

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  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



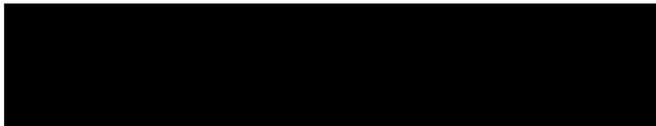
D13

Date: OCT 06 2011 Office: CALIFORNIA SERVICE CENTER FILE: 

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.

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 Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner is a Sikh temple. 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 an assistant harmonium player. The director determined that the petitioner had not established that the beneficiary was a member of the petitioner's denomination for two full years immediately preceding the filing of the petition and that the position qualifies as that of a religious occupation. The AAO affirmed the director's decision and additionally found that the petitioner had failed to establish how it would compensate the beneficiary.

On motion, counsel asserts that the AAO found that the petitioner had submitted sufficient documentation to establish the beneficiary's two-year denomination requirement. Counsel further states that the proffered position of "tabla player and vocalist . . . qualifies as a religious occupation or vocation," and that the petitioner has demonstrated that it "has the financial capability of paying [the] Beneficiary's wages." Counsel submits additional documentation in support of the motion.

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.

Counsel first asserts:

The first of these issues [presented on appeal] was determined in favor of Petitioner, where the AAO found that “the documentation sufficiently establishes that the beneficiary is a member of the Sikh religion and has been a member of the petitioner’s denomination for the two years immediately preceding the filing of the petition.”

However, the AAO’s decision of November 10, 2010 clearly states:

The director denied the petition, in part, because the petitioner failed to provide documentation of the beneficiary’s membership in the denomination. The petitioner provides no argument or documentary evidence regarding this issue on appeal to contest the finding of the director, only repeating the information regarding the beneficiary’s current work. Accordingly, we will not further review this finding. The director’s determination on this issue remains.

The petitioner states no new facts and submits no affidavits or other documentary evidence that the AAO’s decision was in error. Accordingly, the petitioner has failed to establish that the beneficiary was a member of its religious denomination for two years prior to the filing of the visa petition.

Counsel further asserts that the “[b]eneficiary’s position as a tabla player and vocalist in singing [REDACTED] qualifies as a religious occupation or vocation.” Nonetheless, the proffered position is that of assistant harmonium player. The documentation in the record and that submitted by the petitioner on motion do not establish that the positions of tabla player and harmonium player are the same. For example, a document submitted by the petitioner on motion entitled “Performance of Kirtan,” retrieved from the *Siknet* website, clearly distinguishes between a tabla player and a harmonium player. In a December 7, 2010 affidavit submitted on motion, the petitioner’s secretary, [REDACTED], also implies that the proffered position is that of tabla player. However, in prior documentation, including on the Form I-129, Petition for a Nonimmigrant Worker, and an August 10, 2009 letter submitted with the appeal, the petitioner states that the proffered position is that of harmonium player.

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. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg’l Comm’r 1978). Additionally, while the petitioner has submitted additional documentation, he has not set forth any new facts in support of the motion as required by the regulation at 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of “new,” a new fact is found to

be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>1</sup>

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered “new” under 8 C.F.R. § 103.5(a)(2). In addition, the petitioner failed to explain why the evidence was previously unavailable and could not have been submitted earlier. The petitioner has been afforded three different opportunities to this submit evidence: at the time of the original filing of the petition on January 16, 2009, in response to the director’s February 9, 2009 request for additional evidence, and at the time of the filing of the appeal on August 17, 2009. A review of the evidence that the petitioner submits on motion reveals no fact that could be considered “new” under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot be considered a proper basis for a motion to reopen.

The third issue presented on motion 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 [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 stated that the beneficiary would receive \$300.00 per month and free boarding and lodging amounting to about \$2000.00/month. The petitioner submitted copies of its unaudited profit and loss statements for 2006 and 2007, letters from its banks dated in March 2009 indicating that it had accounts totaling approximately \$63,500, and a copy of an April 28, 2008 statement from its accountant certifying that the petitioner received \$103,007 in contributions for 2007. The bank statements reflect the petitioner’s balances subsequent to the January 20, 2009

---

<sup>1</sup> The word “new” is defined as “1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . .” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984) (emphasis in original).

filing date of the petition and are not evidence of the petitioner's ability to compensate the beneficiary as of the filing date. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1),(12); *Matter of Michelin Tire Corp* at 248. Additionally, the profit and loss statements and the statement from the accountant purport to attest to the petitioner's financial status two and three years prior to the petition's filing date. Thus, they also do not provide evidence of the petitioner's ability to compensate the beneficiary on the date the petition was filed.

The petitioner submitted a copy of IRS Form 1065, U.S. Return of Partnership Income, for [REDACTED] for 2007. Counsel states on motion that [REDACTED] is a holding company formed by the petitioner to purchase the land and building used by the petitioning organization. The petitioner states that [REDACTED] is the actual employer of the [REDACTED] employees, including [the beneficiary], and is responsible for day-to-day operations. [REDACTED] owns the land and the building where the [REDACTED] is housed, and the [REDACTED] leases the land and the building from the LLC." [REDACTED] is not the beneficiary's prospective employer, documentation relating to its financial standing is not evidence of the petitioner's ability to compensate the beneficiary.

On motion, the petitioner submits uncertified copies of its IRS Form 990, Return of Organization Exempt from Income Tax, for the years 2008 and 2009. The regulation at 8 C.F.R. § 214.2(r)(11) requires the petitioner to submit certified copies of its tax returns. The IRS Forms 990 submitted by the petitioner do not reflect that they have been received and processed by the IRS.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the petitioner has not met that burden.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. As no new evidence has been presented to overcome the grounds for the previous dismissal, the previous decisions of the AAO and the director will be affirmed. The petition is denied.

**ORDER:** The motion to reopen is dismissed, the decision of the AAO dated November 10, 2010, is affirmed, and the petition remains denied.