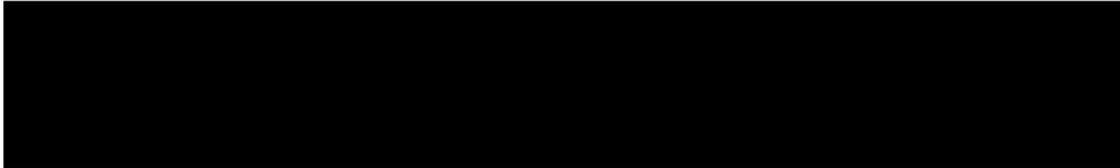


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



C₁

DATE: **APR 05 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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:

SELF REPRESENTED

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 immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a religious organization that ensures that Jewish dietary law is kept in establishments that state that they are kosher. 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 or kosher kitchen supervisor. The director determined that the petitioner had failed a compliance review based on noncompliance with U.S. Citizenship and Immigration Services (USCIS) nonimmigrant worker regulations.

On appeal, the petitioner submits a brief and additional evidence.

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 petitioner filed the Form I-360 petition on June 9, 2008. The AAO notes that the beneficiary possessed R-1 nonimmigrant status to work for the petitioner from January 27, 2005 to January 26, 2008. Prior counsel for the petitioner stated in a letter dated June 5, 2008 that the beneficiary served as a volunteer mashgiach for the petitioner from April of 2004 until January of 2005 and then as a

full-time paid mashgiach for the petitioner from January of 2005 until the present. Prior counsel for the petitioner stated that the petitioner placed the beneficiary with the [REDACTED] in January of 2005. Prior counsel for the petitioner stated that the beneficiary's duties include washing and inspecting meats and vegetables while supervising others as they prepare and cook food to ensure that they are following the Jewish dietary laws, inspecting deliveries, and ensuring that Sabbath dinners are prepared and served according to the Jewish religion.

The Form I-360 petition states that the petitioner will compensate the beneficiary \$27,040.00 each year plus overtime based on religious holidays and special events. The petitioner submitted Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements from the [REDACTED] to the beneficiary for work performed in 2005 to 2008 in the respective amounts:

- 2005 – \$29,639.25
- 2006 – \$34,554.26
- 2007 – \$39,813.45
- 2008 – 28,156.24

The petitioner also submitted an IRS Form W-2 Wage and Tax statement from its organization to the beneficiary for work performed in 2008 in the amount of \$7,038.45.

On January 19, 2010, the director issued a Notice of Intent to Deny (NOID) the petition based on information obtained through the compliance review process (including a site inspection on August 13, 2008). The director stated that USCIS visited the petitioner's headquarters and found a very small work space with several computers and two employees. The director stated that the size of the office was inconsistent with the number of petitions the petitioner had filed in recent years. The director stated that [REDACTED] informed the USCIS officer telephonically that his organization employed approximately 80 people, 50 of which were full-time and 30 of which were part-time.

The director also noted that the petitioner's profit and loss statement for approximately the first half of 2008 revealed only \$168,331.29 in payroll expenses for the petitioner's 80 employees, which would amount to a very low average salary for each individual. The director concluded that the petitioner's organization appears to petition for religious workers and then hire them out to kosher eateries, acting as a quasi job placement facility.

In response to the director's January 19, 2010 NOIR, prior counsel asserted that the petitioner maintained control of its employees who worked with kosher eateries. The petitioner also submitted documentation showing that the [REDACTED] was a 501(c)(3) IRS tax exempt organization like the petitioner's organization. The petitioner additionally submitted an agreement between its organization and the [REDACTED] which states that all mashgiach expenses are paid directly to the mashgiach by the [REDACTED]. The agreement stated that the [REDACTED] would also pay the petitioner a monthly fee for the kosher certification.

In her March 8, 2010 denial decision, the director found that the beneficiary was actually working for a different entity than the petitioner's organization, which had been operating as a quasi job placement facility for foreign religious workers.

