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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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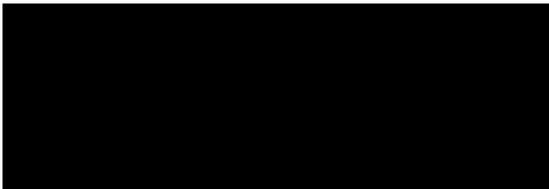
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DATE: **DEC 14 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R)(i) of the  
Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(i)

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.

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 \$630. 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 a Christian church of the Antiochian Syriac Orthodox denomination. 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 priest. The director determined that the petitioner had not submitted sufficient evidence relating to its tax-exempt status or the beneficiary's intended compensation.

On appeal, the petitioner submits a statement from a church official and copies of previous 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 first issue under consideration concerns evidence of the petitioner's tax-exempt status. The USCIS regulation at 8 C.F.R. § 214.2(r)(9)(i) requires the petitioner to submit a currently valid determination letter from the Internal Revenue Service (IRS) showing that the organization is a tax-exempt organization.

The petitioner filed the Form I-129 petition on July 16, 2010. The petitioner's initial submission included an exhibit list, indicating that the record included a "Copy of Letter of Exemption from the Internal Revenue Service verifying status under section 501(c)(3)." The initial submission, however, did not include that document.

Therefore, on October 26, 2010, the director issued a request for evidence (RFE), instructing the petitioner to submit, among other things, an IRS determination letter establishing the petitioner's individual or group exemption. The director stated that the petitioner had to submit the requested evidence no later than November 25, 2010, and that "[p]ursuant to 8 C.F.R. 103.2(b)(11) failure to submit ALL evidence requested at one time may result in the denial of" the petition (emphasis in original).

The director received the petitioner's response to the notice on November 22, 2010. The petitioner's response included most of the requested evidence, but not the IRS letter, nor any explanation for its absence.

On December 27, 2010, the director received a second submission from the petitioner, attached to a copy of the RFE cover sheet. The petitioner submitted a copy of an IRS determination letter, along with a cover letter from the petitioner's then-accredited representative. The representative stated that she "omitted to send" the IRS letter with the previous response to the RFE and acknowledged that the IRS letter was "file[d] late," but asked the director to "take [it] into consideration" nonetheless.

In the RFE, the director cited the USCIS regulation at 8 C.F.R. § 103.2(b)(11), which reads:

*Responding to a request for evidence or notice of intent to deny.* In response to a request for evidence or a notice of intent to deny, and within the period afforded for a response, the applicant or petitioner may: submit a complete response containing all requested information at any time within the period afforded; submit a partial response and ask for a decision based on the record; or withdraw the application or petition. 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 wording of the regulation is clear. The petitioner has only one opportunity to respond to an RFE, and must submit its entire response at one time. By considering only the petitioner's first, timely response to the RFE, the director followed regulations that are binding on all USCIS employees. *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); *Morton v. Ruiz*, 415 U.S. 199 (1974) (where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures).

Furthermore, the IRS letter, dated December 13, 2010, referred to the petitioner's "Dec. 02, 2010, request for information regarding [its] tax-exempt status." The letter, therefore, indicates that the petitioner did not contact the IRS for a copy of the letter until about a week after the RFE response deadline had passed. The version of the letter submitted by the petitioner did not exist until shortly before its submission. The petitioner's former representative referred to a copy of an IRS determination letter as early as July 2010, showing awareness that the letter was required evidence, but the petitioner has submitted no letter that existed at that time.

Additional time to respond to a request for evidence or notice of intent to deny may not be granted. 8 C.F.R. § 103.2(b)(8)(iv). Therefore, the director could not have accepted the untimely submission of the IRS letter without going against a number of USCIS regulations.

Before the director received the IRS letter, the director denied the petition on December 22, 2010, stating that the petitioner's November 22, 2010 response to the RFE did not include the required IRS determination letter. On appeal, the petitioner blames "malpractice" by the accredited representative who had handled the initial filing and the response to the RFE.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what

representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The AAO also applies the *Lozada* test to claims of ineffective assistance by an accredited representative.

In this instance, the petitioner has not addressed any element of the *Lozada* test. The petitioner simply accuses its former representative of "malpractice" and states that it would have submitted the IRS letter earlier but for the representative's poor advice. The record contains no proof to support the petitioner's self-serving claim that the representative alone is to blame, and therefore USCIS and the AAO should accept the untimely IRS letter despite regulations and case law to the contrary.

Because the petitioner (represented, on appeal, by an attorney) has not even minimally followed the necessary procedure to claim ineffective assistance by a prior representative, the AAO cannot accept the complaint as a valid basis for appeal. The AAO will therefore affirm the director's finding that the petitioner did not submit the required IRS letter in its timely response to an RFE. This finding is, by itself, grounds for denial of the petition.

