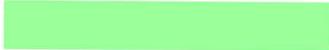




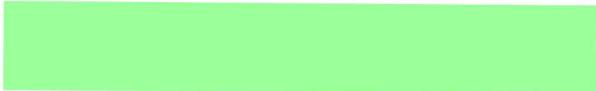
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: MAR 26 2014 OFFICE: CALIFORNIA SERVICE CENTER 

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
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 AAO will withdraw the director's decision. Because the record, as it now stands, does not support approval of the petition, the AAO will remand the petition for further action and consideration.

The petitioner is a Pentecostal Christian church. It seeks to classify the beneficiary as a nonimmigrant religious worker pursuant to section 101(a)(15)(R) of the Act, to perform services as an associate pastor. The director determined that the petitioner had failed a compliance review, and had not established that the beneficiary would work at least 20 hours per week.

On appeal, the petitioner submits a statement and supporting documents.

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.

U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 214.2(r)(1) state 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.

I. COMPLIANCE REVIEW

The USCIS regulation at 8 C.F.R. § 214.2(r)(16) reads:

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 August 25, 2010. The form listed the petitioner's [REDACTED]. The petitioner stated that the beneficiary would work full-time at the above address.

On January 10, 2011, the director issued a notice of intent to deny the petition, advising the petitioner that it had failed a 2007 compliance review relating to another beneficiary. The petitioner's response included:

- a letter from the petitioner's senior pastor, [REDACTED] on church letterhead. The printed letterhead included the address [REDACTED]

- a January 29, 2011 letter on [REDACTED] letterhead, relating to the petitioner at "[REDACTED] MA"
- a copy of a September 30, 2006 month-to-month lease for [REDACTED]

On March 25, 2011, the director issued a request for evidence (RFE) requesting, among other things, "[c]opies of the petitioner's CURRENT lease agreements, rental agreements, and/or mortgage payments" and "[c]olor photographs of the petitioner's location, both inside and outside the building." The petitioner's response repeated the assertion that the church is "located at [REDACTED]". The petitioner submitted several documents relating to that address:

- a copy of a month-to-month lease for the property, executed December 2009;
- a copy of an "Annual Fire Inspection Report" from the Massachusetts Department of Public Health, dated April 11, 2011; and
- copies of exterior photographs, showing a sign featuring the above address.

In an accompanying cover letter, dated April 15, 2011, counsel stated that the terms of the month to month lease "remain in effect to [the] present day."

In another RFE dated June 10, 2011, the director requested "copies of the petitioner's banks [sic] statements for the past 3 months." The petitioner submitted copies of bank statements for April, May, and June of 2011, all addressed to the petitioner at [REDACTED], Massachusetts.

The director approved the petition on November 9, 2011. Subsequently, on April 19, 2012, the director issued a notice of intent to revoke the approval of the petition, stating:

A post-adjudicative compliance review inspection was conducted on the petitioner on January 30, 2012 with additional site visits at differing locations conducted on 2/9/2012, and 3/6/2012.

. . . USCIS visited the address stated on the petition at [REDACTED]. The petitioner was not located at that building. USCIS spoke to the building manager who indicated that the petitioner had ceased its tenancy in the building in October 2010 for non payment of rent. . . .

Therefore, the petitioner misrepresented material facts to USCIS in their February 9, 2011 response to a Notice of Intent to Deny and in their July 22, 2011 response to a Request for Evidence.

The director noted that the petitioner's submissions, described above, continued to state the petitioner's address as [REDACTED] several months after the petitioner left that

address. The director also stated that, on January 16, 2012, “the beneficiary applied for an R-1 visa at the Madrid Consulate . . . [and] stated that he would reside at [REDACTED] 01600.”

The director listed other discrepancies as well, stating that the petitioner, on its employer attestation, claimed 64 members of the petitioning organization and eight workers, whereas “a roster of the organization’s members” identified 54 members and nine workers. USCIS consulted the petitioner’s web site, [REDACTED], on December 20, 2011, and found no upcoming events listed even though Christmas was only five days away. The web site listed two addresses, neither of which matched the address that the petitioner previously provided. The director also stated that public records showed still other addresses for the petitioner.

In response to the notice, [REDACTED] stated that the public records reflected a failed attempt to move to a new location in 2008, as well as moves to different suites at [REDACTED] accommodate changes in the size of the congregation. [REDACTED] added that “church numbers are not static” and therefore changes in the congregation’s size should not be, in and of themselves, grounds for concern.

Citing documents showing the petitioner’s continued use of the [REDACTED] [REDACTED] stated that a rent increase forced the petitioner out of that address in October 2011, not 2010 as stated in the notice of intent to revoke, and that the beneficiary had not yet learned of the change of address when he applied for his R-1 nonimmigrant visa in January 2012. The petitioner submitted a copy of a letter dated June 28, 2011, from [REDACTED] informing the petitioner of a \$100 monthly rent increase on the [REDACTED] property “[e]ffective August 1, 2011.” A January 2012 “Tenancy at Will” document established the petitioner’s rental of a new property beginning March 1, 2012, at a rate substantially below that of the [REDACTED] address.

With respect to the two addresses on the church’s web site, [REDACTED] asserted that the petitioner held regular services at one address (subsequently abandoned due to parking issues) and revival meetings at the other address (which corresponded to a hotel conference room). Rev. [REDACTED] stated: “The only events we post on our website are major upcoming revivals programs,” and that the absence of announcements of Christmas programs “should not be misconstrued as [the petitioner] having no religious activity.”

On June 6, 2012, the director issued an RFE, instructing the petitioner to submit evidence “to establish religious activity at the petitioner’s new location.” The petitioner’s response included photographs and utility bills establishing the petitioner’s presence at the new location ([REDACTED]) and promotional materials advertising events at that location.

The director revoked the approval of the petition on March 12, 2013, stating: “The petitioner has not established they are a bona fide religious organization offering services at the address indicated.” The director stated that the rental agreement for the petitioner’s claimed current address on [REDACTED]

Road in North Attleboro “is signed by Patience Afun, the beneficiary of a previously denied petition, who is . . . currently volunteering for the petitioner even though she is out of status.”

On appeal, the petitioner resubmits copies of documents showing its continued use of the J Street address after October 2010. stated that the petitioner had submitted several exhibits “proving [its] existence, activities and operation at the [most recent claimed] location.” Rev. signature “should not invalidate the lease.” Rev. observes that the lease has two signature lines marked “tenant,” and he claims that signed the document (along with Rev. simply so that there would be signatures on both lines.

The petitioner’s assertions on appeal are supported by evidence. The petitioner has submitted evidence from several sources indicating that it remained at the Street address well into 2011. The inspecting USCIS officer spoke to the suite’s current tenant, who had been “occupying since January 2012,” a date that does not overlap with the petitioner’s claimed occupancy of that suite. The results of the site visit do not appear to undermine or contradict the petitioner’s claims regarding its location in late 2010 and 2011.

The compliance review report states, at one point, that the petitioner “ceased its tenancy in October of 2010,” and at another point that the petitioning “organization was evicted from the premises in October of 2010.” The petitioner denies the allegation of eviction, and the record contains no documentation of eviction proceedings. Also, the record contains no documentary evidence that the petitioner left the address in 2010 rather than 2011.

The petitioner’s assertions regarding its changes of address are consistent with the available evidence, including un rebutted third-party documentation placing the petitioner at the Street address during 2011. Taking all available factors into consideration, the petitioner has established by a preponderance of the evidence that it left in 2011, not in October 2010.

Concerning the petitioner’s current claimed location, the director did not explain why signature on the petitioner’s 2012 lease discredits that document. USCIS records show that a USCIS officer visited the petitioner’s latest address on on March 6, 2012. While no one from the petitioning organization was present at the time, the building manager confirmed that “the organization moved into the space in February 2012.” The petitioner has overcome the director’s findings regarding the compliance review inspection.

II. WORK SCHEDULE

The second stated ground for revocation concerns the beneficiary’s claimed work schedule. To qualify for R-1 nonimmigrant status, the beneficiary must be coming to the United States to work, on average, at least 20 hours per week. *See* 8 C.F.R. § 214.2(r)(1)(ii).

The director did not mention this ground for revocation in the April 19, 2012 notice of intent to revoke. In the revocation notice itself, the director's discussion of the issue reads as follows:

Although the petitioner submitted a daily work schedule that the petitioner states that they believe the beneficiary will follow, the record does not contain a detailed description of these activities. The beneficiary is not working an average of at least 20 hours per week, working in a religious occupation.

Accordingly, the petitioner has not demonstrated that the position offered constitutes a religious occupation in a part time position of at least 20 hours per week.

The USCIS regulation at 8 C.F.R. § 205.2(b) requires USCIS to give the petitioner the opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval. A decision to revoke approval of a visa petition can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations specified in the notice of intention to revoke. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988). The director incorrectly introduced a second ground for revocation at the decision stage. As the petitioner addressed this second ground on appeal, a discussion of this issue follows below.

Rev. [REDACTED] on appeal, maintains that the petitioner "submitted . . . a weekly work schedule with a detailed description of various activities and hours required to perform each activity."

On Part 5, line 6 of the Form I-129 petition, the petitioner indicated that the beneficiary would work full time. As noted previously, on Part 5, line 12 of the same form, the petitioner stated that it had eight volunteer workers but no current employees. The "Nontechnical Job Description" at Part 5, Line 2, reads:

Preaching, teaching the Christian faith, leading Bible Studies, performing wedding ceremonies, baptisms and burials, providing counseling to church members, visiting church members, leading prayer services, and conducting weekly worship services for the church community. Additionally, we envision that he will be instrumental in helping to build the membership of this church and in developing a Spanish ministry for the church.

The "[d]etailed description of the alien's proposed daily duties" at line 5 of the petitioner's employer attestation is essentially identical to the description quoted above.

A list of church workers in the record lists the beneficiary's duties as associate pastor, stating that he:

- (a) Shall be in charge of our teaching service programs
- (b) Lead church to pray during church services.
- (b) [sic] Help build a strong prayer and evangelism team.
- (c) Shall be involved in one-on-one evangelism

- (d) Shall in consultation with the Senior Pastor design suitable outreach and evangelism programs to reach out to lost souls.
- (e) Help in planning revival and missions programs of the church.
- (f) Take up some preaching roles in the church
- (g) Help build church membership through visitation and spiritual counseling
- (h) Shall design outreach and evangelism programs towards winning some Spanish communities.
- (i) Perform Spanish interpretation roles

The list identified seven other workers (including volunteers).

the petitioner's director of church programs, stated in a July 12, 2010 letter that the beneficiary's weekly schedule would consist of the following duties:

Bible Study	4 hours
Sermon Preparation	6 hours
Community Ministry	8 hours
Sunday Church	all day
Counseling	6 hours
Visitation	10 hours
Prayer Time	6 hours

Although the director issued several notices to the petitioner before the notice of revocation, none of those notices instructed the petitioner to provide more details about the beneficiary's work schedule. The director, in the revocation notice, did not specify which of the listed duties required further explanation, or state why the supplied list is not sufficient. The director did not explain how the lack of detail led to the conclusion that the beneficiary would work less than 20 hours per week.

Because the director introduced a ground for revocation without prior notice, the AAO must withdraw that ground. Should the director choose once again to revoke on this ground, the director must first provide advance notice of that intention, as required by the regulation at 8 C.F.R. § 205.2(b), and must articulate specific reasons for citing this ground of revocation. See *Matter of Arias*, 19 I&N Dec. 570.

While the AAO is withdrawing the above stated grounds for revocation, the petition is not approvable. 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).

First, there is the issue of compliance review. The petitioner has not successfully completed compliance review as required by 8 C.F.R. § 214.2(r)(16); no one from the organization was at the address when a USCIS officer visited the site.

Second, the petitioner has not established how it will compensate the beneficiary. 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 petitioner included the following information on Part 5 of Form I-129:

- 6. Wages per week: \$150/wk including room & board
- 7. Other compensation: Room & board provided by church
- 12. Current Number of employees: 0 (8 volunteers)
- 13. Gross Annual Income: Approx. \$60,000
- 14. Net Annual Income: Approx. \$5,000

The above information indicates that room and board are part of the beneficiary's \$150 weekly compensation, but every other reference to the beneficiary's compensation indicates that he would receive room and board in addition to \$150 per week. On line 5 of the employer attestation, the petitioner stated that it "will pay [the beneficiary] a minimum weekly stipend of \$150, as well as provide him room and board from the church."

A salary of \$150 per week translates to roughly \$7,800 per year, without taking additional room and board costs into account. Because the petitioner claimed no paid employees at the time of filing, these costs would all be new expenses on top of the petitioner's existing ones. On the petition form, the petitioner claimed only \$5,000 in net annual income, an amount insufficient to cover the beneficiary's salary, room and board.

In the initial submission, [REDACTED] stated:

[The petitioner] will pay [the beneficiary] a minimum weekly stipend of \$150, as well as room and board from the church. . . .

In 2008, our total Income was approximately \$65,000.00 with a bank balance of approximately \$2,400.00 by December, 2008. In 2009 our total income was approximately \$60,000.00 with a bank balance of approximately \$2560.00 by December 31, 2009. In those two years, we employed a full-time minister for the church, and we spent a total of . . . \$29,760.00 in 2008 and then . . . \$20,990.00 in 2009 as salaries and other expenses for him.

At the moment, the church has volunteers but no employees. From January 1, 2010 to June 3, 2010, our total income is \$25,212.40 with a bank balance of \$6,621.91. . . . We are willing and able to compensate [the beneficiary] as stated above.

The petitioner's initial submission did not include the financial documentation that the regulation at 8 C.F.R. § 214.2(r)(11)(i) requires.

The director's January 2011 notice of intent to deny the petition indicated that a July 2007 site inspection cast doubt on the petitioner's ability to compensate its workers. In response, Rev. [REDACTED] stated: "Over the years, our financial situation has improved and our needs are completely different. . . . We are willing and able to support [the beneficiary] as indicated in our petition for him."

In a letter dated January 29, 2011, [REDACTED] small business specialist at [REDACTED] Massachusetts, stated that the petitioner deposited \$14,729.00 into its checking account during 2007, and that the account balance at the end of July 2007 was \$424.00. The bank letter did not provide more recent information.

In the March 2011 RFE, the director instructed the petitioner to "[s]ubmit financial information including bank statements for the past 6 months; recent audits; current monthly budget reports, annual reports, [and] audited financial statements." The petitioner did not submit the requested evidence.

In the June 2011 RFE, the director requested "copies of the petitioner's bank[] statements for the past 3 months including copies of budget reports and audited financial statements." In response, the petitioner submitted bank statements showing end-of-the-month balances of \$976.97 for April 2011, \$801.09 for May 2011 and \$1,204.51 for June 2011. All three statements show "insufficient funds" charges, indicating that the petitioner repeatedly issued checks that its bank balance could not cover.

An accompanying "statement of activity (cash basis) for the three months ending June 30 2011" showed \$8,756.41 in income and \$7,552.97 in expenses, leaving a net "increase in net assets" of \$1,203.44. Extrapolated to a full year, this rate of net income is slightly less than the \$5,000 per year that the petitioner claimed on Form I-129. The itemized expenses did not include the beneficiary's room, board, or \$150 weekly salary.

In an August 26, 2011 RFE, the director instructed the petitioner to submit the evidence required by the USCIS regulation at 8 C.F.R. § 214.2(r)(11). In response, counsel stated: "At a leadership meeting of the church held on February 5th, 2010, the senior pastor agreed to provide accommodation and food for the [beneficiary] at his residence in the period that he is in the United States on R-1 Visa."

The petitioner submitted a notarized "Pledge of Support in Accommodation & Food," dated October 3, 2011, in which Rev. Ayesiyenga stated: "I do hereby certify that I will provide accommodation and food for [the beneficiary] at the above stated address during the period that he is here on R-1 Visa." The above stated address was on [REDACTED]

In the June 6, 2012 RFE, the director requested "verifiable documentation that room and board is provided" to the beneficiary. In response, the petitioner submitted a notarized statement from [REDACTED] who stated: "[The petitioner] resides in my apartment . . . together with his family. . . . His stay in my apartment is part of my personal support to the [petitioning] church." The petitioner also submitted a copy of [REDACTED] lease. The phrase "room and board" indicates food as well as lodging, but [REDACTED] did not indicate that she provided food for the beneficiary and his family.

The same submission included a copy of the petitioner's membership directory as of June 27, 2012. [REDACTED] name does not appear in the directory, or in an earlier directory submitted in response to the August 2011 RFE. The record does not include any contract or other formal agreement requiring [REDACTED] to continue to house the beneficiary's family while the petitioner continues to employ the beneficiary, and it does not show any contingency plans in the event that [REDACTED] left the area or was otherwise unable or unwilling to continue to house the petitioner.

The record contains no evidence that the beneficiary received room and board "from the church" as the petitioner originally asserted. The petitioner did not explain why [REDACTED] was not personally providing room and board to the beneficiary as stated in his notarized pledge of October 3, 2011. The petitioner's response to the June 2012 RFE did not mention the pledge at all.

Copies of pay receipts show that the petitioner paid the beneficiary \$671.17 per month in March, April and May of 2012. The monthly and "Year to Date" totals are the same on the March 2012 receipt, indicating that the petitioner did not pay the beneficiary before March 2012. The sum of \$671.17 per month is roughly comparable to \$150.00 per week, indicating the stated weekly amount does not include the value of non-salaried compensation such as room and board. (Otherwise, the costs of food and lodging would have proportionately reduced the cash salary.) If the beneficiary had to purchase food using his weekly stipend, then the petitioner did not provide the stipend "as well as room and board" as the petitioner previously indicated.

The record shows that, at the time the petitioner filed the petition, it paid \$1,200 per month in rent to the manager of the [REDACTED] property. The rental cost of the petitioner's new address is \$900 per month, a savings of \$300 per month, or \$3,600 per year, which frees up roughly \$69 per week for

other expenses such as the beneficiary's compensation. It is not evident that this savings would make up the full shortfall between the petitioner's originally claimed income and the cost of the beneficiary's compensation. Furthermore, the petitioner must establish eligibility for the requested benefit at the time of filing the benefit request, and that eligibility must continue through adjudication. See 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

The record indicates that the petitioner's net income as of the filing date was insufficient to cover the full amount of the beneficiary's intended compensation. Shortly after the filing date, the petitioner repeatedly incurred "insufficient funds" charges for its existing expenses, not including the added expense of the beneficiary's compensation. If, at the time of filing, the petitioner was not able to pay the beneficiary \$150 per week, while also providing room and board "from the church," then the petition was not properly approvable at the time of filing. Any future decision from the director must take this information into account. Evidence regarding the petitioner's finances after the date of filing may show the petitioner's continued ability to compensate the beneficiary, but cannot retroactively show that the petitioner could afford the full level of compensation as of the filing date.

For the reasons discussed above, the AAO hereby withdraws the director's decision. At the same time, the petitioner has not established that the petition was approvable. Therefore, the AAO will remand this matter to the director. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.