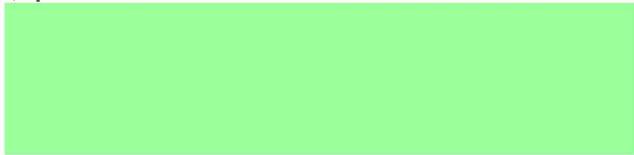


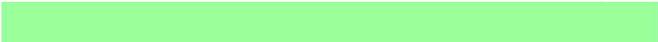


U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **APR 04 2013** Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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:


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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is an Orthodox Jewish congregation. It seeks to classify the beneficiary 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 (rabbinical quality assurance specialist) at [REDACTED]. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel, a letter from the petitioner, copies of the beneficiary's tax returns from 2007 through 2011, and copies of the beneficiary's Forms W-2 from 2010 and 2011.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

(i) for at least 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;

(ii) seeks to enter the United States –

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before September 30, 2012, 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) before September 30, 2012, 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; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The U.S. Citizenship and Immigration Service (USCIS) regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation, either abroad or in lawful immigration status in the United States,

continuously for at least the two-year period immediately preceding the filing of the petition. The petition was filed on December 8, 2011. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work in lawful immigration status throughout the two-year period immediately preceding that date. The regulation at 8 C.F.R. § 204.5(m)(4) also sets forth the requirements for an acceptable break in the continuity of an alien's religious work as follows:

A break in the continuity of the work during the preceding two years will not affect eligibility so long as:

- (i) The alien was still employed as a religious worker;
- (ii) The break did not exceed two years; and
- (iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States....

The USCIS regulation at 8 C.F.R. § 204.5(m)(11) provides:

Evidence relating to the alien's prior employment. Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:

- (i) Received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns.
- (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.
- (iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.

If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

The USCIS regulation at 8 C.F.R. § 204.5(m)(12) 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, 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.

According to the Form I-360 petition and accompanying materials, the beneficiary most recently entered the United States on February 9, 2009 in R-1 nonimmigrant status expiring November 13, 2011. In a letter accompanying the petition, the petitioner stated that the beneficiary worked "as a Mashgiach [sic] for our organization from November 2006 through November 13, 2011," performing duties "similar to" those of the proffered position, described as follows:

In the proffered permanent position, [REDACTED] will be responsible for the religious function to ensure that kosher standards are maintained in the manufacture and production of Matzos at the [REDACTED]. [REDACTED] will also be responsible for the preparation of Matzo for our community. The entire process of making Matzo from the initial planting to the baking process, packaging and distribution of the Matzo is always overseen and supervised by the Mashgiach. Furthermore [REDACTED] will be responsible for overseeing the milling process in preparation for baking of the Matzos, inspect the quality of the wheat used to manufacture the Matzos from harvest to the final product, supervision of every aspect of production to ensure that Jewish dietary laws and customs are observed at all times, ensuring that the operations are Kosher and that staff follow guidelines in the areas of personal hygiene, safety, sanitation. He will coordinate activities of other units within the bakery to conduct one on one training sessions and hold group meetings with new and seasoned staff to ensure that all Jewish dietary laws, standards and guidelines are followed.

In the employer attestation portion of the petition, question 5.e, "List of the specific address(es) or location(s) where the alien will be working, the petitioner stated: [REDACTED] Brooklyn, NY 11211."

The petitioner submitted a copy of the beneficiary's 2010 Form W-2, indicating that he received \$21,750 from [REDACTED] during that year. The petitioner also submitted an uncertified copy of the beneficiary's Form 1040 tax return for 2010, as well as copies of several biweekly paystubs from [REDACTED] issued during 2011.

In a letter submitted with the petition, counsel for the petitioner stated:

Please note a change of status application from R-1/R-2 to B-2 classification has been filed and is currently pending with the immigration service on behalf of [REDACTED] and his accompanying family members. He continues to have full responsibility of the mazta [sic] making bakery.

On January 31, 2012, USCIS issued a Request for Evidence (RFE), in part requesting evidence "that the beneficiary has been employed and receiving compensation for said employment during the two year period immediately preceding the filing of the petition." The notice also requested an explanation for any break in the continuity of the work and regarding counsel's statement about the pending change of status and the beneficiary's continuing responsibility at the bakery.

In a letter responding to the notice, the petitioner stated the following:

In response to your question please be advised that being that [REDACTED] R1 status had expired, he requested to change his status to a (B-2) visitor classification in order to maintain legal status in the United States while his children remain in school.

In regard to [REDACTED] [sic] involvement with our Congregation and its matzoh bakery, please not that [REDACTED] **is not** employed by the congregation or our bakery. Since [REDACTED] ceased his employment at the end of his R-1 visa status, a temporary substitute has been assigned to his job duties. However, the substitute does not possess the high level of Jewish Law (halachik) expertise that [REDACTED] has in order to answer complicated questions regarding Jewish Law. Therefore, [REDACTED] remains our ultimate authority as an unpaid consultant on questions of Jewish religious law.

(Emphasis in original). The petitioner submitted a copy of the beneficiary's 2011 Form W-2 from [REDACTED] indicating compensation of \$34,500 for the year, as well as an uncertified copy of his 2011 tax return and additional copies of paystubs for that year. The petitioner also submitted photographs of its facilities including the bakery, and photographs "of the Matzo making process within the bakery."

On July 20, 2012, USCIS issued a Notice of Intent to Deny the petition (NOID), based in part on the negative findings of a compliance review site visit conducted on May 15, 2012. The notice stated the following:

A site check at the stated premises [REDACTED] on 5/15/12 in Brooklyn NY resulted in the observation that the bakery was in fact not operating, but closed;

Telephonic contact made with [REDACTED] on 5/23/[2012] resulted in [REDACTED] verification of his having filed and signed the petition in [sic] behalf of the beneficiary; however, [REDACTED] indicated that he did not know the beneficiary [REDACTED]

GSI [Government Site Inspector] was then referred to [REDACTED] Bakery Site Supervisor, who indicated that Beneficiary had been working for the bakery in November 2006 and stopped working in November 2011 when the beneficiary's R1 visa expired;

The observations noted by GSI of the stated bakery location (claimed site of the beneficiary's work for the past five years) showed that the premises were not operating on a daily basis and the claims of the petitioner with regard to a permanent full time job offered to the beneficiary could not be verified.

In response to the NOID, the petitioner submitted a letter from [REDACTED], bakery site supervisor, in part explaining that "Matzoh must be Shmurah 'guarded' from the time the wheat is cultivated and harvested." [REDACTED] stated:

It was therefore always a part of [REDACTED] position as Mashgiach, or Kosher Supervisor during the years we employed him that he would supervise the religiously sanctioned sourcing and cultivation of the appropriate wheat from the field. This demand of the laws of Shmurah Matzoh-making takes [REDACTED] on travels across the country to find the driest harvest of wheat available in order to be in strict compliance with the religious tenets of Matzoh production at all times of the year. ... Therefore the Bakery is not open year-round, but only during the religious season when the Matzohs are prepared to be consumed. The rest of the year entails selecting and transporting the Matzoh in observance of strict religious laws. [REDACTED] would oversee the transport of the wheat in religiously approved 80 lb sacks which were personally sealed by him and he would further accompany the wheat in its travels from around the country to the Bakery in Brooklyn, all the while ensuring that no moisture or contamination would come into contact with the wheat. This explains why at the visit on May 15, 2012 the Bakery was not open.

[REDACTED] also asserted that the beneficiary was employed as mashgiach at [REDACTED] [REDACTED] for five years until the expiration of his R-1 status in November 2011.

On August 27, 2012, the director denied the petition. The director found that the petitioner failed to establish that the beneficiary was engaged in qualifying work in lawful immigration status "during the entire prescribed two-year period (12/8/2010 – 12/8/2012)," as his valid R-1 nonimmigrant status expired on November 13, 2011. The director also noted that the beneficiary's purported responsibility of "traveling in search of the driest harvest of wheat" was not included in the Form I-360 petition, and found that the petitioner had not submitted sufficient documentary evidence to "corroborate" the explanations provided in response to the NOID.

On appeal, the petitioner acknowledges that the beneficiary "was not employed for a period of twenty five (25) days from (November 13, 2011 when his 5 year-long R-1 classification expired) through December 8, 2011 when his I-360 petition was received at your office." However, petitioner and counsel argue that this period was very short, and assert that the beneficiary "took no vacations" during his five years of employment. Counsel asserts that "a favorable exercise of prosecutorial discretion is available," arguing that "strict compliance with the provisions of INA 204.5(m)(4) can be waived when *de minimis*." In his brief, counsel cites a USCIS Supplemental Questions and Answers document which suggests that normal vacations will not be seen as a break in the required religious work, as well as a USCIS Memorandum regarding the use of prosecutorial discretion.

The AAO notes that the documents cited by counsel are not binding authorities nor do they create any right or entitlement to any benefit. The regulations do not provide any exception to the requirement of two years of continuous religious work beyond those listed under 8 C.F.R. § 204.5(m)(4). The petitioner has acknowledged a break in the beneficiary's religious work and has not established that it meets the requirements of an acceptable break according to the regulations. Furthermore, regardless of the length of the break, the AAO finds that the petitioner has not sufficiently established the continuity of the beneficiary's qualifying religious work prior to the expiration of his R-1 status.

The compliance review found that the bakery at which the beneficiary purportedly worked was not in continuous operation, thereby calling into question the petitioner's assertions regarding the beneficiary's full-time employment. In response, the petitioner asserted that the bakery is only open a portion of the year, but that the beneficiary spends most of the year traveling in order to search for the driest wheat and to supervise every aspect of cultivation, harvest, and transportation of the wheat. However, as noted by the director, the petitioner did not submit any documentary evidence in support of the assertion that the beneficiary spends most of the year travelling around the country in order to conduct his religious work. 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)). Further, the petitioner provides no explanation as to why it did not mention that most of the beneficiary's work would be conducted off-site when it was asked to list the "specific address(es) or location(s) where the alien will be working." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits

competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel argues on appeal that the director erroneously requires the petitioner to “overwhelmingly convince” USCIS of its need for a full time mashgiach. The AAO agrees that this statement does not accurately describe the petitioner’s standard of proof. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has not submitted documentary evidence beyond its own assertions to rebut the compliance review findings and to establish that the beneficiary was continuously engaged in qualifying religious work despite the limited seasonal operation of his listed work location. Accordingly, the AAO finds that the petitioner has not met its burden of proof.

For the reasons discussed above, the AAO agrees with the director’s determination that the petitioner failed to establish that the beneficiary has the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition.

As an additional matter, the AAO finds that the petitioner failed to establish that the beneficiary will be working for a bona fide non-profit religious organization in the United States. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial 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).

The United States Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(3) provides that in order to be eligible for classification as a special immigrant religious worker, an alien must be coming to work for a bona fide non-profit religious organization in the United States, or a bona fide organization which is affiliated with the religious denomination in the United States. The regulation at 8 C.F.R. § 204.5(m)(5) states, in pertinent part:

(5) Definitions. As used in paragraph (m) of this section, the term:

Bona fide non-profit religious organization in the United States means a religious organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the IRS confirming such exemption.

Bona fide organization which is affiliated with the religious denomination means an organization which is closely associated with the religious denomination and which

is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code and possessing a currently valid determination letter from the IRS confirming such exemption.

Tax-exempt organization means an organization that has received a determination letter from the IRS establishing that it, or a group that it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the Internal Revenue Code . . .

The regulation at 8 C.F.R. § 204.5(m)(8) states:

Evidence relating to the petitioning organization. A petition shall include the following initial evidence relating to the petitioning organization:

- (i) A currently valid determination letter from the Internal Revenue Service (IRS) establishing that the organization is a tax-exempt organization; or
- (ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or
- (iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, as something other than a religious organization:
 - (A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;
 - (B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;
 - (C) Organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization; and
 - (D) A religious denomination certification. The religious organization must complete, sign and date a religious denomination certification certifying that the petitioning organization is affiliated with the religious denomination. The certification is to be submitted by the petitioner along with the petition.

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On the Form I-360 petition, the petitioner identified itself as the prospective employer, and listed its "IRS Tax #" as [REDACTED]. Accompanying the petition, the petitioner submitted an May 28, 1991 letter from the IRS confirming that [REDACTED] Employer Identification Number (EIN) [REDACTED] is a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code.

In letters accompanying the petition, counsel stated that the petitioning congregation "operates a wide variety of religious organizations and affiliated businesses and institutions," and the petitioner indicated that the beneficiary would be working at [REDACTED] which it described as "our kosher bakery plant." As mentioned above, the petitioner submitted paystubs and tax documents indicating that the beneficiary received compensation from [REDACTED]. The beneficiary's Form W-2 from the bakery identified the "Employer's EIN" as [REDACTED].

The petitioner also submitted a letter from the New York State Department of Agriculture and Markets, granting the petitioner a "religious exemption" from licensing, inspections, and regulations for its matzoh bakery.

In the July 20, 2012 NOID, USCIS found that the petitioner failed to document the affiliation between the bakery and the petitioning organization, and additionally stated the following:

The beneficiary's immediate employer as shown by the W2s is a bakery that has not been established as a bona fide non-profit religious organization as described in section 501(c)(3) of the Internal Revenue Code...

In response to the NOID, the petitioner submitted a deed showing its ownership of the property at the bakery's address, and an Assumed Name Certificate from the New York State Department of States Division of Corporations stating that the petitioner does business under the assumed name [REDACTED]. The petitioner submitted letters from its accountant and the bakery site supervisor, both of which asserted that the bakery is affiliated with the petitioner as one of its many subsidiary organizations. Counsel for the petitioner asserted that "[t]he [REDACTED] is an affiliated organization of the IRS section 501(c)(3) tax exempt Congregation."

While the petitioner has established that it qualifies as a bona fide non-profit religious organization according to the regulations, it has not established that the beneficiary will in fact be employed by the petitioning organization rather than by [REDACTED]. Although the petitioner submitted evidence to establish an affiliation between itself and the bakery, it has consistently indicated that the relationship is that of a parent and subsidiary. Despite the affiliation between the two organizations, the petitioner has not established that Congregation [REDACTED] applied for or was granted a group exemption which would apply to subordinate organizations.

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Further, the AAO finds that the petitioner has not submitted sufficient evidence to establish that the bakery qualifies as “a bona fide organization that is affiliated with the religious denomination” under the regulations. The regulations still require such an organization to possess a valid determination letter from the IRS confirming its tax-exempt status, as well as requiring documentation of the organization’s religious nature and purpose. The petitioner has not submitted a determination letter from the IRS which applies to [REDACTED]

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.