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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

**PUBLIC COPY**



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Date: **MAY 23 2012** 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, 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 with the field office or service center that originally decided your case by filing a 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 a "choir boy and soloist." The director determined that the petitioner had not established how it intends to compensate the beneficiary or that the proffered position qualifies as that of a religious occupation.

On appeal, counsel asserts that the petitioner received ineffective assistance of counsel in the filing of the visa petition. 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.

Part 8 of the Form I-129, Petition for a Nonimmigrant Worker, was signed by an attorney, James C. Zinman as the preparer. The [REDACTED] signed the petition on behalf of the petitioner. In Part 5 of the Form I-129, the proffered position is listed as "choir boy and soloist." Part 5 indicated that wages would be \$200 per week. In Section 1 of the Form I-129 Supplement R, the proffered position is identified as "choir member and solo singer," and the duties indicate that the beneficiary will "Sing with the choir and also sings as a soloist in the church."

With the petition, the petitioner submitted copies of pages from its website which included information about its music ministry. It identified the staff as the director of music, the associate director of music, the principal organist, an office assistant and a principal cantor. The petitioner also submitted statements from the beneficiary's aunt and uncle, who stated that they would provide the beneficiary with board and lodging during his stay in the United States.

The regulation at 8 C.F.R. § 214.2(r)(3) provides:

*Religious occupation* means an occupation that meets all of the following requirements:

- (A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination;
- (B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination;
- (C) The duties do not include positions which are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible; and
- (D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

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.

(ii) *Self support.*

(A) If the alien will be self-supporting, the petitioner must submit documentation establishing that the position the alien will hold is 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.

(B) An established program for temporary, uncompensated work is defined to be a missionary program in which:

- (1) Foreign workers, whether compensated or uncompensated, have previously participated in R-1 status;
- (2) Missionary workers are traditionally uncompensated;
- (3) The organization provides formal training for missionaries; and
- (4) Participation in such missionary work is an established element of religious development in that denomination.

(C) The petitioner must submit evidence demonstrating:

- (1) That the organization has an established program for temporary, uncompensated missionary work;
- (2) That the denomination maintains missionary programs both in the United States and abroad;
- (3) The religious worker's acceptance into the missionary program;
- (4) The religious duties and responsibilities associated with the traditionally uncompensated missionary work; and
- (5) Copies of the alien's bank records, budgets documenting the sources of self-support (including personal or family savings, room and board with host families in the United States, donations from the denomination's churches), or other verifiable evidence acceptable to USCIS.

In a May 12, 2011 request for evidence (RFE), the director instructed the petitioner to submit, *inter alia*, documentation to establish that the proffered position is that of a religious occupation as that term is defined by the regulation at 8 C.F.R. § 214.2(r)(3) and to submit 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 the proffered position is that of "choir, singer/soloist" and that compensation would be \$800 per month funded by "continuous fundraising." A handwritten annotation of the music ministry webpage states "[the beneficiary] singing solo with the choral group volunteer." It is not clear whether the annotation refers to the individual who appears in the photograph on the webpage or to the proposed duties of the beneficiary. The petitioner provided a job description which describes the position as "choir vocalist/lead cantor/liturgical worker." 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 that it stated it would pay.

On appeal, current counsel alleges that "at or around the time that he represented Petitioner, [REDACTED] is believed to have suffered an incapacitating stroke, which may have contributed to the provision of incompetent legal services" and that [REDACTED] "made numerous fundamental errors in the preparation of the petition." Counsel alleges that [REDACTED] errors consisted of failing to provide evidence of the petitioner's nonprofit status, failing to provide the required financial documentation customarily submitted with such petitions, that he mischaracterized the beneficiary's job title, and failed to provide the requested work schedule which led the director to conclude that the proffered position did not qualify as a religious occupation. 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."

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 petitioner submits a copy of a statement to the Office of Bar Counsel, The Board of Professional Responsibility, District of Columbia Court of Appeals, which outlines the petitioner's complaint against [REDACTED] and an unsworn statement by [REDACTED] regarding the filing of the instant petition and what he perceives as [REDACTED] failings in representing the petitioner. Counsel states that the complaint against [REDACTED] with the

District of Columbia Bar is pending notification of [REDACTED] Counsel thus argues that the petitioner has complied with the procedural requirements of *Lozada*.

There is no indication, however, that [REDACTED] 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.<sup>1</sup> A review of the DC Bar website does not reveal any disciplinary history for [REDACTED]

Without relying on them, counsel cites to several cases in which the courts have held that strict compliance with *Lozada* is not necessary. A review of these cases reveals that they involve some error by counsel that is obvious on the face of the record. Such is not the issue with the instant petition. The allegations of the petitioner, as outlined by [REDACTED] are not supported by the record. For example, the petitioner alleges that it succumbed to [REDACTED] insistence that the title of the proffered position be listed as soloist rather than as assistant music director. However, the annotations on the RFE appear to be that of the petitioner [REDACTED] did not receive a copy of the RFE) and the petitioner provided a copy of a job description. Both indicate that the proffered position is that of a singer and not an assistant choir director. Additionally, many counsel fail to provide specific documentation required by the regulation or requested by the director. It is not clear from the record that [REDACTED] failure to do so in this case rises to the level of ineffective assistance. Counsel also alleges that [REDACTED] actions resulted from a stroke that impaired his competence; however, the petitioner presented no documentation of a physical impairment of [REDACTED]

The petitioner has failed to comply with the requirements of *Lozada* and thus has failed to establish that the petitioner received ineffective assistance of counsel in the pursuit of its petition. On appeal, the petitioner submits the additional documentation requested by the director. 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.

The record before the director sufficiently establishes that the proffered position is a religious occupation within the meaning of the regulation. The petitioner's documentation reflects that it has a robust music ministry. Soloists would be an integral part of that ministry. The petitioner has submitted sufficient documentation to establish that the duties of the proffered position primarily relate to a traditional religious function, and primarily relate to, and clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination. The director's decision to the contrary is withdrawn.

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<sup>1</sup> [www.dcbbar.org](http://www.dcbbar.org), accessed on May 7, 2012, a copy of which is incorporated into the record.

The petitioner failed to provide the director with sufficient documentation to establish how it intended to compensate the beneficiary. Despite instructions in the regulation and the RFE, the petitioner submitted no verifiable documentation of how it would pay the beneficiary the proffered wage of \$200 per month. On appeal, the petitioner submits a copy of its July through December 2011 budget and unaudited income statement for the same period. In addition to the petitioner failing to provide this document with the petition or in response to the RFE, the document is dated after the filing date of the petition. 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).

The petitioner has failed to provide verifiable documentation of 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.