

(b)(6)



U.S. Citizenship
and Immigration
Services

Date: **JAN 10 2013**

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)(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,

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 a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be dismissed.

The petitioner is a Sikh temple. It seeks to extend the beneficiary's classification as a nonimmigrant religious worker pursuant to section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), to perform services as a religious priest. Based on the results of a compliance review verification visit at the petitioner's premises, the director determined that the petitioner had not established that it had extended a qualifying job offer to the beneficiary and had not satisfactorily completed an onsite inspection. The director also determined that the petitioner had failed to provide a complete attestation as required by the regulation at 8 C.F.R. § 214.2(r)(8).

The AAO affirmed the director's decision. Regarding the qualifying job offer, the AAO found that the petitioner had failed establish how it intends to compensate the beneficiary. The AAO found that the petitioner had failed to submit certified copies of its tax returns, and that copies of checks written to the beneficiary by the petitioner were not processed by the bank and therefore were not evidence that the beneficiary actually received the alleged salary.

On motion, counsel asserts that the petitioner "has amply demonstrated that [the beneficiary] was being paid \$1200 per month by the gurudwara, and that the gurudwara has been paying his room and board." On motion, the petitioner submits copies of checks made payable to the beneficiary in the amount of \$1,200 and dated each month from December 2010 to May 2012. The check copies were retrieved from the bank's website on June 20, 2012, thus indicating they were processed by the bank.

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). 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.¹ The petitioner does not argue, and submits no evidence, that the copies of the checks it submits on motion were not available during the earlier stages of this proceeding. Additionally, the petition was filed on October 19, 2009. The petitioner submitted no verifiable evidence of its ability to compensate the beneficiary as of the date the petition was filed. 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).

Counsel asserts that the petitioner's request for certified copies of its tax returns is pending at the Internal Revenue Service (IRS), and that "Petitioner was informed that it now takes 60 days to

¹ 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 NEW COLLEGE DICTIONARY, (3d Ed 2008). (Emphasis in original).

obtain certified copies of the financial documents.” The AAO notes that the motion was filed on June 22, 2012, and the record does not reflect that the petitioner has attempted to provide certified copies of the tax returns. Additionally, 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 [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.

The petitioner failed to provide certified copies of tax returns with the petition and failed to explain why the documents were unavailable. Counsel asserts that the petitioner “is required to submit ‘verifiable’ evidence of compensation, not necessarily ‘verified.’” Counsel then asserts that “the Service can easily verify with the IRS whether these returns were actually filed.” “Verifiable evidence” of how the petitioner intends to compensate the beneficiary must be contained within the record of proceeding. The burden of proof in this proceeding is with the petitioner, not the United States Citizenship and Immigration Service.

Counsel also asserts that the petitioner’s “profit and loss statement for October 2009 through September 2010 shows that Petitioner had a total income of about \$190,104 during the period” and “clearly shows that petitioner had the ability to pay [the beneficiary] \$1200 per month plus room and board.” As pointed out in the AAO’s decision, however, the petitioner submitted no documentation to support the representations of its financial status as made in the unaudited reports. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

Finally, counsel asserts on motion that the petitioner’s failure to submit the attestation required by the regulation at 8 C.F.R. § 214.2(r)(8) was the result of previous counsel’s failure to comply with the director’s request for a completed attestation. In a June 21, 2012 affidavit, [REDACTED]

[REDACTED], the petitioner's president, states that prior counsel "never completely filled out the employer attestation, and indeed never told us that the Service was repeatedly requesting a completed attestation." Mr. [REDACTED] states, "It was only on appeal when we retained the services of current counsel that we realized that the Service had repeatedly asked us for a completed attestation and it was not submitted by our previous attorney."

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 has submitted none of the documentation outlined above, and it cannot be ascertained from the record and the petitioner's statement alone that fault with the submission of the required attestation rests solely with counsel.

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 motion to reopen will be dismissed.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The motion to reopen is dismissed, the decision of the AAO dated May 23, 2012 is affirmed, and the petition remains denied.