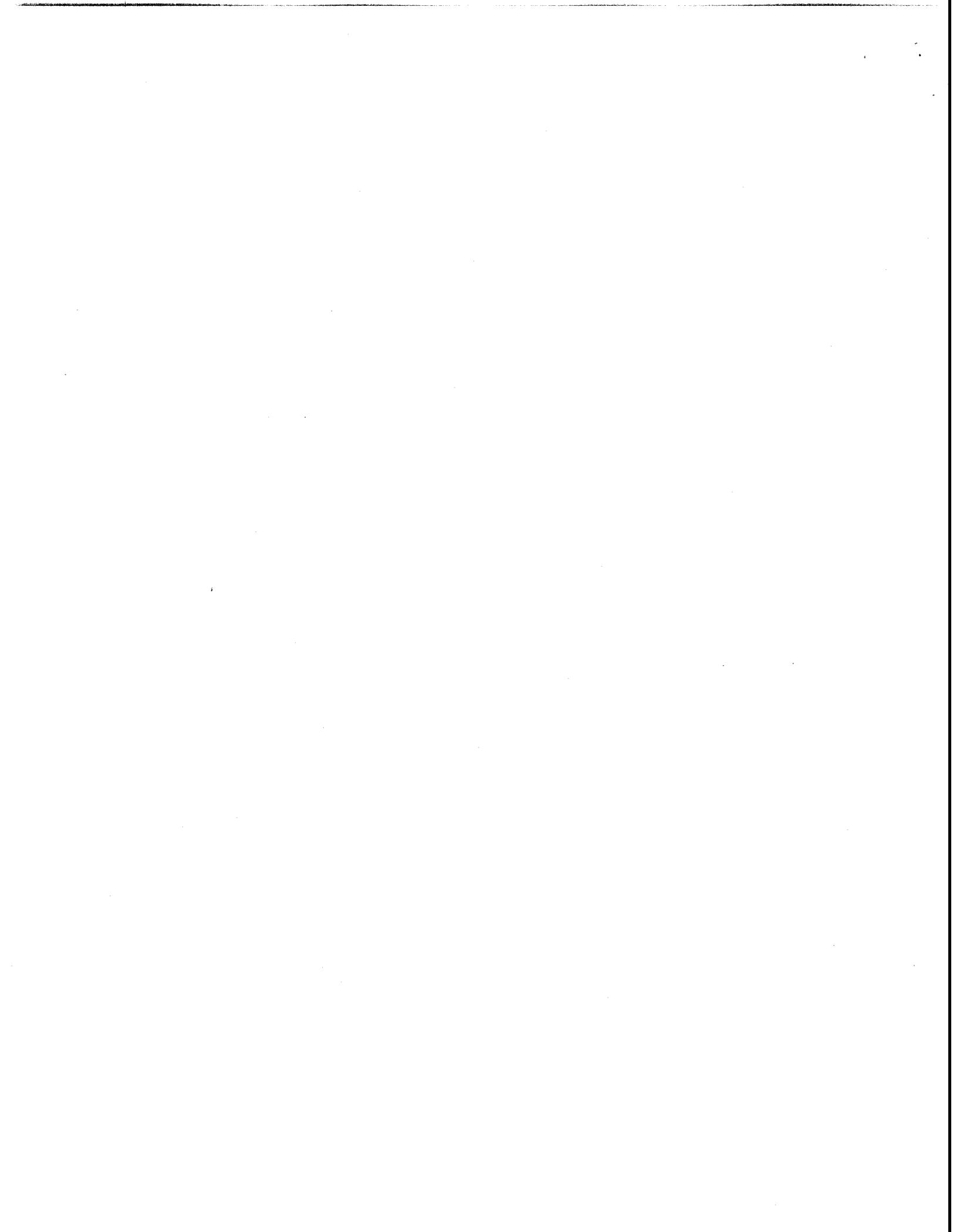
- (i) Be a member of a religious denomination having a bona fide non-profit religious organization in the United States for at least two years immediately preceding the time of application for admission;
- (ii) Be coming to the United States to work at least in a part time position (average of at least 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 PROPOSED POSITION

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

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.

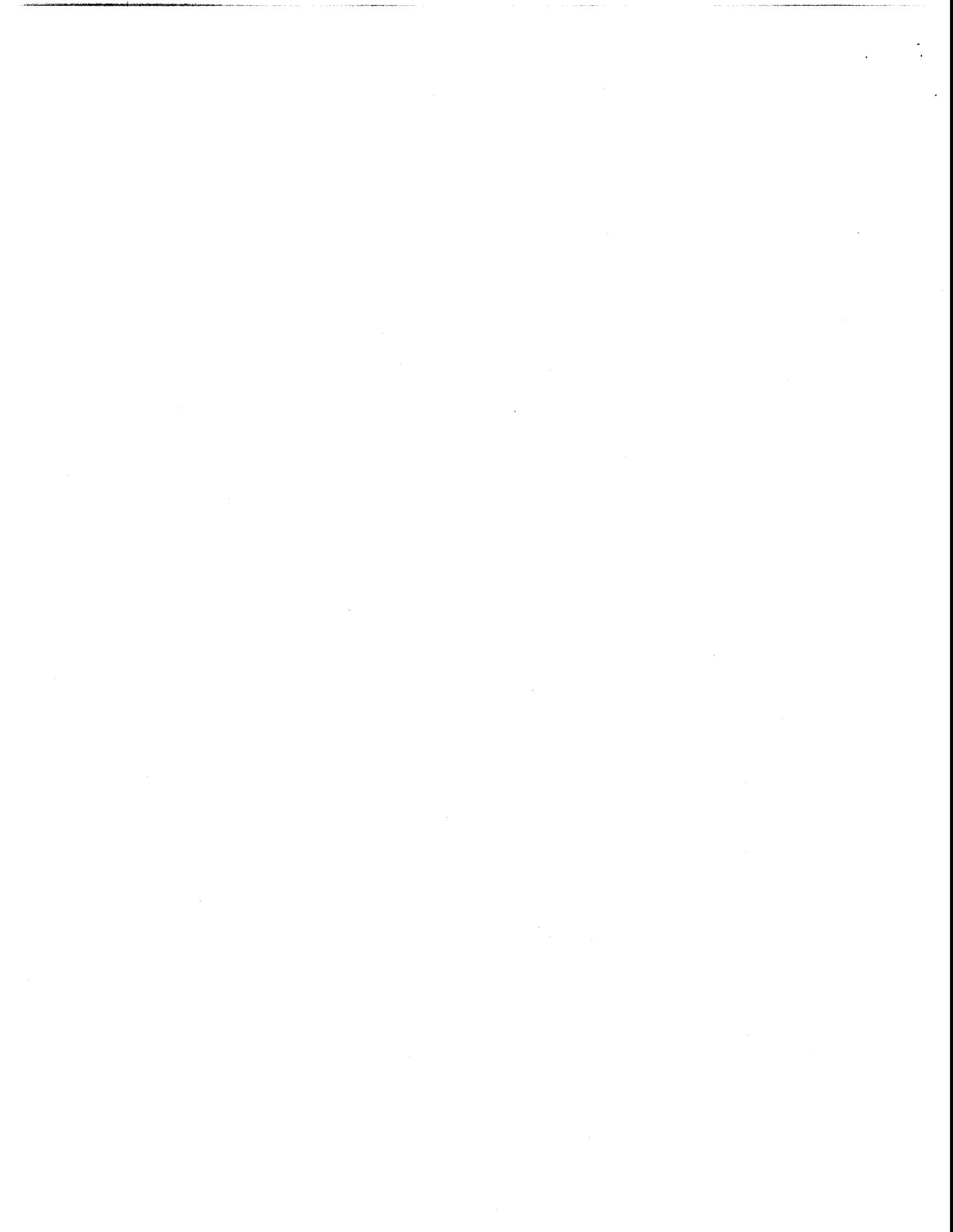
On Form I-129, the petitioner indicated that the beneficiary “[t]eaches Qu’ran (Koran) to female Islamic students.” In an accompanying letter, dated December 28, 2007, Hafiz Mohammad Iqbal, president of the petitioning organization, stated:

It is our desire to employ [the beneficiary] as a religious educator and director of our women[']s programs in our congregation on a temporary basis. . . . The specific duties of [the beneficiary] shall include teaching of Qu’ranic memorization and recitation (known as *Hifz-ul-Qu’ran* and *Qirat*, respectively) to our female adult and children congregants. Our *masjid* [mosque] is open every day and runs a full-time *Hifz-ul-Qu’ran* program, of which [the beneficiary] will be an integral part. We also have a weekly radio broadcast and would like for [the beneficiary] to address women’s issues in Islam as a regular contributor to this broadcast. . . .

It is the opinion of the members of the Madrasah that [the beneficiary] is well-qualified for temporary employment as one of our religious educators. She holds three degrees from the University of Peshawar in Pakistan. . . . [The beneficiary] has dedicated herself since she was young to the principles and art of *Hifz-ul-Qu’ran* and *Qirat*. . . . It should be noted that, although [the beneficiary] has extensive experience in these areas, there is no requirement in Islam that such a teacher have a degree in order to perform these duties. Experience and ability are the primary prerequisites, and [the beneficiary] possesses both, in large degrees.

Copies of certificates attest to the beneficiary’s academic degrees and her memorization of the Quran.

The director denied the petition on September 12, 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.

Furthermore, Mr. [REDACTED] had specifically stated that "there is no requirement in Islam that such a teacher have a degree in order to perform these duties." Rather, the petitioner had indicated that the beneficiary's extensive training and education amount to highly useful and relevant skills for the position, rather than minimal qualifications as such.

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.

We note that, if a given position has certain minimum training and/or educational requirements, then the petitioner must show that the beneficiary meets those requirements. This does not mean, however, that a position that does not "require any religious training or qualification" cannot qualify an alien for R-1 classification. The statute and regulations do not establish any minimum threshold of training or education that a position must meet in order to qualify as a religious occupation or vocation.

On appeal, counsel argues that the petitioner had submitted "evidence that Beneficiary had previously worked as a teacher at the secondary and university level and was a member of the Qu'ranic recitation and memorization faculty at her madrasah in Pakistan," and that the petitioner's documents "clearly show that teaching Qu'ranic memorization and recitation is NOT a task for just any Muslim or any Arabic speaker."

The petitioner has satisfied the three basic requirements to meet the regulatory definition of "religious occupation" at 8 C.F.R. § 214.2(r)(3). The duties primarily relate to a traditional religious function (study of the Quran), and the beneficiary's prior employment in a similar capacity at other facilities supports the conclusion that her work is recognized as a religious occupation within the denomination. The duties are primarily related to, and clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination. The duties are not primarily administrative or support functions. The beneficiary's work is clearly religious (as opposed to secular), and clearly an occupation (as opposed to an uncompensated volunteer function). It is not clear why the director does not consider the beneficiary's position to be a religious occupation. We therefore withdraw the director's finding in this regard.



COMPENSATION

The remaining grounds for denial concern the beneficiary's offered compensation. The director divided this issue into two grounds, concerning the petitioner's intent to pay the beneficiary and, separately, its ability to do so. Under the current regulatory structure, these related issues fall under a single heading.

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. 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 the Form I-129 petition, the petitioner indicated that the beneficiary would receive \$7,800 per year plus "[p]aid housing." The petitioner claimed gross annual income of \$300,000, and net annual income of \$50,000. In his introductory letter, Mr. [REDACTED] stated that the petitioner "will pay [the beneficiary] \$650.00 per month. Additionally, we will provide her a housing allowance in the amount of \$1,000.00 per month."

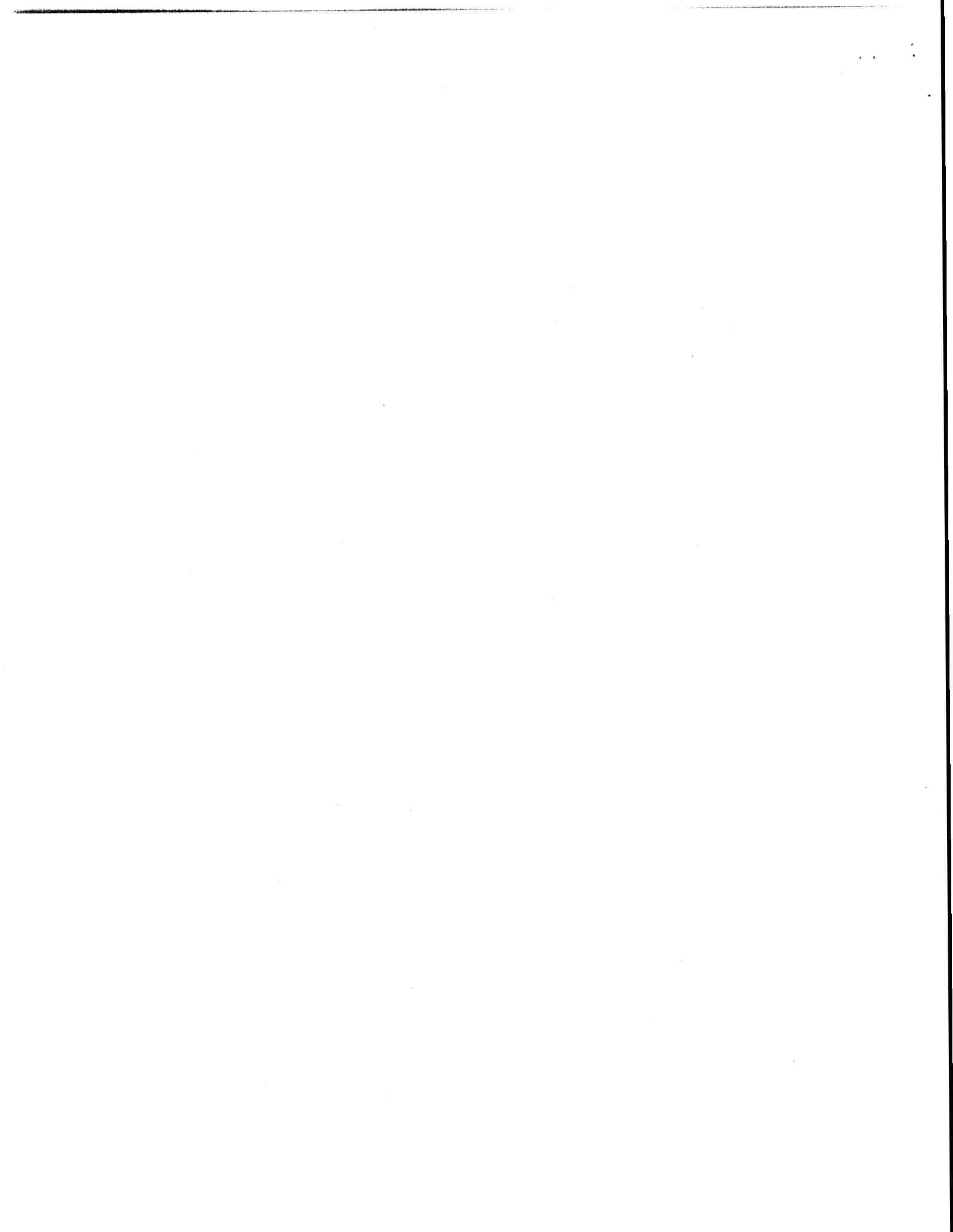
Bank statements submitted with the initial filing show that the petitioner's "general account" carried a balance that varied between \$50,000 and \$111,000 in mid-2007.

In denying the petition, the director stated:

In Part 5 of the Form I-129, the petitioner lists that the beneficiary will be compensated \$7800.00 per year. . . . The petitioner's offered salary is below the federal poverty guide line. . . . [T]he petitioner has not established that the beneficiary possesses sufficient independent finances to support herself during her stay in the United States. . . .

It appears that the alien would be required to make a living in the United States by obtaining other, secular employment. . . .

[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 wage to the beneficiary at the time of the filing of the petition or thereafter.



On appeal, counsel asserts that, when placing the beneficiary's compensation below the poverty level, the director considered only her salary, without taking into account the value of other benefits such as housing. Counsel also asserts that the petitioner's bank documents establish sufficient cash on hand to compensate the beneficiary.

Counsel's arguments and the petitioner's documents are persuasive as far as they go. The regulations, however, include additional documentary requirements, particularly with regard to IRS documentation. Because this documentation was not yet required at the time of filing, we cannot fault the petitioner for failing to submit it at that time. The director did not issue a request for evidence to allow the petitioner to submit the newly required documents prior to the decision. The director's decision does not mention the new requirements at all, relying instead on the old regulations and other factors outside of the regulations. Therefore, the petitioner has not had a fair opportunity to meet the regulatory requirements at 8 C.F.R. § 214.2(r)(11)(i) by submitting IRS documentation or by providing a credible explanation for its unavailability.

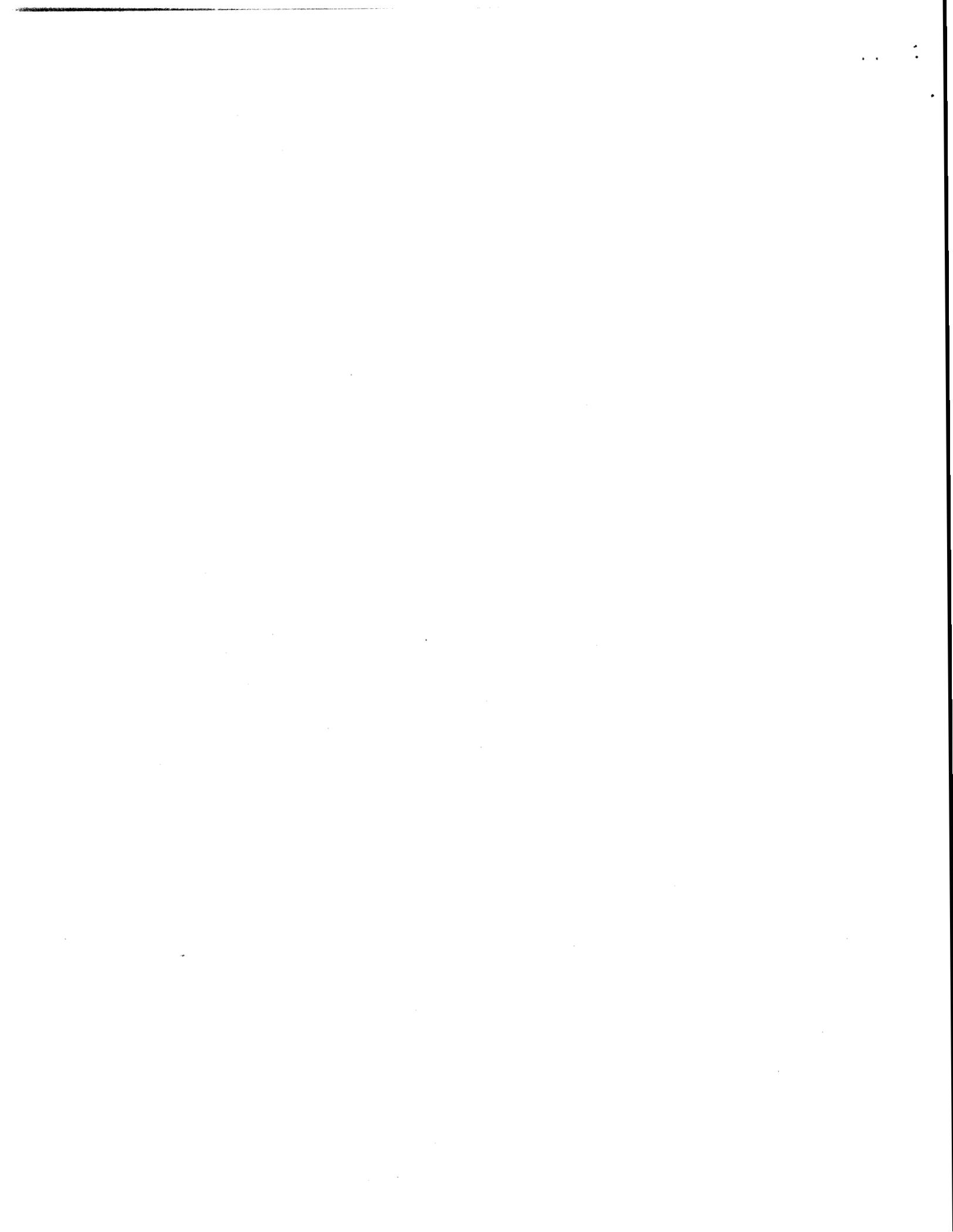
We withdraw the director's findings regarding the beneficiary's compensation. Any new finding by the director must rely on the regulations now in effect, rather than on obsolete regulations or non-USCIS guidelines. The petitioner has not yet met the regulatory requirements, but we cannot defend or sustain the grounds for denial stated by the director.

The AAO may discuss additional grounds for denial 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). In our review of the record, we have found that the petitioner has failed to meet additional requirements that the director failed to address in the denial decision. The director must allow the petitioner a good faith opportunity to meet those requirements before the director issues a new decision. If, in response, counsel persists in claiming that the new regulations do not apply to this proceeding (with the evident exception of the new provision for appeal rights), then the director may rightly conclude that the petitioner has refused to provide required evidence, which is by itself grounds for denial under the regulation at 8 C.F.R. § 103.2(b)(14).

The USCIS regulation at 8 C.F.R. § 214.2(r)(8) requires the petitioner to submit a detailed attestation regarding the petitioner, the beneficiary, and the job offer. The petitioner's initial submission predated the attestation requirement, and the director never subsequently requested the document, and therefore the record, as it now stands, does not contain the required attestation.

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.

Materials available to the AAO show that a site inspection took place on August 12, 2009. Those materials, however, do not reveal whether the inspecting officer considered the petitioner to have passed that inspection. Documentation to that effect belongs with the other materials relating to the site inspection, so that the director, AAO, and any other relevant reviewing authorities have the full compliance review report available.

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.

