

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 **DEC 04 2012**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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 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,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal from that decision. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner is a church of the [REDACTED] 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 "choir boy and soloist." The director determined that the petitioner had not established that the position qualifies as a religious occupation, or shown how it intends to compensate the beneficiary. The AAO withdrew the first finding but affirmed the second, and dismissed the appeal.

The petitioner's appeal had included a claim of ineffective assistance of counsel on the part of the petitioner's prior attorney, [REDACTED]. The AAO found that the petitioner had not met the *Lozada* requirements to establish ineffective assistance of counsel.

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).

On motion, the petitioner submits a brief from counsel and various supporting documents.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). 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 USCIS regulation at 8 C.F.R. § 214.2(r)(11) reads, 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.

The USCIS regulation at 8 C.F.R. § 214.2(r)(11)(ii) contains provisions for self-supporting aliens, but permits self-support only as part of an established program for temporary, uncompensated missionary work, which is part of a broader international program of missionary work sponsored by the denomination.

The petitioner filed the Form I-129 petition on March 3, 2011, indicating that the beneficiary would work full-time (37 hours per week) for a salary of \$800 per month with no additional non-salaried compensation. The petitioner's initial submission included a notarized statement from [REDACTED] and [REDACTED] the beneficiary's uncle and aunt, stating that they would provide the beneficiary's "board and lodging while he is in the United States serving at [the petitioning] Church."

The AAO's May 23, 2012 dismissal notice described subsequent events:

In a May 12, 2011 request for evidence (RFE), the director instructed the petition to submit, *inter alia*, documentation . . . in accordance with the regulation at 8 C.F.R. § 214.2(r)(11) to establish how the petitioner intends to compensate the beneficiary. In its response, the petitioner provided a copy of the RFE with handwritten annotations which reflects . . . that compensation would be \$800 per month funded by "continuous fundraising." . . . The petitioner also submitted a "schedule of choral music" for the period September 2010 to February 2011 and a page from its website that specifically supports fundraising for the music department. The petitioner, however, submitted no documentation of any specific income that it would use to support the beneficiary.

In denying the petition, the director determined that the petitioner had not sufficiently responded to the RFE with the requested documentation and that it had failed to submit documentation of how it intended to compensate the beneficiary with the \$200 per month [*sic*] that it stated it would pay.

On appeal, current counsel alleges that "at or around the time that he represented Petitioner, Attorney [REDACTED] is believed to have suffered an incapacitating stroke,

which may have contributed to the provision of incompetent legal services” and that Mr. ██████████ “made numerous fundamental errors in the preparation of the petition.” Counsel alleges that Mr. ██████████ errors [included] . . . failing to provide the required financial documentation customarily submitted with such petitions. . . . Counsel then argues that the “under the circumstances, the service should excuse petitioner’s previous filing and reopen the adjudication of the Form I-129.”

The petitioner’s appeal included a copy of a complaint to the District of Columbia (DC) Office of Bar Counsel, dated November 16, 2011, in which Rev. ██████████ of the petitioning church protested the claimed lack of action by Mr. ██████████. The AAO, in its dismissal notice, stated:

There is no indication, however, that Mr. ██████████ has been made aware of the complaint against him and given an opportunity to respond. There is no evidence that the completed statement/complaint was ever submitted to the District of Columbia Office of Bar Counsel. A review of the DC Bar website does not reveal any disciplinary history for Mr. ██████████

(Footnote omitted.) The AAO found that the petitioner had failed to meet the *Lozada* requirements to establish error by Mr. ██████████. The AAO refused to consider financial documents submitted on appeal, because the petitioner failed to submit those materials in response to the RFE.

On motion, counsel states: “The AAO erroneously concluded that . . . ██████████ had not been made aware of the [complaint], when in fact, the attorney was informed of the charges. Indeed, the investigation of the allegations against the attorney [is] still pending with the DC bar.” The AAO did not make a finding of fact that Mr. ██████████ “had not been made aware” of the complaint. Rather, the AAO made a procedural finding that the petitioner had not submitted any evidence to that effect.

The petitioner, on motion, submits a copy of a three-page letter from Mr. ██████████ to the DC Office of Bar Counsel, dated December 9, 2011. Almost all of the body of the letter is missing from the copy, apart from the opening sentence: “This is in reply to your inquiry dated December 2, 2011.” The heavily edited letter establishes that Mr. ██████████ was in contact with the DC Office of Bar Counsel relating to the complaint, but little else.

Counsel, in an affidavit, states that the complaint is still under investigation and “has not been resolved.” The petitioner, on motion, submits nothing from the DC Office of Bar Counsel to support this claim. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Lozada requires “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.” The petitioner previously submitted an affidavit by Rev. ██████████ intended to satisfy this requirement,

but Rev. [REDACTED] did not set forth in detail the agreement with Mr. [REDACTED]. Indeed, Rev. [REDACTED] indicated that Mr. [REDACTED] was not the petitioner's attorney in the first place:

As [the beneficiary] approached his 21st birthday, I decided with our Finance Council to see if we could obtain for him a religious worker's visa. His family did not want the parish to bear the cost of religious proceedings, and therefore they said they would obtain the services of an immigration lawyer. . . .

My work with the lawyer was essentially serving as the sponsoring organization. I had only a single conversation with him. He indicated to me all the supporting materials he needed could be taken from the parish web site.

The above does not "set[] 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." The affidavit does not indicate that Mr. [REDACTED] made any commitments that he failed to keep with respect to preparing and filing the petition. Thus, the petitioner has not met this facet of the *Lozada* test.

The AAO had previously observed that the director sent the May 2011 RFE directly to the petitioning entity, which therefore had knowledge of what evidence was required as well as the opportunity to submit that evidence. The inadequacy of the petitioner's response to the RFE does not rest wholly on Mr. [REDACTED] shoulders. The petitioner, on motion, has not shown that *Lozada* requires consideration of the financial documents submitted on appeal.

The petitioner has not provided sufficient new facts to overturn the AAO's prior finding that the petitioner has not met the *Lozada* requirements relating to ineffective assistance of counsel. The petitioner has not established that the previous decision was incorrect based on the evidence of record at the time of that decision. Therefore, the petitioner has not satisfied the regulatory requirements at 8 C.F.R. § 103.5(a)(2) or (3), and thus the AAO must dismiss the motion.

With respect to the beneficiary's intended compensation, review of the record raises a serious issue not previously discussed. The AAO may deny an application or petition that fails to comply with the technical requirements of the law 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).

On Section 1, line 5d of the employer attestation that accompanied the petition form, the petitioner stated that the beneficiary "will be paid a salary of Eight Hundred Dollars per month." Elsewhere on the petition form, on Part 5, line 8, the petitioner indicated that the beneficiary would receive a salary of \$200 per week, but \$800 per month is not equivalent to \$200 per week, because most months are more than four weeks long. A weekly salary of \$200 would add up to at least \$10,400 per year,

because each year is just over 52 weeks long. A monthly salary of \$800, however, would yield only \$9,600 over 12 months.

The AAO notes that the Arizona minimum wage was \$7.35 per hour in 2011, with subsequent increases.¹ At \$200 per week, the beneficiary's stated rate of pay would be less than \$5.41 per hour. Working 37 hours per week at \$800 per month, the beneficiary would earn less than \$4.99 per hour. It is not at all evident that the petitioner has offered the beneficiary a lawful rate of pay.

On Section 1, line 9 of the accompanying employer attestation, the petitioner indicated that the "[p]osition is a religious vocation." The USCIS regulation at 8 C.F.R. § 214.2(r)(3) defines the term "religious vocation" as:

a formal lifetime commitment, through vows, investitures, ceremonies, or similar indicia, to a religious way of life. The religious denomination must have a class of individuals whose lives are dedicated to religious practices and functions, as distinguished from the secular members of the religion. Examples of vocations include nuns, monks, and religious brothers and sisters.

There is no evidence that the beneficiary's intended position meets the above definition. It appears that counsel used the term "religious vocation" in an informal sense rather than in the strictly defined sense that the regulations contemplate. Therefore, the AAO will not attribute the beneficiary's low pay rate to the minimal compensation often provided to "nuns, monks, and religious brothers and sisters" who work in recognized religious vocations.

In the affidavit prepared as part of the complaint against Mr. [REDACTED] Rev. [REDACTED] stated: "The job of Assistant Choir Director for our Youth Mass has a minimal requirement of 20 hours per week. In reality, there may be a number of occasions that those hours will be exceeded up to 37 hours per week." A monthly salary of \$800 for part-time work would conform to minimum wage requirements, but this new description of the position as a part-time job contradicts the original description on Form I-129. Rev. [REDACTED] signed Part 7 of that form, thereby certifying under penalty of perjury that the petition and the evidence submitted with it were true and correct to the best of his knowledge. The assertion that Rev. [REDACTED] had minimal contact with Mr. [REDACTED] who prepared the petition form, does not relieve the petitioner of responsibility for its contents. *Cf. Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991) (Represented party who signs his or her name to documents filed in court bears personal, nondelegable responsibility to certify truth and reasonableness of document and failure to meet that duty subject signor to Rule 11 sanctions).

A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec.

¹ Source: <http://www.dol.gov/whd/state/stateMinWageHis.htm> (excerpts added to record November 14, 2012).

169, 175 (Comm'r 1998). Changing the beneficiary's work schedule from a full-time, 37-hour week to a part-time, 20-hour week at the same salary surely constitutes a material change to the petition.

Living arrangements provided by the beneficiary's uncle and aunt do not constitute compensation provided by the petitioner, and do not count toward the petitioner's obligation to compensate the beneficiary. Therefore, even without considering the documentation relating to how the petitioner will compensate the beneficiary, the offered compensation is, itself, inadequate on its face. It does not appear that the petitioner could lawfully employ the beneficiary under the terms described in the Form I-129 petition. Therefore, it does not appear that the petitioner has extended a *bona fide* offer of employment.

ORDER: The motion is dismissed.