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U.S. Citizenship
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Services

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MAR 10 2005

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 122 52976

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The I-360 petition form identifies the petitioner as [REDACTED]. Subsequently, attorney David B. Gardner has requested that the petition be transferred to [REDACTED]. The director complied with this request. There is, however, no clear regulatory provision to allow the transference of an I-360 petition in this manner. Furthermore, the petitioner must sign Part 9 of the Form I-360, thereby affirming (under penalty of perjury) the truth of the factual claims expressed in the petition and accepting legal responsibility for the petition. In this instance, no official of [REDACTED] has signed the Form I-360 or otherwise claimed responsibility for the petition.

The Form I-290B Notice of Appeal was filed by Mr. Gardner, who states that he acts on behalf of [REDACTED]. The record, however, contains no Form G-28 Notice of Entry of Appearance as Attorney or Representative designating Mr. Gardner as that entity's attorney. The record does, however, contain several forms G-28 indicating that Mr. Gardner represents the alien beneficiary.

As noted above, no one from [REDACTED] signed the Form I-360 petition. There are two signatures at Part 9 of the form; that of [REDACTED] of [REDACTED] and that of the alien beneficiary. [REDACTED] has taken no further direct action with regard to this petition. Because the beneficiary signed Part 9 of the petition; the attorney who filed the appeal was authorized only to represent the beneficiary; and there is no clear provision for substitution of petitioners, especially without the express concurrence of all parties involved, the most expedient and justifiable solution at this point is to deem the alien beneficiary to have filed the petition on his own behalf. This action preserves the integrity and continuity of the proceeding, and also avoids rejection of the appeal pursuant to 8 C.F.R. § 103.3(a)(v)(A)(2)(i). Thus, henceforth, the alien beneficiary shall be considered to be the petitioner, and Mr. Gardner shall be considered counsel for the petitioner.

The petitioner seeks classification as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a *mashgiach* (kosher food supervisor) at [REDACTED] bakery and restaurant on behalf of [REDACTED]. The director determined that the prospective employer is not a qualifying tax-exempt religious organization, and that the petitioner has not established that he had the requisite two years of continuous work experience as a *mashgiach* immediately preceding the filing date of the petition.

8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization qualifies as a non-profit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases, evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

According to documentation from the Internal Revenue Service, [REDACTED] tax-exempt status derives from classification not under section 170(b)(1)(A)(i) of the Internal Revenue Code of 1986 (the Code), which pertains to churches, but rather under section 170(b)(1)(A)(vi) of the Code, which pertains to publicly-supported organizations as described in section 170(c)(2) of the Code, "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes," or for other specified purposes. This section refers in part to religious organizations, but to many types of secular organization as well.

Clearly, an organization that qualifies for tax exemption as a publicly-supported organization under section 170(b)(1)(A)(vi) of the Code can be either religious or non-religious. The burden of proof is on the petitioner to establish that its classification under section 170(b)(1)(A)(vi) of the Code derives primarily from its religious character, rather than from its status as a publicly-supported charitable and/or educational institution.

The Code and its implementing regulations do not specifically define "religious organization," but we note that Internal Revenue Service Publication 1828, *Tax Guide for Churches and Religious Organizations*, specifically states that the term "religious organizations" is *not* strictly limited to churches: "Religious organizations that are not churches typically include nondenominational ministries, interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion." *Id.* at 2. The proper test, therefore, is not whether the intending employer is a church *per se*, but rather an entity whose principal purpose is the study or advancement of religion.

The organization can establish this by submitting documentation which establishes the religious nature and purpose of the organization, such as brochures or other literature describing the religious purpose and nature of the activities of the organization. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operations, *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003):

- (1) A properly completed IRS Form 1023;
- (2) A properly completed Schedule A supplement, if applicable;
- (3) A copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization;
- (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

The above list is consistent with the regulatory requirement at 8 C.F.R. § 204.5(m)(3)(i)(B), cited above. The memorandum specifically states that the above materials are, collectively, the "minimum" documentation that can establish "the religious nature and purpose of the organization." Thus, for example, a petitioner cannot meet this burden by submitting only the organization's articles of incorporation. That being said, it is important to note that item (2), Schedule A of Form 1023, is only required "if applicable." If Schedule A is not applicable in a given instance (i.e., the entity does not claim to be a church or an integrated auxiliary thereof), then the petitioner's failure to submit Schedule A is not grounds for denial of that petition.

Also, obviously, it is not enough merely for the petitioner to *submit* the documents listed above. The *content* of those documents must establish the religious purpose of the organization.

The director, prior to denying the petition, made no effort to ascertain whether the petitioner's federal tax exemption derives from its religious character. The director simply denied the petition because the Internal

Revenue Service classified the petitioner under section 170(b)(1)(A)(vi) rather than section 170(b)(1)(A)(i) of the Internal Revenue Code. This finding, the sole stated ground for denial, relies on a flawed and impermissible interpretation of the regulations. The director must, therefore, provide the petitioner with an opportunity to submit the materials outlined in that memorandum, and thereby demonstrate that the prospective employer's tax-exempt status derives primarily from its religious character.

The other basis for denial concerns the petitioner's past experience. The regulation at 8 C.F.R. § 204.5(m)(1) indicates that the "religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition." 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate that, immediately prior to the filing of the petition, the alien has the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on March 7, 2003. Therefore, the petitioner must establish that he was continuously performing the duties of a *mashgiach* throughout the two years immediately prior to that date. Witnesses, including rabbis and restaurateurs, assert that the petitioner has performed the duties of a *mashgiach* since before the qualifying period began.

In denying the petition, the director did not dispute the claims of the witnesses. Instead, the director appears to have taken issue with the means of the petitioner's compensation, stating:

The petitioner indicated that the beneficiary was working as a Mashgiach with various Rabbis and Rabbinic organizations from February 2000 to January 2003, and since January 2003 to present with [REDACTED] (original petitioner). The petitioner further indicated that the beneficiary was unable to receive formal employment compensation as an employee by reason of his inability to obtain a federal tax id number. Partial cash payments and partial in-kind support accommodation, food compensated the beneficiary, and other living expenses provide by the kosher supervision religious organization for which he performed service. In addition to support from the Rabbinic organizations, the beneficiary received supplementary support from family members.

In order to qualify for special immigrant classification in a religious occupation, the job offer for an employee of a religious organization must show that he or she will be employed in the conventional sense of full-time **salaried** employment and will not be dependent on supplemental employment. Because the statute requires two years of continuous experience in the same position for which special immigrant classification is sought, the prior experience must have been full-time salaried employment in order to qualify as well.

Therefore, the evidence is insufficient to establish that the beneficiary has been performing full-time salaried work in this occupation continuously for the two-year period immediately preceding the filing of the petition.

Sic. The meaning of the above passage is not entirely clear, owing in part to grammatical errors in the first paragraph, but the director appears to state that, because the petitioner sometimes received payment in kind rather than a cash wage or salary, his work was not truly "employment" and therefore is not qualifying experience. This conclusion is inconsistent with established case law. In *Matter of Hall*, 18 I&N Dec. 203 (BIA 1982), the Board of Immigration Appeals determined that a religious worker who received room and board rather than a cash wage was, nevertheless, "employed" for immigration purposes.

Of greater concern is the lack of primary, contemporaneous corroboration, and of sufficient details to allow the conclusion that the petitioner performed full-time religious work, rather than relying on secular employment as his primary means of support. These issues must be resolved, but the director, by focusing on the means of compensation, did not allow the petitioner an adequate opportunity to address these deficiencies.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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.