The director noted that 8 C.F.R § 204.5(m)(10) specifically states that a petitioner and not a third party must provide verifiable evidence of how it intends to compensate the alien. The director stated that there is no provision in the regulations that would allow another organization to compensate a nonimmigrant religious worker instead of a petitioner. The director additionally highlighted that 8 C.F.R § 214.1(e) requires a nonimmigrant who is permitted to engage in employment only to engage in employment that has been authorized. The beneficiary has been working for the [REDACTED] which does not have authorization to employ him. Such unauthorized employment constitutes a failure to maintain status. Accordingly, the director found that the petitioner was not in compliance with USCIS religious worker regulations and denied the petition.

On appeal, the petitioner states that the job duties for a mashgiach require him or her to work in the field, so that is why USCIS did not find more employees at its office during the site visit. The AAO finds this argument to be persuasive regarding the site visit findings related to the petitioner's facility size.

The petitioner also states that many of employees are either part-time, volunteer, or paid by supervised facilities, so its financial information did not reveal substantial amounts paid out in employee salaries. The petitioner asserts that the petitioner hired the beneficiary and has always dictated the terms of his employment, including his rate of pay and instruction. The petitioner states that a mashgiach acts as an extension of a rabbi or religious organization and does not take orders from the facility which he or she supervises. The petitioner underscores that the beneficiary's position is fully religious in nature, so no other type of immigration benefit would be appropriate. The AAO does not question the religious work being performed and agrees that this type of outside employment would explain the petitioner's relatively low salary pay outs. However, as it relates to the beneficiary, the fact that he was not employed by the petitioner during the requisite two-year period is disqualifying.

The petitioner additionally states that, in the spirit of cooperation with USCIS, it is now paying its employees directly even though this change increases operational costs. Such a fact, however, does not remedy the petitioner's past practice and specifically the fact that the beneficiary was not an employee of the petitioner but rather of the [REDACTED]. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). 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 regulation at 8 C.F.R. § 204.5 (m)(4) states:

(4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. 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. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.

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

(11) 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 beneficiary failed to maintain status as an R-1 nonimmigrant when he began working for the [REDACTED]. Any employment based upon the petitioner's approval as an R-1 nonimmigrant was authorized only for the organization that petitioned for him, in this case the petitioner.

The regulations at 8 C.F.R. §§ 214.2(r)(3)(ii) and (ii)(E) indicated that the beneficiary could only work for the specific organizational unit of the religious organization which will be employing and paying the beneficiary. Further, the regulation at 8 C.F.R. § 214.2(r)(6)(2006) indicated that "a different or additional organizational unit of the religious denomination seeking to employ or engage the services of a religious worker" shall file a new petition and that "any unauthorized change to a new religious organizational unit will constitute a failure to maintain status . . ." Finally, under 8 C.F.R. § 214.1(e), a nonimmigrant may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status.

As soon as the beneficiary began work for the [REDACTED] he failed to maintain his status as an R-1 nonimmigrant.

The regulation at 8 C.F.R. § 204.5(m)(4) prohibits USCIS from considering work that was not "in lawful immigration status" and any "unauthorized work in the United States." The regulation at 8 C.F.R. § 204.5(m)(11) requires that "qualifying prior experience . . . must have been authorized under United States immigration law." Therefore, the regulations, separately and together, require that USCIS must have affirmatively authorized the beneficiary to perform any claimed religious functions while in the United States; it cannot suffice to claim that an alien entered the United States as an R-1 nonimmigrant, who, after his status expired, ended up volunteering for a religious organization. The record therefore reflects that the beneficiary was not in an authorized immigration status during the two years immediately preceding the filing of the visa petition. Accordingly, any work that he may have performed in an unauthorized status would interrupt the continuity of the qualifying work experience.

The petitioner has failed to submit sufficient documentation to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the petition.

Under 8 C.F.R. §§ 204.5(m)(4) and (11), the petition cannot be approved, because the beneficiary's religious employment in the United States during the qualifying period was not authorized under United States immigration law.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed.