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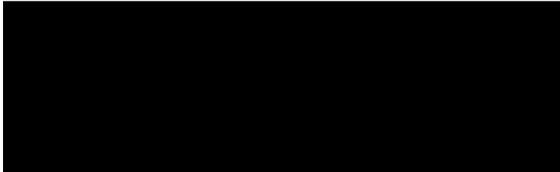
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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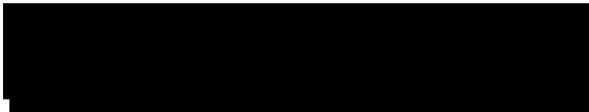


DATE: **DEC 29 2011** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be dismissed.

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). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner is a church. It seeks to extend the beneficiary's status as a nonimmigrant religious worker pursuant to section 101(a)(15)(R)(1) of the Act to perform services as a pastor. The director determined that the petitioner has not satisfactorily completed a compliance review onsite inspection. The AAO affirmed the director's decision on appeal and additionally found that the petitioner had not established how it intends to compensate the beneficiary and had not provided the attestation required by the regulation at 8 C.F.R. § 214.2(r)(8).

On motion, counsel asserts that the petitioner has resolved the inconsistency in the record regarding the failed compliance review. Counsel also asserts that the AAO "inappropriately applied the law when it identified other grounds for denial which went beyond the findings made by the Director in the original decision." Counsel submits a brief and additional documentation in support of the motion.

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 first issue presented is whether the petitioner successfully completed a compliance review.

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

Inspections, evaluations, verifications, and compliance reviews. The supporting evidence submitted may be verified by USCIS [U.S. Citizenship and Immigration Services] 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.

On February 10, 2009, an immigration officer (IO) visited the petitioner's premises at the address provided by the petitioner on its Form I-129, Petition for a Nonimmigrant Worker, filed on August 18, 2006. The IO found the organization closed and the doors and windows darkened such that the interior could not be viewed from the outside. The IO reported that she attempted to reach the petitioner by telephone "numerous times in February, March and April, 2009 at various times of the day" with no success. The IO reported that one of the petitioner's numbers rang unanswered and messages left on the answering machine at the other were not returned.

The petitioner stated that it was in the process of moving during the IO's visit, and that its phones were not working because of the move. The petitioner submitted a copy of a February 13, 2009 agreement with the [REDACTED] for rental of its fellowship hall. On appeal, counsel argued that the petitioner failed to respond to the IO's phone calls because of the "magnitude and complication of said move to a different location."

On motion, counsel asserts that the petitioner "could not properly address the issue" of why it did not respond to the IO's phone calls because the decisions "did not specify the specific number called, the specific date when the calls were made, nor the specific number of calls made during those months." Counsel stated that the pastor of the petitioning organization provided two telephone numbers with the Form I-129 but that those numbers had changed. Counsel further stated that the petitioner attempted to obtain its records from the telephone company but that the records no longer existed.

Counsel's argument is without merit. In its decision, the AAO pointed out that the IO had attempted to call two numbers provided by the petitioner and met no success with either. Additionally, the IO reported that she attempted to reach the petitioner during a period of approximately three months from February to April 2010. The petitioner alleged that its move occurred during the first week in February. The petitioner has offered no reasonable explanation as to why its phones and answering machine remained out of service for three months. It would be remarkable that on each occasion over the three-month period, the petitioner would have been unavailable or unable to receive or return calls. Therefore, counsel's arguments that the specific dates and the specific number of calls would somehow explain the petitioner's failure to respond to the AAO's attempts to reach it telephonically are unpersuasive. Additionally, counsel alleges that the phone numbers had changed. However, there is nothing in the record to reflect that the petitioner notified USCIS of the changes.

The petitioner has not provided sufficient documentation to establish its existence as a going concern at the time the IO conducted her investigation in February 2009.

Counsel also asserts that regulations implemented on November 26, 2008 were inapplicable to the instant petition as the final rule was not retroactive and the director did not issue a request for evidence (RFE) to enable the petitioner to meet the new evidentiary requirements. Counsel provides no documentation to support her assertion that the final rule was not "retroactive." Furthermore, when USCIS published the new rule in November 2008, it did so in accordance with explicit instructions from Congress. Supplementary information published with the new rule specified:

All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information. 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

As the petition was pending on November 26, 2008, it is subject to the requirements of the new regulation. Counsel also asserts that the petitioner was not given an opportunity to submit documentation as required by the new regulation. Regarding the petitioner's failure to establish how it intends to compensate the beneficiary, counsel argues:

[W]hile the decision from the AAO correctly pointed out that the Church had a loss of \$1,593.45 for the year of 2005, it did not afford the Petitioner an opportunity to prove that it paid the Beneficiary a salary during that year and thus it has established that it was able to compensate the beneficiary.

Nonetheless, the regulations in effect in 2006 when the petition was filed required the petitioner to provide as part of its initial evidence, documentation of any arrangements made for the beneficiary's remuneration including the amount and source of any salary or a description of any other types of remuneration to be received. 8 C.F.R. § 214.2(r)(3). The petitioner failed to provide this initial evidence with the petition or at any time prior to the instant motion.

Additionally, on motion, the petitioner again failed to submit the attestation required by the regulation at 8 C.F.R. § 214.2(r)(8). Rather, counsel submits a copy of a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, filed by the petitioner on behalf of the beneficiary and which contains a similar attestation required under the regulation at 8 C.F.R. § 204.5(m)(7). Accordingly, the petitioner has not submitted an attestation in accordance with the regulation at 8 C.F.R. § 214.2(r)(8).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. As new evidence has not been presented to adequately overcome the grounds for the previous dismissal, and no reasons set forth indicating that the decision was based on an incorrect application of law, the previous decisions of the AAO and the director will be affirmed. The petition is denied.

ORDER: The AAO's decision of October 21, 2010 is affirmed. The petition is denied.