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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



C,

DATE: **APR 26 2012** 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 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, (“the director”) denied the employment-based immigrant visa petition. The petitioner timely filed an appeal to the denied 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 rabbinical council. 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 a kosher food production supervisor. On July 23, 2007 the petitioner filed the Form I-360 petition. On September 20, 2007, the director sent out a Request For Evidence (“RFE”), to which the petitioner timely responded. On December 7, 2009, the director issued a Notice of Intent to Deny, (“NOID”), to which the petitioner also timely responded. On June 16, 2010, the director denied the petition, noting the petitioner’s failure of a site verification inspection. First, the director denied the petition because she found that the beneficiary had not continuously worked in the United States in lawful status. Second, the director found that the petitioner failed to establish its ability compensate the beneficiary for his employment in the United States. Third, the director found that the petitioner did not submit a valid IRS determination letter.

On appeal, the petitioner submits a brief to challenge the director’s adverse finding.

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 first issue is whether the beneficiary possesses two years of continuous lawful work experience in the United States immediately prior to the filing of the form I-360 petition. The regulation at 8 C.F.R. § 204.5(m)(4) states that:

(m) *Religious workers.* This paragraph governs classification of an alien as a special immigrant religious worker as defined in section 101(a)(27)(C) of the Act and under section 203(b)(4) of the Act. To be eligible for classification as a special immigrant religious worker, the alien (either abroad or in the United States) must:

* * *

(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.
(Emphasis added)

Further, the regulation at 8 C.F.R. § 204.5(m)(11) states that:

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.
(Emphasis added)

The Form I-360 petition was filed on July 23, 2007. According to the regulation above, the beneficiary must have been working in lawful status for two years prior to the filing of the petition, from July 23, 2005 to July 23, 2007. The record reflects that during this time period the beneficiary was approved as an R-1 nonimmigrant to work for the Orthodox Rabbinical Board from June 1, 2005 to May 31, 2008. Although the director did not cite the specific regulation, she essentially found that the beneficiary did not satisfy the two years of continuous lawful work experience based upon 8 C.F.R. § 214.1(e). The director wrote:

Second, as stated in 8 C.F.R. 214.1(e), a nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Nonimmigrant religious workers may work for the petitioner only. Any employment by nonimmigrant religious worker beyond the scope, location, and duration of the employment authorized by USCIS (even if the worker is being employed by an organization which has a written or verbal agreement with a petitioner) constitutes unauthorized employment and a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act. In this case, the record of evidence indicates that the beneficiary has been working for [REDACTED] USCIS records reflect that this organization has no authority to employ the beneficiary.

As an initial matter, the AAO notes that the director erred in finding that the “the record of evidence indicates that the beneficiary has been working for [REDACTED] There is no evidence in the record that the beneficiary worked for the [REDACTED] However, there is evidence in the record that shows that the beneficiary worked for [REDACTED] There are IRS Forms W-2 from 2005 and 2006 showing that this company paid the beneficiary a salary directly. As correctly determined by the director, employment for an entity other than the petitioning R-1 employer violates the terms of the beneficiary’s R-1 status. The regulations at 8 C.F.R. § 214.2(r)(3)(ii)(E) as were in effect when the beneficiary was approved as an R-1 nonimmigrant, indicated that the beneficiary could only work for the specific organizational unit

of the religious organization which would be employing and paying the beneficiary. Further, the regulation at 8 C.F.R. § 214.2(r)(6) 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 . . .”

Further, the regulation at 8 C.F.R. § 274a.12(b) provides, in pertinent part:

Aliens authorized for employment with a specific employer incident to status. The following classes of non-immigrant aliens are authorized to be employed in the United States by the specific employer and subject to the restrictions described in the section(s) of this chapter indicated as a condition of their admission in, or subsequent change to, such classification...

