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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

D.13

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 04 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)

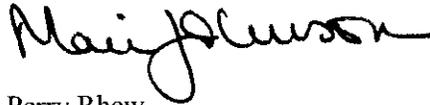
ON BEHALF OF PETITIONER:
[REDACTED]

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

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 dismiss the appeal.*

The petitioner is an Anglican church. It seeks to classify the beneficiary as a nonimmigrant religious worker under section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1), to perform services as a minister. *The director determined that the petitioner had submitted insufficient financial documentation, and that the beneficiary had violated his nonimmigrant status by engaging in disqualifying secular employment.*

On appeal, the petitioner submits arguments from counsel and copies of previously submitted materials.

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)(I) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii)(I), pertains to a nonimmigrant who seeks to enter the United States solely for the purpose of carrying on the vocation of a minister of the petitioner's religious denomination.

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.

One stated ground for denial concerns evidence that the beneficiary performed unauthorized secular work, and therefore violated his R-1 nonimmigrant status. Under the USCIS regulation at 8 C.F.R. § 214.1(c)(4), an alien who fails to maintain status is not eligible for extension of stay. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status. 8 C.F.R. § 214.1(e).¹ There is no appeal from the denial of an application for extension of stay filed on Form I-129. 8 C.F.R. § 214.1(c)(5). Because unauthorized employment by the beneficiary is an extension issue, not a petition issue, it lies outside of the AAO's appellate authority. The director must issue a separate decision, specifically addressing the extension request rather than the petition itself.

The only ground for denial under our appellate jurisdiction concerns the beneficiary's intended compensation. In a letter dated May 20, 2009, [REDACTED] the petitioner's executive secretary, stated that the beneficiary "will be compensated with a salary of Twenty Four Thousand Dollars (\$24,000) per year and other fringe benefits as they become available." The regulation at 8 C.F.R. § 214.2(r)(11)(i) requires the petitioner to 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 [Internal Revenue Service] 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.

The petitioner submitted photocopies of four processed checks, showing monthly salary payments of \$2,000 each from December 2008 to March 2009. The checks do not reflect any withholding of taxes.

The petitioner submitted an uncertified copy of IRS Form 990-EZ, Return of Organization Exempt From Income Tax, for calendar year 2008. The return indicated that the petitioner paid only \$2,000 in

¹ The beneficiary's past employment with the petitioner is, itself, another violation of the beneficiary's status. An R-1 alien may not be compensated for work for any religious organization other than the one for which a petition has been approved or the alien will be out of status. 8 C.F.R. § 214.2(r)(13). While the petitioner claims to seek "[c]ontinuation of previously approved employment without change with the same employer," the beneficiary originally received R-1 status in 2006 to work at [REDACTED] (see I-129 receipt number [REDACTED]). The beneficiary, on his résumé, claims to have worked for [REDACTED] from 2006 to 2007; the record does not reveal whether or not the above two churches are one and the same. The present petition was not incorporated until October 7, 2008. Any work that the beneficiary has already performed for the present petitioner, or for any church other than Chapel of [REDACTED] has not been authorized under his prior R-1 status, and the petition does not, as claimed, seek continuation of previously approved employment with the same employer.

salaries that year, an amount matching the single paycheck from December 2008. According to this return, the petitioner's entire gross revenue for 2008 was \$18,066, an amount barely sufficient to pay the beneficiary's salary for nine months even if the petitioner had no other expenses of any kind. The petitioner's net income after expenses was \$10,465.

The record shows that the petitioner filed its articles of incorporation on October 7, 2008, less than eight months before it filed the petition on May 29, 2009. This mitigates the low figures on the IRS Form 990 return – clearly those numbers do not reflect an entire year's income and expenses – but it also emphasizes the petitioner's negligible history of employee compensation.

On August 6, 2009, the director issued a request for evidence (RFE), instructing the petitioner to submit, among other things, financial evidence including “copies of the petitioner's IRS Forms W-3 (Transmittal of Wage and Tax Statements) evidencing wages paid to employees for the past 2 years.” At the time, the director advised the petitioner: “Pursuant to 8 C.F.R. 103.2(b)(11) failure to submit ALL evidence requested at one time may result in the denial of your application” (emphasis in original). The cited regulation reads, in part: All requested materials must be submitted together at one time, along with the original USCIS request for evidence or notice of intent to deny. Submission of only some of the requested evidence will be considered a request for a decision on the record.

The petitioner's response, postmarked October 2, 2009, included a cover letter from counsel. The letter contains the statements “I am currently the only paid employee for the church” and “I am the only person in [a] paid position in the church.” It appears that counsel prepared these assertions for the beneficiary's signature, but inadvertently incorporated them into counsel's own letter, on counsel's letterhead and with counsel's signature. There is no reason to believe that the petitioner or counsel intended to assert that the beneficiary is not the petitioner's employee, but that counsel is.

The petitioner submitted copies of additional \$2,000 paychecks dated May through August 2009. The copies show no sign of processing for payment, and therefore the checks are not, on their face, evidence that the beneficiary received payment from the petitioner.

The petitioner submitted copies of documents showing that the petitioner opened new bank accounts in September 2008, but no bank statements showing that the beneficiary's paychecks after March 2009 have cleared.

Subsequently, on October 27, 2009, the director received further documentation in what counsel called “a supplement to the previously submitted evidence,” which counsel acknowledged was “not complete.” Most of the materials (including bank records, IRS printouts, and other documents) are dated mid-September 2009 or earlier, and thus should have been available for submission when the petitioner mailed its initial RFE response in early October 2009.

The director denied the petition on October 28, 2009, stating that the petitioner did not submit sufficient evidence regarding the beneficiary's intended compensation. The director discussed the petitioner's initial response to the RFE, but not the later “supplement.” On appeal, counsel states that her law firm

submitted “the first set of evidence” in response to the RFE in early October 2009, and then “the complete set of evidence” later that month. Counsel states that the director rendered a decision “based on partial evidence.”

The director correctly found that the petitioner’s early October RFE response did not contain required documentation. Counsel, on appeal, does not contest this finding. Rather, counsel contends that the director should have given consideration to the “supplement” that followed several weeks later.

When the director issued the RFE, the director cited the regulation at 8 C.F.R. § 103.2(b)(11) and made it clear, with emphasis, that the requested evidence had to be submitted “at one time.” We cannot rationally find that the director erred by following binding regulations in this way. The regulation is binding on USCIS employees in their administration of the Act, and USCIS employees do not have the authority to waive this processing requirement. *See, e.g., 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). The petitioner’s failure to follow clear instructions based on cited regulations does not and cannot require USCIS to make special concessions in the petitioner’s favor.

The director followed the appropriate guidelines when issuing the RFE, and the director properly notified the petitioner that any response had to be submitted at one time. The petitioner having had the opportunity to submit its response properly, the AAO will not consider the impermissible “supplement” for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533, 537 (BIA 1988). We must base our adjudication on the record of proceeding before the director as of the submission of the first (and only acceptable) RFE response. We find that the director made the correct decision based on the evidence the director was permitted to consider.

Review of the record reveals another issue of concern. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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)(9) requires the petitioner to submit a currently valid determination letter from the IRS (and, in some instances, additional evidence) to establish that the petitioner qualifies as a tax-exempt religious organization. The director requested such documentation in the RFE. The petitioner’s response, however, did not contain an IRS determination letter. This omission amounts to an additional, independent ground for denial of the petition.

The AAO will dismiss the appeal for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. If the director has not done so already, the director must issue a separate decision relating specifically to the application for extension of status.