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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

D13

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 15 2010

IN RE: Petitioner: 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 appeal will be dismissed.

The petitioner is a 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 its minister of music. The director determined that the petitioner had not provided the required attestation and had not established how it intends to compensate the beneficiary.

The petitioner submits additional documentation in support of the appeal.

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 first issue presented is whether the petitioner has submitted the required attestation.

The petition was filed on November 10, 2008. 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 (USCIS) promulgated a

rule setting forth new regulations for special immigrant religious worker petitions. 73 Fed. Reg. 72276 (Nov. 26, 2008). 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. 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. 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

The new USCIS regulation at 8 C.F.R. § 214.2(r)(8) requires:

> *Attestation.* 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.

Accordingly, on February 6, 2009, the director issued a request for evidence (RFE) instructing the petitioner to "[c]omplete the attached employer attestation." In response, counsel stated that no attachment accompanied the RFE. The petitioner did not provide an attestation in any other form and the record does not reflect that counsel or the petitioner inquired about the attestation from anyone within USCIS.

In denying the petition, the director noted that the attestation requirement was published in the Code of Federal Regulations (C.F.R.), and that counsel should have been aware of the requirement. Counsel does not address this issue on appeal and does not submit the attestation.

Therefore, the petitioner has failed to provide the attestation required by the regulation.

The second issue is whether the petitioner has established how it intends to compensate the beneficiary.

The regulation at 8 C.F.R. § 214.2(r)(11) provides:

> *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 its letter of employment dated March 2, 2008, the petitioner stated that the beneficiary would receive compensation of $2,000 per month "inclusive of board and lodging." The petitioner submitted no documentation with the petition to establish how it intended to provide this compensation to the beneficiary.

In her RFE, the director instructed the petitioner to "[p]rovide evidence of compensation." In response, counsel stated that "[e]veryone at the Church is a volunteer" and that the beneficiary "would be the very first compensated employee of the Church." Counsel further stated that the petitioner had not filed an IRS Form 990, Return of Organization Exempt from Income Tax, as it

was not aware that it was required to do so. The petitioner submitted no documentation as to how it intended to compensate the beneficiary.

On appeal, the petitioner submits a copy of its audited financial statements for 2007 and 2008. The statements, audited on June 19, 2009, reflect that the petitioner had sufficient funds by which to compensate the beneficiary. Nonetheless, the financial statements were not audited until June 2009, eight months after the appeal was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Accordingly, the petitioner failed to provide verifiable documentation of how it intends to compensate the beneficiary.

The petition will be denied 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.