(16) An alien having a religious occupation, pursuant to § 214.2(r) of this chapter. An alien in this status may be employed only by the religious organization through whom the status was obtained;

Finally, the regulation at 8 C.F.R. § 214.1(e) states, in pertinent part:

Employment... Any other nonimmigrant in the United States may not engage in an employment unless he has been accorded a nonimmigrant classification which authorizes employment or he has been granted permission to engage in employment in accordance with the provisions in this chapter. A nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a non-immigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

As soon as the beneficiary began employment with [REDACTED] he was in violation of his R-1 status, and failed to maintain that status. Therefore, he did not possess two years of continuous lawful work experience in the United States immediately prior to the filing of the form I-360 petition as required by 8 C.F.R. §§ 204.5(m)(4) and (m)(11).

In the record, the prior counsel addressed this issue in response to a request for evidence. He wrote:

[REDACTED] place is a kosher food facility that was under the supervision of the ORB organization. The location is now closed and not in operation. The ORB placed [REDACTED] in that facility as the ORB mashgiach and representative. It was the mistake of the ORB in failing to demand that the [REDACTED] pays directly to ORB and from there, the ORB will pay a salary to the mashgiach. While the ORB is aware of that mistake and corrected that recently, during a period of time in which the beneficiary was placed in that location, the owners paid directly to the beneficiary and continued to pay the supervision monthly fee to the ORB. Nonetheless, at no time was [REDACTED] the employee of [REDACTED]. He is the employee of the ORB

and has been since June of 2005. While we understand now that this must be documented in pay stubs, 1099 and W-2, at the time we were not aware of that requirement. We do request, however, that you do not treat this as a second employer or a former employer. The beneficiary does not have any other employer, other than the ORB since obtaining his nonimmigrant visa approval in the R-1 status in June 2005.

The AAO is not persuaded by this argument. The record reflects that [REDACTED] paid the salary to the beneficiary directly, and recorded that in a Form W-2 directly to the beneficiary. The AAO understands the nature of the beneficiary's work for the petitioner. However, [REDACTED] treated the beneficiary as an employee, by giving him a Form W-2 for each year in 2005 and 2006. The fact that the petitioner now pays the beneficiary directly does not nullify its past practice.

On appeal, present counsel also argues that:

While both R1 visa and the I360 petition have similar requirements, under the law they are viewed as two completely separate statuses and applications, and thus any issue that the Service has with the employer's current nonimmigrant visas practices should not affect or prejudice the adjudication of current or future immigrant visa petitions.

The AAO acknowledges that the director cited the R-1 regulations and not the regulations for the immigrant petitions. However, the R-1 regulations that the director applied are also directly applicable to the regulations in 204.5(m), as explained above. The R-1 regulations and the beneficiary's maintenance of his prior R-1 nonimmigrant status are directly relevant to a determination of whether the petitioner has established the beneficiary's continuous lawful employment under 8 C.F.R. §§ 204.5(m)(4) and (11). Counsel also stated, "the service should look at the qualifications and merits of the I-360 petition independently as a prospective position and determine that all the requirements are met." The record reflects that during the two year period immediately preceding the filing of the petition, the beneficiary violated his R-1 status by working for an employer for which he was not authorized and therefore failed to maintain his status. Accordingly, the petitioner has failed to establish that the beneficiary meets the requirements of the regulations above.

The second issue is whether the petitioner has established its ability to compensate the beneficiary for his employment in the United States. The regulation at 8 C.F.R. § 204.5(m)(10) states that:

Evidence relating to compensation. Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence 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. If IRS documentation, such as IRS Form W-2

or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

Evidence of ability and intent to compensate can be established by documentary evidence that the proffered salary was paid to the beneficiary in the past or through budget set aside for salary, leases, etc. As it relates to the beneficiary's proffered salary, the petitioner claimed two separate wages. First, in the attestation clause on the Form I-360 petition, submitted with the Form I-360 petition on July 23, 2007, the petitioner stated that the beneficiary's salary would be "\$10.00/hour," which equates to \$400.00 per week. However, in a letter to the director dated December 10, 2007, the petitioner stated "the beneficiary has been working a full time, 40 hour week position. The beneficiary's rate of pay is \$1,000 per week and on weeks of holiday time he receives more funds and on weeks where he works less than five days, he receives less income." Because the petitioner has provided a discrepant rate of pay, the AAO cannot determine how much the petitioner intends to compensate the petitioner if the Form I-360 petition were approved.

Despite these discrepant rates, the AAO will next examine whether the ability and intent to compensate can be shown through past evidence. In the record, there are two IRS Forms 1099-MISC submitted into the record:

- In 2005, the petitioner submitted an IRS Form 1099-MISC showing that it paid the beneficiary \$11,925.
- In 2006, the petitioner submitted an IRS Form 1099-MISC showing that it paid the beneficiary \$24,629.
- In 2007, the petitioner submitted no IRS Forms W-2 or 1099 MISC

No matter which wage is used, the petitioner failed to show past compensation to the beneficiary. The AAO notes that for 2005, the wage paid to the beneficiary is a little over half of the proffered wage of the attestation clause, and well below the proffered wage set forth in the letter to the director dated December 10, 2007. Further, the petitioner did not submit any evidence of past compensation for 2007. Therefore, the petitioner has not established past compensation through payment of the beneficiary's salary to determine whether the petitioner had the ability to compensate the beneficiary.

As the petitioner is unable to show its ability to compensate through past compensation, the AAO will next look at the financial documentation submitted by the petitioner to determine whether the petitioner has the ability to compensate the beneficiary. For 2006, the petitioner did not submit a budget, but rather payroll summaries for all of its employees. As an initial matter, these documents were not prepared and certified by an accountant. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. A review of these documents shows that the beneficiary had been slated to earn \$13.00 an hour which

equates to \$520.00 per week. This is found in the document from 2006 that lists all of the *mashgiach's* hourly salaries in the record from 2006. This adds to the confusion about the beneficiary's salary, since it is different from both the Form I-360 petition attestation clause and the letter that [REDACTED] provided to the director.

The petitioner also submitted a copy of its Form I-990 from 2005. The petitioner's net current assets were \$35,564. Given the discrepant claims regarding the beneficiary's salary, the AAO is unable to determine whether this is sufficient to show the petitioner's ability to compensate the beneficiary, since the beneficiary's salary could be \$20,800, \$27,040, or \$52,000, depending on which salary one uses. Further, compensation of officers was listed at \$123,337 and other wages and salaries totaled \$83,600. However, given how many employees the petitioner has, it is unclear whether there is enough salary in the budget to pay the beneficiary's salary, whatever that may be.

Finally, the petitioner submitted payment records between 2005 and 2007. However, these payments are not consistent as to when they were issued or for the amount which they were issued. Therefore, it is unclear to the AAO whether these payment records show that the petitioner has the ability to pay the proffered wage to the beneficiary.

Overall, the evidence in the record has not established that the petitioner has the ability to compensate the beneficiary. For this reason, the petition will be dismissed on this basis as well.

The third issue is whether the petitioner qualified as a bona fide non-profit religious organization at the time of filing the petition. The regulation at 8 C.F.R. § 204.5(m)(1) states that:

For at least the two years immediately preceding the filing of the petition have been a member of a religious denomination that has a bona fide non-profit religious organization in the United States.

The regulation at 8 C.F.R. § 204.5(m)(5) further states:

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.

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

(8) 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.

According to the regulations above, the petitioner must show that it is a member of a bona fide non-profit religious organization. The director denied the petition on this basis, finding that not only does the petitioner need to show that it is a tax exempt organization, but also all of the organizations that the beneficiary works for as well. The regulation only refers to the petitioner, not the petitioner and all of the organizations that the beneficiary worked for. In the present case, the petitioner submitted a letter from the IRS which states that the petitioner had 501(c)(3) status since May of 2002. Therefore, the AAO is satisfied that the petitioner was a bona fide non-profit religious organization at the time of filing the petition. As a result, this part of the director's decision will be withdrawn.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed