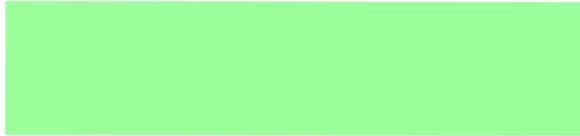


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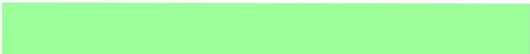
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **JUN 28 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)

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,

A handwritten signature in cursive script that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based nonimmigrant visa petition. After the director dismissed two motions to reopen and reconsider the decision, the petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO rejected the appeal as untimely, and the petitioner filed a third motion to reopen and reconsider the decision. The director dismissed that motion, and the petitioner has timely appealed the decision to the AAO. The AAO will dismiss the appeal.

In this decision, the term “prior counsel” shall refer to [REDACTED] who represented the petitioner at the time the petitioner filed the petition. The term “counsel” shall refer to the present attorney of record.

The petitioner is a *gurdwara* (sometimes spelled *gurudwara*), or Sikh temple. It seeks to classify the beneficiary as a nonimmigrant religious worker pursuant to section 101(a)(15)(R) of the Act. The petitioner claims that the beneficiary will perform services as a *kirtankar*, or devotional hymn singer and priest. Following a compliance review site inspection, the director determined that the petitioner did not intend to employ the beneficiary in a qualifying religious occupation.

On appeal, the petitioner submits a brief from counsel.

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.

At issue in this proceeding is whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The USCIS regulation at 8 C.F.R. § 214.2(r)(3) defines “religious occupation” as 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 USCIS regulation at 8 C.F.R. § 214.2(r)(16) states:

Inspections, evaluations, verifications, and compliance reviews. The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning

organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, or satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

The petitioner filed the Form I-129 petition on July 25, 2011. [REDACTED] identified as president of the petitioning entity, signed the Form I-129. In an accompanying introductory letter dated July 21, 2011, the same individual stated:

[The beneficiary] has obtained religious training of Kirtan (Hymns singing) and Granthi (Priest). . . .

In the Gurudwaras, he has accompanied Granthis by rendering Kirtans (Hymns) and Kathas (verses from the holy book) while playing Tabla (set of two drums played by both hands individually) together with other Kirtankars playing musical instruments such as harmonium, etc. to synchronize the recitation of holy scriptures in the form of singing accompanied by the music.

To support prior counsel's assertion that "this relates to a traditional religious function," the petitioner submitted a copy of Chapter V, Article VI of the *Reht Maryada (Code of Sikh Conduct and Convention)*.

On December 2, 2011, the director issued a notice of intent to deny the petition, stating:

There are several individuals listed with petitions by this organization. However, when names were read to [REDACTED], who signed several such petitions], he indicated that he did not recognize many of them because they change president/signatory every two years. The signatory ([REDACTED] also stated that the petitioner reported to Department of State that they have multiple people for whom they petitioned not reporting as religious workers, but working in construction.

The director instructed the petitioner to identify "ALL employees who worked for [the petitioning] organization from the year 2007 to the present." In response, the petitioner submitted a list of eight names, including the beneficiary, identified as a "Priest/Hymn Singer." (The list did not identify [REDACTED] identified as president of the temple at the time of the July 2008 compliance review site inspection.)

The director denied the petition on January 13, 2012, stating:

Please be advised that during the site visit of FDNS [Fraud Detection and National Security] officer(s) the president of the organization [REDACTED] confirmed that the beneficiary . . . was said to be employed to clean the temple. . . .

The beneficiary's duties do not relate to a traditional religious function. A review of the petition reveals that the beneficiary will be primarily involved in cleaning the organization[']s temple and it is not a religious activities [sic]. The petitioner has not shown that the beneficiary's essential job functions are inherently or predominantly religious.

On motion from the above decision, prior counsel stated:

First of all, in 2008 Mr. [REDACTED] had submitted an [sic] detailed sworn/notarized affidavit in May 2009 [sic]. . . . Mr. [REDACTED] specifically stated under oath that he never said anything which means that [the beneficiary was] employed to clean the temple. Mr. [REDACTED] also admitted in his affidavit that he had very limited proficiency in English and [the] whole telephonic conversation took place in English without the help of any interpreter. . . . But the Service did not give any consideration to that affidavit and never made any further attempts to verify the correct facts about [the beneficiary's] nature of employment.

. . . [The beneficiary] started working with [the petitioner] as a Kirtankar and Priest in April 2003 when Mr. [REDACTED] was the president. Since then four different individuals have served as president . . . and every single president has confirmed in the affidavits that [the beneficiary] has always performed the duties of a Kirtankar.

The petitioner submitted a new letter attributed to [REDACTED] and new affidavits attributed to [REDACTED], and a copy of a previous affidavit from [REDACTED]. The individuals all identified themselves as presidents of the petitioning temple ([REDACTED] being the current president, the others his predecessors), and all claimed personal knowledge of the beneficiary's work as a *kirtankar*. The affidavits attributed to Mr. [REDACTED] indicated that the beneficiary "has always performed the religious duties of a Kirtankar," and blamed the language barrier for any misunderstanding.

The director dismissed the petitioner's motion on March 9, 2012. The director disputed the newly submitted evidence, stating: "[REDACTED] even stated during his phone interview with the IO [immigration officer] that the organization's name was being fraudulently used to obtain visas. This statement does not sound like it would come from someone who does not have command of English language."

The petitioner filed a second motion to reopen and reconsider on May 23, 2012. Counsel stated: "The Petitioner's previous counsel provided ineffective assistance of counsel, thereby tolling the time limitation, by never informing Petitioner of the deadline for reopening and failing to provide proper

rebuttal to the negative information erroneously provided to the Service.” The petitioner submitted new photographs showing the beneficiary apparently performing during a religious service, and in a formal pose with temple officials and visitors. Counsel contended that prior counsel’s failure to submit these photographs amounted to 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).

The petitioner’s May 2012 motion did not meet any of the *Lozada* requirements to establish ineffective assistance of counsel. The newly submitted affidavit attributed to [REDACTED] did 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 petitioner in this regard.

The petitioner subsequently submitted a copy of a letter to the Departmental Disciplinary Committee of the New York State Supreme Court, advising them of the submission of “a copy of a motion to reopen . . . provided to comply with the requirements of Matter of Lozada.” A notation on the letter indicated that a courtesy copy went to prior counsel. The date on this letter is February 23, 2013, nine months after the petitioner filed the May 2012 motion. Therefore, the motion did not include this letter at the time of filing. Furthermore, the third prong of *Lozada* refers to the filing of “a complaint . . . with appropriate disciplinary authorities.” It is not evident that sending the authorities a copy of a motion to reopen satisfies this requirement.

Regarding the newly submitted affidavit attributed to [REDACTED] counsel stated: “An affidavit is attached which demonstrates that the person who claimed to have knowledge that the Beneficiary was not performing religious [duties] did not have proper knowledge to make such statements.” The new affidavit, dated May 20, 2012, reads, in part:

[M]any members of the Temple volunteer their time to clean and maintain the facility. If the Beneficiary cleans the facility, his doing so is incidental to his religious duties, and a function of his membership in the Temple rather than his employment.

Not all Presidents of our Society have the same level of involvement in the operation of the Society that I have. In the past, [REDACTED] was President of the society. I was a member of the society at the time. I knew that Mr. [REDACTED] was not involved with many of the day-to-day operations of the society. When I found out that he was interviewed by USCIS and provided inaccurate information, I was surprised, because I

did not think he would even claim that he knew the answers to the questions he was asked.

Although Mr. [REDACTED] can speak English in an intelligible manner, his understanding of the language is somewhat limited, and it is likely that a person speaking with him would believe that he understood more English than he actually does.

I do not understand why the Society's previous attorney chose to have Mr. [REDACTED] provide an affidavit essentially contradicting his oral statements. Previous counsel should instead have asked me what I knew about Mr. [REDACTED] knowledge of the operations of the Temple. . . .

If I had not acted on [prior counsel's] advice, I would have responded differently, and in particular provided additional explanations regarding Mr. [REDACTED] statements and the Beneficiary's duties.

The above information indicates that the petitioner, in its second motion, questioned the reliability of at least one affidavit submitted with the first motion. When [REDACTED] signed the petition, he certified under penalty of perjury, on behalf of the petitioning entity, that all the information submitted with the petition was true and correct. The petitioner has now submitted admittedly conflicting affidavits concerning the extent of [REDACTED] knowledge of the beneficiary's work for the petitioning temple.

Another conflict arises from the new assertion that Mr. [REDACTED] had little knowledge of the beneficiary's activities at the temple. The petitioner's first motion included an affidavit, dated February 10, 2012, attributed to [REDACTED]. That affidavit included this claim: "I personally supervised [the beneficiary] until July 2008 when . . . my term as president came to an end."

The second motion also included Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements showing that the petitioner employed the beneficiary in 2008-2010. These documents establish compensation, but not the nature of the work performed, and therefore they do not address the grounds for denial.

The director dismissed the petitioner's second motion on June 18, 2012, stating "the petitioner has not submitted nor alleged new facts for consideration." On appeal from that decision, counsel stated that the "new facts" requirement, found at 8 C.F.R. § 103.5(a)(2), applies only to motions to reopen, and that the director "ignore[d] the portion of the motion seeking reconsideration rather than reopening."

Counsel claimed that "the Petitioner provided an affidavit from [REDACTED] which confirmed that Mr. [REDACTED] was not competent to describe the nature of the duties [that] the Beneficiary was performing." The affidavit in question was attributed not to [REDACTED] but to [REDACTED]. [REDACTED] affidavit simply attested to the claimed nature of the beneficiary's work.

The petitioner submitted additional affidavits from individuals identified as officials and members of the petitioning temple, asserting that the beneficiary worked in the qualifying religious occupation of a *kirtankar*, at most performing occasional, incidental cleaning and maintenance activities.

The petitioner submitted an affidavit in [REDACTED] native Punjabi language along with a certified translation that reads, in part:

Sometime in late 2011, I was at the Society's facilities. A person from USDHS asked me questions about [the beneficiary]. . . . I had difficulty understanding the questions because my ability to understand and speak English is limited. I told the USDHS officer that [the beneficiary's] role as a Priest included many duties. . . . I did state that occasionally [the beneficiary] would need to perform cleaning or maintenance tasks. . . . I never intended to state that [the beneficiary's] primary or main duties involved cleaning or maintenance. . . .

Because I was no longer the President, I did not even have direct knowledge of [the beneficiary's] duties; my statements were based solely upon what I saw him doing and what I knew that other Priests did. . . .

I previously provided an affidavit prepared by a prior attorney. That affidavit was translated orally, and I never read a version in my native language of Punjabi. As you can see, this affidavit has been translated into Punjabi, and I read it in that language. Therefore, this affidavit is more accurate than the one that I previously submitted.

Notwithstanding the claim that this latest affidavit is more reliable than previous statements attributed to [REDACTED] the new affidavit contains inaccuracies. The affidavit indicates that Mr. [REDACTED] spoke to a USCIS officer in person while visiting the petitioning temple in late 2011. (The numerals "2011" are evident in the Punjabi version of the affidavit.) The original derogatory information, however, came from a telephone conversation with Mr. [REDACTED] on July 22, 2008.

The AAO rejected the appeal as untimely on February 5, 2013. The petitioner filed a motion to reopen and reconsider the AAO's decision. In the motion, counsel acknowledged that the prior motion did not meet the *Lozada* requirements, and submitted another affidavit attributed to [REDACTED] and the aforementioned letter to the New York State Supreme Court.

The petitioner also submitted a photocopied IRS Form W-2, purporting to indicate that the petitioner paid the beneficiary \$16,250 in 2012. The document is altered; the final "2" is handwritten on the otherwise printed year "2012." There are marks on lines 1 through 6, 16, and 18 of the form that are consistent with erasure and replacement of information. The dollar amounts on those lines are all handwritten on the otherwise typed or printed form. The director dismissed the motion on March 7, 2013, stating "the petitioner has not submitted nor alleged new facts for consideration."

The petitioner then filed the latest appeal in this proceeding. In the appellate brief, counsel claims that prior filings "includ[ed] proof of compliance with Matter of Lozada," but on the next page of the

same brief, counsel states: “it is conceded that if Lozada . . . is applicable, it was not complied with.” Counsel maintains, nevertheless, that “the ineffective assistance of counsel was clear.” The latest claim of ineffective assistance of counsel rests on different grounds than the earlier claims. Specifically, counsel asserts that prior counsel failed to make the petitioner “aware of the due date for an appeal or motion.” Because the present appellate decision includes a review of the merits of the petition, there is no need to explore the timely filing issue here.

Counsel repeats the assertion that the petitioner has submitted multiple affidavits in an effort to rebut the information from the compliance review. A discussion of this evidence appears earlier in the present decision. Whatever uncertainty may surround the information from the July 2008 compliance review, the petitioner’s submission of conflicting and sometimes inaccurate affidavits in an effort to rebut the findings from that compliance review fails to resolve the matter. Doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 582, 591-92. The petitioner’s submissions lack internal consistency and therefore are not demonstrably more reliable than the inspecting officer’s disputed claims. The petitioner’s refutation of sworn affidavits from its own officials diminishes the evidentiary weight of affidavits in the proceeding.

Even if the petitioner had fully overcome the stated ground for denial, another issue remains which appears to preclude approval of the petition.

The AAO may identify additional grounds for denial beyond what the Service Center identified 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 Part 3, line 2a of Form I-129, asked when the beneficiary last arrived in the United States, the petitioner stated “07/25/2011.” This date cannot be correct, because the petitioner filed the petition before that date. The petitioner gave the same date on line 2d, “Date Status Expires,” and the petitioner apparently repeated that same date in error when asked for the beneficiary’s arrival date. On Part 9 of the same form, [REDACTED] signed the handwritten assertion that the “Beneficiary has been working for the [petitioner] on [an] R-1 visa since April 2003.” In his July 21, 2011 introductory letter, the same individual asserted that the beneficiary “has been continuously working with [the petitioner] since April 2003.” A similar claim appeared in prior counsel’s introductory statement. The petitioner made this assertion in July 2011, more than eight years after April 2003. Section 101(a)(15)(R)(ii) of the Act limits R-1 nonimmigrant admission to “a period not to exceed 5 years.” An alien who has spent five years in the United States in R-1 status may not be readmitted to or receive an extension of stay in the United States under the R visa classification unless the alien has resided abroad and has been physically present outside the United States for the immediate prior year. 8 C.F.R. § 214.2(r)(6). Therefore, if the beneficiary had in fact been in R-1 nonimmigrant status since April 2003, as the petitioner claimed on the petition form, then the

beneficiary has been statutorily ineligible for such status since April 2008. After that date, any admissions as an R-1 nonimmigrant would have been in error.

Because the petitioner asserts that the beneficiary has been in R-1 nonimmigrant status continuously for more than five years, the statute does not allow USCIS to grant the beneficiary further status in that classification until he has spent at least a year continuously outside the United States. This is a fundamental statutory requirement.

If, on the other hand, the beneficiary was not continuously in R-1 nonimmigrant status since April 2003, then [REDACTED] made a false statement that is material to the proceeding. Also, the petitioner stated that it seeks to extend the beneficiary's existing R-1 nonimmigrant status. If the beneficiary was not in valid, current R-1 nonimmigrant status at the time of the petitioner filed the petition, then such status cannot be extended. *See* 8 C.F.R. § 214.1(c)(4). While the regulation at 8 C.F.R. § 214.1(c)(5) places issues regarding extension of status outside the AAO's appellate authority, nevertheless the issue is material to this proceeding and to any future filing to extend the beneficiary's R-1 nonimmigrant status.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed.