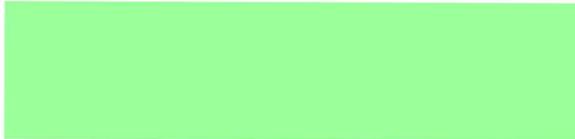
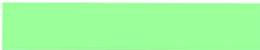


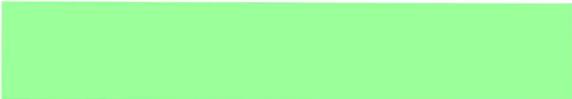
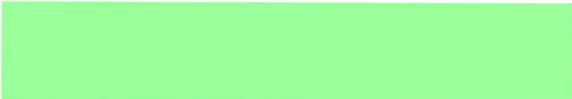


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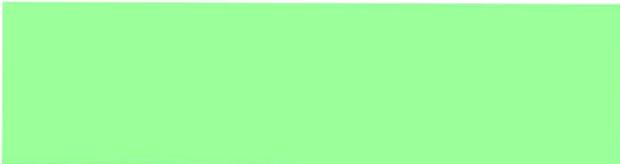


DATE: **OCT 10 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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 (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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

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 appeal will be dismissed.

The petitioner is a church. It seeks classification of the beneficiary as a nonimmigrant 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), to perform services as a pastor. The director determined that the petitioner failed to establish how it intends to compensate the beneficiary.

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 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 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 [U.S. Citizenship and Immigration Services]. IRS [Internal Revenue Service] 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 filed the Form I-129, Petition for a Nonimmigrant Worker, on June 19, 2012. On the petition, the petitioner stated that the beneficiary would receive wages of \$40,000 per year in addition to food and clothing. In the Employer Attestation in Supplement R of the petition, the petitioner described the proposed compensation as “\$255 for food and house allowance and \$524 weekly salary,” which would equal an annual salary of \$27,248 and an annual food and housing allowance of \$13,260, for a total compensation package of \$40,508. In a letter dated May 25, 2012, the petitioner stated that the beneficiary would earn \$512 per week as “Base Salary” and \$255 as “weekly allowances for food, housing, transportation and other related expenses” which would equal an annual salary of \$26,624 and an annual expense allowance of \$13,260 for a total of \$39,884 per year total compensation. Thus the record is not clear as to the compensation that the petitioner intends to pay to the beneficiary. It is incumbent on 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In support of its intent and ability to provide the proffered compensation, the petitioner submitted a typewritten IRS Form W-2 for 2011, showing wages it paid to the beneficiary of \$6,995.00, plus housing allowance of \$15,000.00, which would total \$21,995.¹ A handwritten 2011 Form W-2 was also submitted showing wages the petitioner paid to the beneficiary of \$6,995.00 plus “other” income of \$15,000.00. The petitioner also submitted an uncertified copy of the beneficiary’s 2011 IRS Form 1040, U.S. Individual Income Tax Return, indicating total ministerial income of \$21,995, which matches the total income reported on the Forms W-2. Although the petitioner submitted a copy of its 2011 IRS Form W-3, Transmittal of Wage and Tax Statements, nothing in the record indicates that the form was actually forwarded to the Social Security Administration (SSA). The Form W-3 shows wages of \$6,995.00 paid to one employee. However, the petitioner’s 2011 Forms 941, Employer’s Quarterly Federal Tax Returns, indicate total compensation of \$22,744.74 paid to one employee. The 2011 quarterly returns show wages paid as follows: first quarter, January through March - \$5,032.89; second quarter, April through June - \$4,959.22; third quarter, July through September - \$6,101.63; and fourth quarter, October through December - \$6,651. The record contains evidence that only the third quarter return was signed. The petitioner submitted copies of three checks made payable to the United States Treasury: January 29, 2012 in the amount of \$885.00; May 1, 2011 in the amount of \$669.37; and October 5, 2011 in the amount of \$811.52. There is no evidence that any of the checks were negotiated through normal banking channels. Further, in response to the director’s July 14, 2012, Request for Evidence (RFE) regarding the beneficiary’s previous employment, the petitioner submitted a statement of earnings from the SSA indicating that the beneficiary reported self-employment earnings of \$20,312 during 2011. No documentation was provided to resolve these discrepancies in the evidence regarding the beneficiary’s 2011 compensation. *Id.*

The petitioner also submitted a copy of its 2012 budget showing total budgeted pastor compensation of \$40,000, to include \$28,000 as “Minister Salary” and \$12,000 as “Minister Bible School Payment.” The budget contains an additional staff expense item of \$5,000. On the Form I-129, Part 5 Section 12, the petitioner indicated that it had a net income of \$10,000 and no employees.

The director denied the petition on May 16, 2013, finding that the petitioner had not established how it intended to compensate the beneficiary with the proffered salary during the period of intended stay. On appeal, the petitioner submitted no additional evidence regarding how it intends to provide the proffered compensation. The petitioner stated that the compensation issue was not mentioned in any of the three RFEs issued by the director and contended that USCIS failed to comply with its own regulations as the petition was denied without first issuing a Notice of Intent to Deny (NOID). The petitioner submitted copies of two USCIS memoranda (dated February 16, 2005 and May 4, 2004 from William R. Yates, then the Associate Director of Operations for USCIS, providing guidance to adjudicators regarding the

¹ In an October 6, 2012 letter, the petitioner stated that the beneficiary first began assisting the petitioning church on October 8, 2010 on a part-time basis while still apparently working for his previous authorized R-1 employer. The record is not clear, however, when the beneficiary began working full time for the petitioner.

issuance of RFEs and NOIDS. The petitioner requested “that the matter be reopened sua sponte” so that the compensation issue “may be properly addressed.”

We note that the memoranda cited by the petitioner were issued prior to the implementation of new regulations in November 2008. The current regulation at 8 C.F.R. § 103.2(b)(8) provides in pertinent part:

(ii) Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

(iii) Other evidence. If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

In denying the petition, the director complied with the provisions of 8 C.F.R. § 103.2(b)(8)(ii) and (iii), which allow for discretionary authority to request additional evidence, provide notice of the director’s intent to deny the application or petition, or deny the petition or application. In this case, the director exercised her discretionary authority and denied the petition based on the petitioner’s failure to provide sufficient evidence to establish eligibility for the benefit sought. We find no error in the director’s exercise of her discretionary authority. The petitioner also failed to submit any documentation of its intent and ability to pay the beneficiary the proffered wage with its appeal.

On May 28, 2014 we issued a NOID after determining the record contained information which compromised the credibility of the petitioner’s claim. The NOID specifically stated:

You submitted [IRS] Forms W-2. . . indicating that your organization paid the beneficiary \$6,995 plus a housing allowance of \$15,000 during 2011. However, you also submitted the beneficiary’s Itemized Statement of Earnings from the Social Security Administration (SSA), indicating that the beneficiary reported only “self-employment” earnings of \$20,312 in 2011. The fact that the beneficiary’s income was not attributed to your organization on his SSA record, in addition to the discrepancy regarding the amount of income, calls into question the legitimacy of the 2011 Form W-2 that you submitted to USCIS. Additionally, you submitted copies of all four quarters of your organization’s 2011 IRS Forms 941, Employer’s Quarterly Federal Tax Returns, indicating you paid a total of \$22,744.74 to a single employee. This figure does not match the amount on the submitted Form W-2 for 2011, again calling into question the credibility of your submitted documentation.

Beyond the unresolved discrepancies described above, the NOID further stated that the evidence does not establish the petitioner's ability to compensate the beneficiary. The NOID noted that the submitted evidence of past compensation paid by the petitioner was less than the proffered wage and, therefore, was insufficient, on its own, to establish the ability to provide the proffered compensation of \$40,000 per year plus food and clothing as stated on the petition. The NOID also noted that a budget submitted by the petitioner stating the beneficiary would receive total compensation of \$40,000 was not supported by verifiable documentation. Finally, the NOID noted that the petitioner on the Form I-129 Supplement R and in an accompanying letter stated that the approximate amount of the beneficiary's compensation would be comprised of a base salary plus a food and housing allowance. The budget submitted by the petitioner lists \$28,000 as "Minister Salary" and \$12,000 as "Minister Bible School Payment." This discrepancy in compensation was not explained. The NOID stated that "[a]bsent independent and objective evidence to overcome the above, we will dismiss the appeal and enter a formal finding of material misrepresentation into the record."

In response to the NOID, [REDACTED] the petitioner's president, states that the Forms 941 for 2011 reflect the correct amount of compensation and withholdings for the year, which was \$22,744.74. According to Mr. [REDACTED] the compensation consisted of a \$15,000 housing allowance and \$7,744.74 in compensation to the beneficiary. The difference between the \$22,774.74 figure reflected in the quarterly tax returns and that reported on the 2011 Form W-2 (\$749.74) was "due to [an] unintentional reporting error." The petitioner states that it has already addressed this issue with the IRS and requested IRS Forms W-2C, Corrected Wage and Tax Statements, and W-3C, Transmittal of Corrected Wage and Tax Statements, to amend the difference. The petitioner has not provided evidence that it has filed Forms W-2C or W-3C to address the error. 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)).

With regard to the SSA report of "self-employment" earnings in 2011 of \$20,312 that were not attributed to the petitioner, the petitioner states that the \$20,312 figure reported by the SSA was taken from the beneficiary's 2011 Form 1040, Schedule SE (Self-Employment Tax), Line 4 and reflects the amount he reported after appropriate adjustment. A review of the beneficiary's 2011 tax return Clergy Worksheet Page 1 – Percentage of Tax-Free Income, states total ministerial income of \$21,995 and is consistent with the amounts reported on the Forms W-2 reportedly issued by the petitioner. However, the petitioner also states that the beneficiary's earnings in 2010 and 2011 were from his previous employer, [REDACTED]. This is inconsistent with the petitioner's claims that it paid the beneficiary at least \$6,995 plus a housing allowance of \$15,000, as reported on the 2011 W-2. It is also inconsistent with the petitioner's claim in response to the NOID that "[i]n 2011 [the beneficiary] only got payment from" the petitioner. The petitioner provided no objective evidence to resolve this inconsistency. *Matter of Ho*, at 591.²

² The present petition was filed on June 19, 2012 seeking a change of employer and extension of stay. Had the beneficiary been working for the petitioner in 2011, he would have been working in violation of his

Finally, in response to issues raised in our NOID about the petitioner's budget for ministerial salaries, the petitioner states that it budgeted to pay the beneficiary a salary of \$28,000, and the remaining \$12,000 of the \$40,000 proffered salary would be paid from a Bible School that was not yet in existence. The petitioner plans to start the Bible School when the petition is approved. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

The petitioner states that it pays the beneficiary gross compensation of \$2,217.17 per month for a total of \$26,606.04 annually. The petitioner submits copies of processed checks reflecting that it paid the beneficiary \$2,069.69 monthly during 2013. The petitioner also states that church members and friends provide the beneficiary with food and other monetary contributions and that "We believe the total of these contributions is more than enough to offset the perceived gap between \$28,000.00 and what [the petitioning] church pays our pastor."

Nonetheless, the petitioner stated that it would pay the beneficiary annual compensation of at least \$39,884. The petitioner did not allege that a portion of this compensation would be provided by others. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Id.* A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner has failed to establish how it intends to provide the proffered compensation. Evidence of past compensation paid by the petitioner is less than the proffered wage and is therefore insufficient, on its own, to establish how the petitioner intends to pay the proffered wage. Although the petitioner submitted a budget stating that the beneficiary would receive total compensation of \$40,000 per year, the figures asserted in the budget are not supported by any verifiable documentation. See *Matter of Soffici at 165*. Further, the record contains unresolved discrepancies, discussed previously, regarding the form and amount of the proffered compensation and the evidence of the beneficiary's 2011 compensation. *Matter of Ho*, at 591.

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). Here, that burden has not been met.

ORDER: The appeal is dismissed.

previously approved R-1 visa. This issue, however, lies outside the AAO's jurisdiction, because it is an extension issue rather than a petition issue. See 8 C.F.R. § 214.1(c)(5).