The second and final stated basis for denial concerns the beneficiary's compensation. The USCIS regulation at 8 C.F.R. § 214.2(r)(11) states, in part:

*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.

On the Form I-129 petition, the petitioner indicated that it did not have any paid employees at the time of filing the petition. The form instructed the petitioner to list its gross and net annual income. The petitioner left those lines blank. The petitioner did not claim that the beneficiary would receive any salary. Instead, the petitioner claimed: "our church will be provided him [*sic*] with room and

board and the medical coverage will be paid by our Diocese of Germany.” The petition form showed the beneficiary’s current address as [REDACTED]

[REDACTED] treasurer of the petitioner’s board of directors, stated that the petitioner “will provide [the beneficiary’s] room and board at our church house in Rhode Island located at: [REDACTED]. The parish will also be responsible for all of [the beneficiary’s] expenses.”

In a June 20, 2010 letter, [REDACTED] stated that the petitioning church “has made arrangements for [the petitioner’s] room and board at their Church house in Rhode Island . . . , as well as all the expenses. As his Bishop, I will provide for [the petitioner’s] medical coverage which will be paid for by the Diocese here in Germany.”

The petitioner submitted no documentation regarding the “church house” or medical insurance coverage. The petitioner did, however, submit a copy of its December 2009 bank statement, showing deposits totaling \$2,873.37 and withdrawals totaling \$2,892.24, for a net loss of \$18.87. A “Six Months Income Statement” for July 2009 through January 2010 showed income of \$12,018.61 against \$9,774.51 in expenses, leaving net income of \$2,244.10 for the six-month period.

In the October 26, 2010 RFE, the director instructed the petitioner to submit “verifiable documentation that room and board will be provided” and additional financial documentation. The director also requested IRS documentation or an explanation for its absence, along with comparable, verifiable documentation.

In response, the petitioner submitted a copy of its 18-month lease on the property at [REDACTED]. The lease required the petitioner to pay \$800 per month for the house.

The petitioner also submitted copies of further bank statements, each (except for August 2010) showing an \$800 payment consistent with the terms of the lease. The statements (covering two accounts) show the following aggregate month-end balances:

December 2010	\$2,873.37	May 2010	\$454.43
January 2010	2,048.10	June 2010	1,215.05
February 2010	1,340.71	July 2010	217.31
March 2010	626.06	August 2010	286.59
April 2010	1,256.06	September 2010	1,008.85

In the denial notice, the director calculated that the petitioner’s average monthly bank balance was \$939.24. The director asserted that this balance is not sufficient to cover the petitioner’s expenses, including \$800 monthly rent on the “church house”; \$75 per week for the use of facilities at St. Luke’s Church; and \$52 a year for vehicle registration. The director noted that the petitioner had not documented additional expenses that the beneficiary would incur.

On appeal, the petitioner faults the director's "incorrect analysis of the bank statements." The petitioner then attempts its own analysis of those documents, to reflect average monthly income of \$1,583.88, which the petitioner states is sufficient to meet its expenses.

Both analyses fail to consider that the bank records already take into account the petitioner's major expenses, such as the \$800 monthly rent. Thus, the petitioner's balance on a given month does not represent the pool from which the petitioner must then pay rent. Rather, with one exception, the balance reflects what remained after the petitioner made the rent payment. The petitioner was already renting the property when it filed the petition, and it indicated that the beneficiary already resided there. Therefore, the \$800 monthly rental charge would not represent a new expense, over and above what the petitioner has already been paying.

Because the director's finding rests on a flawed reading of the evidence, the AAO must withdraw that finding. Nevertheless, insufficiencies in the financial evidence still warrant denial of the petition. The AAO may identify additional grounds for denial beyond what the Service Center identified 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 (9<sup>th</sup> 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).

As noted previously, the regulation at 8 C.F.R. § 214.2(r)(11)(i) requires verifiable evidence relating to compensation, including budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. That same regulation also requires verifiable documentation comparable to IRS documentation. With respect to the beneficiary's medical expenses, the petitioner has not met this standard. The petitioner has submitted a letter from a church official in Germany, pledging to pay the beneficiary's medical costs. This letter is not verifiable documentation comparable to IRS documentation.

The petitioner cannot meet its evidentiary burden relating to compensation simply by providing a vaguely-worded letter from a church official, regardless of the official's title or location. The petitioner, therefore, has not provided sufficient verifiable evidence relating to that aspect of the beneficiary's intended compensation. This deficiency independently constitutes grounds for denial.

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.