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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**

813

Date: **AUG 10 2012**

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R)(1) of the Immigration and Nationality 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 associate pastor of its children and youth ministry. The director determined that the petitioner had not established how it intends to compensate the beneficiary.

On appeal, counsel asserts that the director “applied the incorrect legal standard in determining whether [the petitioner] submitted sufficient verifiable evidence of its intent to compensate [the beneficiary]” and “made several erroneous assumptions and calculations which cast doubt on the validity of the decision.” Counsel submits a brief and 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 issue presented is whether the petitioner has established how it intends to compensate the beneficiary.

The U.S. Citizenship and Immigration Services (USCIS) 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 [Wage and Tax Statement] 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 September 5, 2011 letter submitted in support of the petition, the petitioner, through its senior pastor [REDACTED] stated that the proffered position is that of associate pastor of children and youth ministry, and that the duties include responsibility for the ministry of youth and children attending school in grades kindergarten to 12th grade, coordinating with all youth ministries, organizing and leading the church's youth group programs and activities. In a July 29, 2011 "certificate of employment," the petitioner certified that the beneficiary had been hired with a current salary of \$46,000 per year.

With the petition, filed on September 9, 2011, the petitioner submitted an uncertified copy of its March 2010 IRS Form 941, Employer Federal Tax Return, reflecting that it paid four employees \$25,374.55 during the quarter and a copy of an electronic deposit confirmation indicating that it paid federal taxes of \$1,008.36 in settlement of its IRS Form 941 for the June 2011 tax period. The petitioner also submitted a copy of its 2010 budget which, in addition to the senior pastor's compensation, shows compensation for an English minister (\$44,136 including housing), young adults pastor (\$13,200), youth pastor/youth minister (\$14,400), and children's minister (14,828.84, including pension).

In an October 20, 2011 request for evidence (RFE), the director instructed the petitioner to provide evidence as outlined in the above-cited regulation to establish how it intends to compensate the beneficiary. In response, the petitioner submitted a copy of its September 2011 monthly bank statement, indicating that it had an ending balance of \$35,169.49, with a beginning balance of \$37,004.08, a low balance for the month of \$22,765.51 and an average balance of \$36,263.35. The petitioner also provided a copy of the 2010 IRS Form W-2 for its English ministry pastor, on which it reported wages of \$23,064 but did not reflect any housing allowance. The petitioner also submitted pay stubs for the English ministry pastor and the senior pastor for October 2011 that included payments of a housing allowance. The petitioner alleges that these financial documents are evidence of compensation for similar positions; it does not allege, however, that the beneficiary is replacing either of these individuals. Thus, the payment of these salaries is not evidence that the petitioner can also pay the beneficiary's proffered salary of \$46,000 per year. The petitioner resubmits its 2010 budget, but does not provide a similar document for 2011, the year in which it offered to hire the beneficiary. Additionally, it provided no documentation of its actual income and expenses for 2010.

The director denied the petition, stating that the petitioner's bank statement shows a gap of 30 checks which "indicat[ed] the possibility of outstanding checks" and that the senior pastor's salary totals 24 percent of the petitioner's annual gross income. The director further stated, "The petitioner's annual budget for 2010

represents only its expenses and is unreliable for determining the petitioner's ability to fully compensate the beneficiary the proffered wage of \$46,000 annually," and that:

The USCIS notes that the petitioner's annual budget is somewhat confusing and while it appears that a housing allowance of \$12,000 was meted out in 2010[,]logic dictates that it was paid to [REDACTED] since he appears to receive \$1,000.00 each month in housing allowance. Also, funds already expended may not be used as proof of the petitioner's ability to compensate the beneficiary.

On appeal, the petitioner submits a copy of a December 30, 2011 letter from [REDACTED] a certified public accountant (CPA), who states: "Upon reviewing the Church's financial records for the past two years and completing a 2011 profit and loss statement for the Church, it is my professional opinion that the Church has sufficient funds to pay [the beneficiary] a salary of \$46,000 annually." The petitioner also submits unaudited copies of its profit and loss statements that were allegedly prepared by the CPA and copies of its monthly bank statements for January through June 2011.

