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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

D13

[redacted]

Date: JUL 16 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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,

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 reconsider. The motion will be dismissed.

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 (USCIS) policy. 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 classify the beneficiary as a nonimmigrant religious worker under section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1), to perform services as a pastor. The director determined that the petitioner had not established that the beneficiary had been a member of its religious denomination for two full years immediately preceding the filing of the petition. On appeal, the AAO affirmed the director's decision and further found that the petitioner had failed to establish how it intends to compensate the beneficiary.

On motion, the petitioner asserts that the language of the AAO's decision "that 'the statute requires that the beneficiary must belong to the same denomination as the petitioning organization' regardless of similar beliefs and practices renders the statute unconstitutional and therefore such position cannot stand" and that the petitioner "has sufficient resources 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 first issue presented is whether the petitioner has established that the beneficiary has been a member of its religious denomination for two full years immediately preceding the filing of the visa petition.

The USCIS regulation at 8 C.F.R. § 214.2(r)(1) provides 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.

The petition was filed on June 14, 2010. Therefore, the petitioner must establish that the beneficiary was a member of its denomination for at least the two years immediately preceding that date.

On appeal, the AAO rejected the petitioner's argument that the beneficiary's qualifying membership need only be as a member of a "similar" denomination as that of the petitioning organization. As stated in the AAO's previous decision, section 101(a)(15)(R)(1) of the Act, 8 U.S.C. § 1101(a)(15)(R)(1), pertains to an alien who has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States for the two years immediately preceding the filing of the visa petition, and section 101(a)(27)(C)(ii)(I) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii) (I), pertains to a nonimmigrant who seeks to enter the United States solely for the purpose of carrying on the vocation of a minister <u>of that religious denomination</u>. The statute does not state that alien must be a member of a denomination that is "similar" or "related" to or "affiliated" with a petitioning organization.

The implementing regulation 8 C.F.R. § 214.2(r)(3) provides that denominational membership means "membership during at least the two-year period immediately preceding the filing date of the petition, in the same type of religious denomination as the United States religious organization where the alien will work." The regulation defines "religious denomination" as:

> [A] religious group or community of believers that is governed or administered under a common type of ecclesiastical government and includes one or more of the following:
>
> (A) A recognized common creed or statement of faith shared among the denomination's members;

(B) A common form of worship;

(C) A common formal code of doctrine and discipline;

(D) Common religious services and ceremonies;

(E) Common established places of religious worship or religious congregations; or

(F) Comparable indicia of a bona fide religious denomination.

The petitioner admitted on appeal that its denomination and that of the beneficiary are "denominationally different." The petitioner asserted, however, that the two denominations "share strongly similar views and beliefs in regard to [] fundamental doctrines." The above-cited regulation provides that a group of believers may be recognized as a religious denomination if it meets certain criteria, the first of which is that they must be "governed or administered under a common type of ecclesiastical government." The petitioner submitted no documentation of this initial requirement and provided only its analysis of how the two denominations were similar. 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. Comm'r 1972)). As discussed further below, the regulation makes a provision for individual churches without a hierarchy; however, the record does not establish that the petitioner falls within this category.

The petitioner renews its argument on motion. The petitioner first asserts that "The Service's requirement in this matter that the Petitioner and the alien be of denominations with the same name regardless of type or similarity is clearly beyond the requirements of the Regulations." There is nothing in either the decision of the AAO or of the Director, California Service Center, that implies that the denominations must share "the same name." The burden of proof is on the petitioner, however, to establish that the beneficiary has been a member of its denomination as that term is defined in the regulation.

The petitioner then argues that the AAO's interpretation of the regulation "renders the Statue and applicable Regulations unconstitutional" asserting that:

> The process for granting legal status for religious workers touches the core of both a petitioning church's and a beneficiary's religious liberty. It is black letter law that statutes restricting religious liberty are subject to strict scrutiny analysis. . . . Petitioner fails to see how the position in the [AAO's decision] (of requiring identical denominational names regardless of practice) is narrowly tailored to achieve the goals of regulating immigration. The language of the Regulation referring to the "same type" is narrowly tailored, yet still services the important state interest of regulating immigration. This "same type" language eliminates sham religious entities and assures that only legitimate religious entities may

> utilize the religious worker visas. This "same type" language would not open up the proverbial flood gates, but it is narrowly tailored and therefore enables a Constitutional interpretation.

The petitioner's argument is without merit. As discussed above, the AAO's decision does not imply that the beneficiary's denomination must share an "identical denomination name[]" with the denomination of the petitioning organization. Additionally, the petitioner submits no supporting case law that supports its interpretation that the "same type" language was designed to weed out "sham" religious organizations and interpreting the regulation to include a "similar" denomination would serve the same governmental purposes. In fact, it is not clear how the petitioner believes that this particular section of the regulation is more likely to catch "sham" religious organizations than, for example, the regulation at 8 C.F.R. § 214.2(r)(9) or 8 C.F.R. § 214.2(r)(16).

In supplemental information accompanying the November 26, 2008 final rule for the current regulation, USCIS indicated that the definition of denomination in the regulation "focus[es] on the commonality of the faith and internal organization of the denomination" and that:

> [A]n individual church that shares a common creed with other churches, but which does not share a common organizational structure or governing hierarchy with such other churches, can satisfy the "ecclesiastical government" requirement of the "religious denomination" definition by submitting a description of its own internal governing or organizational structure." 73 Fed. Reg. at 72280-72281(Nov. 26, 2008).

The petitioner stated that it is associated with the [redacted] and is covered under the group tax exemption granted to that organization by the Internal Revenue Service. Thus, the petitioner does not allege that it is an "individual church" which can satisfy the requirements of the regulation by showing commonality with the beneficiary's denomination. As discussed in the AAO's previous decision, the petitioner submitted no documentation from either the [redacted] or [redacted] indicating that the two organizations are denominationally linked or otherwise constitute a religious denomination as that term is defined by the regulation. Section 291 of the Act, 8 U.S.C. § 1361.

Finally, the petitioner asserts that the AAO's decision violates the Religious Freedom and Restoration Act of 1993 (RFRA) because it "substantially burdens both" the petitioner and the beneficiary by "disallowing the same type of denominations with similar believes [sic] and practices" and therefore cannot stand. The petitioner's allegation is again without merit. The AAO has not imposed any restrictions on the petitioner or the beneficiary regarding the qualifications of, or membership in, either the petitioning organization or its denomination. The petitioner is free to determine its needs and to decide who is best qualified to meet those needs. However, while the determination of an individual's status or duties within a religious organization is not under the purview of USCIS, the determination as to the individual's qualifications to receive benefits under the immigration laws of the United States rests with

USCIS. Authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States. *Matter of Hall*, 18 I&N Dec. 203 (BIA 1982); *Matter of Rhee*, 16 I&N Dec. 607 (BIA 1978). The petitioner does not argue, and submits no documentation, that subordinate U.S. immigration laws to the RFRA. USCIS is not required to ignore immigration laws or defer to a religious organization in its stated need for a particular individual.

The petitioner has failed to establish that the beneficiary was a member of its religious denomination for two full years immediately preceding the filing of the petition. For this reason alone, the petition may not be approved.

As an additional issue, the AAO also determined that the petitioner had failed to establish how it intended to compensate the beneficiary. The petitioner alleges that it "provide[d] sufficient information in its original application" to meet the requirements of the regulation. 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:
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> > (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 [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 stated that it would compensate the beneficiary at the rate of $32,500. The AAO determined that the petitioner's 2009 IRS Form W-3, Transmittal of Wage and Tax Statements, with the accompanying IRS Forms W-2, did not reflect any payment to the beneficiary, and the petitioner did not allege that the beneficiary would be replacing any of the individuals whose IRS Form W-2 it provided. The petitioner also submitted a copy of its unaudited financial statements for 2009 and 2010. The 2009 "General Fund Expenses/Budget" reflects income in excess of expenses of $27,275.29. Additionally, the petitioner's balance sheet for 2009 reflects a loss of $36,673.70. The petitioner's 2010 "Profit & Loss Budget Overview" contains a budget item for payroll expenses but there was no documentation in the record to indicate that the petitioner budgeted for the beneficiary's salary. The petitioner provided a partial copy of its March 2010 bank statement, which reflects an ending balance of $73,563.60. Nonetheless, the AAO

determined that this document alone, especially considering the other evidence of record, was insufficient to establish how the petitioner intends to compensate the beneficiary.

On motion, the petitioner states: "Petitioner submitted information that its budget was in excess of $700,000 and part of those funds would be used to pay beneficiary's salary of $32,500.00. [The beneficiary's] salary is less than 5% of [the petitioner's] annual income." The petitioner submits copies of its unaudited "Profit & Loss vs Actual" financial statement for 2011 and its 2012 budget. The petitioner also provides a February 16, 2012 affidavit from the petitioner's who states that the 2011 financial statement included compensation for the beneficiary in the amount of $35,750 and the approved 2012 budget included compensation for the beneficiary in the amount of $36,822.50. The petitioner states that these documents are evidence that the petitioner "has budgeted for [the beneficiary] over [the] past several years."

The AAO first notes that the financial documentation submitted on motion is dated after the June 14, 2010 filing date of the petition. 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. Comm'r 1978).

Additionally, like the previous budget, the financial documentation provided by the petitioner on motion includes a line item for payroll expenses but does not otherwise indicate that it includes the proposed salary for the beneficiary. alleges that the expenses for 2011 included compensation for the beneficiary. However, as the beneficiary was not authorized to work for the petitioner, it is not clear whether the beneficiary actually received the proposed salary and whether the figure is included in the final (actual) amount. The petitioner did not provide a copy of an IRS Form W-2 that it provided to the beneficiary in 2011. Additionally, the 2011 document indicates budgeted salary and hourly expense of $15,774 with actual expense of $355,397.39. The AAO notes that the petitioner's previous budgets reflected payroll expenses of $382,571 in 2009, $426,438 in 2010, and $394,119 in 2012. The 2011 budget raises questions as to the accuracy of the financial information provided in the petitioner's budgets. The petitioner has failed to provide verifiable documentation of how it intends to compensate the beneficiary.

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 no new evidence has been presented to 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 January 24, 2012 is affirmed. The petition is denied.