Counsel asserts on appeal that the director applied the incorrect standard of review in determining whether the petitioner has established how it intends to compensate the beneficiary. Counsel states:

8 C.F.R. § 214.2(r)(11) states, in part, that "[i]nitial 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." This is not the same standard found in 8 C.F.R. § 204.5(g)(2) which requires that a petition filed for an employment-based immigrant visa must include evidence that the prospective employer has an absolute ability to pay the offered wage. Throughout the decision dated December 8, 2011, the Director appears to erroneously apply the legal standard for employment-based immigrant visa petitions in adjudicating [the petitioner's] R-1 nonimmigrant visa petition. The Director states that the record fails to establish that the Church possesses the requisite funds to "fully compensate the beneficiary." . . . Nowhere in 8 C.F.R. § 214.2(r)(11) does it say that the petitioning church must evidence that it can fully compensate the beneficiary. It merely states that the petitioner must submit verifiable evidence showing how it will compensate the alien.

The Church indicates that it will pay [the beneficiary] \$46,000 per year in addition to relocation expenses. It plans to compensate [the beneficiary] through the tithes it collects from parishioners which constitutes the Church's "income." The 2011 Profit and Loss statement prepared by the [CPA] evidences that the Church had a gross income of \$398,376.00 and a net ordinary income of \$49,397.49 for the 2011 year. . . . The Church's net income exceeds the offered wage of \$46,000. The 2012 Profit and Loss Budget Overview, which includes [the beneficiary's] proposed wage of \$46,000 in the Church's 2012 expenses, evidences an expected net income of \$6,965.46. . . . In addition, the Church's accountant who has been a [CPA] since 1984, confirms that upon review of the Church's financial records for the past two years, it is his professional opinion that the Church has sufficient funds to pay the offered wage to [the beneficiary].

... There is no reason to doubt [REDACTED] professional opinion as a CPA with more than 27 years of experience.

The Church is also submitting herewith 10 months of bank statements for the periods between December 31, 2010 and October 31, 2011 which evidence that the Church consistently maintains a monthly balance of more than \$35,000. . . . [The beneficiary's] monthly salary amounts to a mere \$3,833 and it is evident that the Church has more than enough money in its bank account each month to pay [the beneficiary] his monthly salary. These bank statements alone constitute verifiable evidence of how the Church intends to compensate [the beneficiary] as it will pay his salary from the Church's bank account.

Counsel's assertion that the director applied the "standard" set forth in 8 C.F.R. § 204.5(g)(2) instead of the "standard" of 8 C.F.R. § 214.2(r)(11) is without merit. The regulation requires the petitioner to provide verifiable documentation of how it intends to compensate the beneficiary. Counsel's argument that this language does not require the petitioning church to establish that it can fully compensate the beneficiary is without substance. In requiring a petitioner to show how it intends to compensate a beneficiary, the regulation, in effect, requires a petitioner to show how it will "fully compensate" the beneficiary. Counsel does not point to any substantive difference between the two regulatory requirements.

Counsel also asserts that the professional opinion of the church's CPA should not be questioned. However, professional longevity does not prove professional competency and does not provide a conclusive basis of one's professional opinion. The CPA does not specify the financial records that he relied upon to reach his opinion, does not express any opinion as to the accuracy and reliability of these financial documents, and does not state that his review of the petitioner's financial documentation was performed according to generally accepted accounting principles (GAAP). Thus, without the assurance of the CPA that his review complied with GAAP and without inclusion in the record of proceeding of the records upon which he relied, the CPA's opinion does not provide verifiable documentation of how the petitioner will compensate the beneficiary.

The petitioner also submits a copy of a projected profit and loss statement for 2012 that includes the proposed salary for the beneficiary's proffered position. Additionally, while the petitioner submitted a budget for 2010, it did not submit a record of its actual income and expenses for 2011, the year the petition was filed, nor did it submit a budget for 2011. 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. Comm'r 1978).

For the first time on appeal, the petitioner provides copies of its monthly bank statements that provide more than just a two-month snapshot of its bank balance. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Counsel takes issue with the director's analysis of the "cancelled checks paid to two of the Church's pastors, [REDACTED] and [REDACTED], which were submitted as evidence of payment for comparable positions in the Church." Counsel asserts that the director made "several unsubstantiated assumptions" regarding these checks, and that even if the "assumptions are correct, the mathematical calculations in the decision are completely erroneous." Nonetheless, the petitioner does not allege, and submits no evidence, that the beneficiary will be replacing either [REDACTED] or [REDACTED]. Therefore, as discussed above, payments to these individuals are not relevant in establishing how the petitioner will compensate the beneficiary in addition to these two individuals.

Counsel alleges that the petitioner will compensate the beneficiary "through the tithes it collects from parishioners which constitutes the Church's 'income'"; however, the petitioner submitted no documentation to establish its income.

The petitioner has failed to establish how it intends to compensate the beneficiary.

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.