

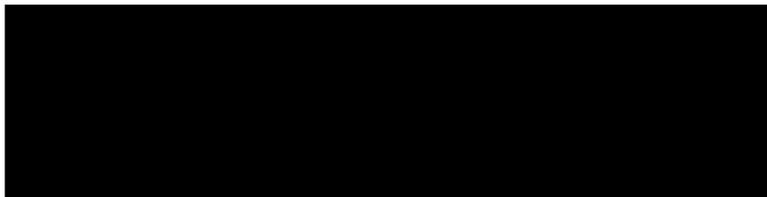
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

**PUBLIC COPY**

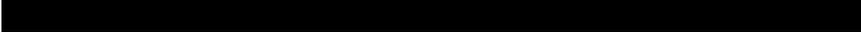


D13

Date: MAY 09 2011 Office: CALIFORNIA SERVICE CENTER

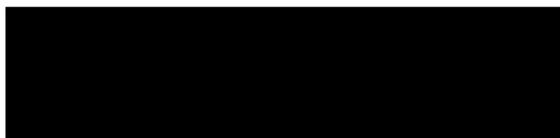
FILE: 

IN RE: Petitioner: 

Beneficiary: 

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:

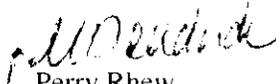


INSTRUCTIONS:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an orthodox Jewish rabbinical council, whose purpose is “to provide kosher supervision, Rabbinical arbitration and undertaking communal religious endeavors.” It seeks to extend the beneficiary’s classification 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 mashgiach (kosher food production supervisor). The director determined that the petitioner had not established how it intends to compensate the beneficiary and that the petitioner had not established that the “affiliate” at which the beneficiary is to work qualifies as a bona fide nonprofit religious organization.

The director’s decision also encompasses the beneficiary’s work during the period of his prior R-1 nonimmigrant approval and whether he has worked for another employer without prior U.S. Citizenship and Immigration Service (USCIS) approval. The regulation at 8 C.F.R. § 214.2(r)(12) requires that any request for an extension of stay as an R-1 must include initial evidence of the previous R-1 employment (including Internal Revenue Service (IRS) documentation if available). 8 C.F.R. § 214.1(e) states that a nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act. Under 8 C.F.R. § 214.2(r)(5), extension of status is available only to aliens who maintain R-1 status.

The issues of the beneficiary’s prior employment and maintenance of R-1 status are significant only insofar as they relate to the application to extend that status. An application for extension is concurrent with, but separate from, the nonimmigrant petition. There is no appeal from the denial of an application for extension of stay filed on Form I-129. 8 C.F.R. § 214.1(c)(5). Because the beneficiary’s past employment and maintenance of status are extension issues, rather than petition issues, the AAO lacks authority to decide those questions, and we will discuss them only as they apply to the issue of the beneficiary’s employer.

On appeal, the petitioner states that “[i]t is our firm belief that the petition was denied on the lack of understanding of Jewish religious law and customs” and claims that the beneficiary works for, and is supervised by, the petitioner. The petitioner submits a brief and additional documentation in support of the appeal.

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.

Although the director determined that the petitioner had not established the bona fides of the organization at which the beneficiary will work and how it intends to compensate the beneficiary, the issue presented stated more simply is whether the petitioner has established that the beneficiary seeks to enter the United States to work for the petitioning organization.

In a February 21, 2006 letter submitted in support of the petition, [REDACTED] the petitioner's [REDACTED] Administrator, stated:

[The petitioner] is made up of 35 rabbis representing their Orthodox Synagogues . . . Our purpose is to ensure that food produced or sold in this area that purports to be [REDACTED] is indeed kosher. We accomplish this by supervising the production of food in the [REDACTED] for this purpose we have about 45 [REDACTED] food production supervisors working in the field.

In his January 7, 2008 letter accompanying the petition, counsel stated:

The Beneficiary . . . was sub-contracted through [the petitioner] to work as the Mashgiach for the [REDACTED] at the University of Florida. Although he is a direct full-time employee of the [petitioner, he] is paid directly through [REDACTED] . . . The Agreement signed between [the petitioner] and [REDACTED] stipulates that [the petitioner] will identify and assign the [ ] certified [REDACTED] to provide the [REDACTED]. [REDACTED] then pays [the petitioner] a monthly fee for their services and pays the salary of the assigned [REDACTED]. Therefore, the [REDACTED] reports to the [petitioner], who in turn can extend the [REDACTED] Certification to [REDACTED], as long as all Jewish dietary laws are kept. The

[petitioner] has final decision making status on [the beneficiary's] ability to fill this position from a religious perspective.

The petitioner submitted a copy of its 2004 contract with ██████████, which provided that ██████████ would pay a registration fee of \$350 and a monthly fee of \$500. The agreement also provided that if the premises required kashering, "there will be a kashering fee. This fee is to be paid directly to the kashering personnel at the time of kashering." The agreement also provided that the petitioner had the right to substitute "its representatives as it sees fit."

In a January 29, 2007 letter, ██████████, the executive director of ██████████ at the University of Florida ██████████, stated:

██████████ contracts the services of the [petitioner] to provide the religious supervision of the dining services we offer to students. As such, we pay the salary of the Mashgiach (the kitchen supervisor) and all benefits, taxes, etc. The Mashgiach is an employee of ██████████ however is also responsible to the [petitioner].

Mr. ██████████ further stated that the beneficiary, the "current person serving as the Mashgiach," was interviewed by the petitioner, who then recommended him to ██████████, "and continues to monitor his progress and job status. [The petitioner] considers him to be a part of their organization serving at ██████████ to ensure their religious supervision of out dining program." The petitioner provided a copy of a job description for the "primary mashgiach" at ██████████ signed by the beneficiary, Mr. ██████████ and another individual, whose position in either organization is not identified in the record. The job description indicates that the mashgiach would report to the executive director, Mr. ██████████, and would be supervised by the associate director of Jewish life. The job description sets the working hours, indicates that the mashgiach was expected to "integrate fully" into the staff of ██████████ and attend all staff meetings, and could be assigned other duties by the associate or executive director. The petitioner also provided copies of the beneficiary's Internal (IRS) Form W-2, Wage and Tax Statement, for 2005 and 2006 and earnings statements dated from July 26, 2007 to November 28, 2007, indicating that the beneficiary was paid by ██████████

On August 13, 2008, an immigration officer (IO) visited the petitioner's address listed on the Form I-129, Petition for a Nonimmigrant Worker, for the purpose of conducting an onsite inspection as part of a compliance verification review. The IO noted that the petitioner had been the sponsor of 26 immigration petitions since 2005 and that ██████████ stated that the petitioner employed 50 full-time and 30 part-time employees. The IO questioned both the size of the petitioner's facilities to house 80 employees and the financial ability of the petitioner to compensate 80 employees. The IO questioned whether the petitioner was acting as a "quasi job placement facility," petitioning for religious workers and then hiring them out to other employers. On December 10, 2009, the director notified the petitioner of her intent to deny the petition based on the results of the onsite inspection.

The regulation at 8 C.F.R. § 214.2(r)(1) provides, in pertinent part:

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:

(iv) Be coming to or remaining in the United States at the request of the petitioner to work for the petitioner.

Further, the regulation at 8 C.F.R. § 214.2(r)(11) provides compensation must come from the petitioner, not a third party.

On the Form I-129 Supplement submitted in response to the director's Notice of Intent to Deny (NOID) the petition, the petitioner stated that the beneficiary "would be placed at [REDACTED] but would also be placed "with any other religiously affiliated organization in Florida that requires" a mashgiach. The petitioner provided copies of the beneficiary's IRS Form W-2 for 2008 reflecting that he received wages of \$28,156.24 from UF Hillel and \$7,038.45 from the petitioner. Copies of pay stubs in the record indicate that the petitioner began paying the beneficiary in October 2008.

In his letter accompanying the petitioner's response to the NOID, counsel stated that the contract between [REDACTED] and the petitioner makes it clear that the petitioner maintained authority over the beneficiary's work and duties, and that while [REDACTED] could "dictate the hours they will operate, [ ] the Mashgichim has autonomy over the procedures to follow, religious days to observe, prayers and blessings to give, religious procedures to follow, etc." and that [REDACTED] could not terminate the mashgiach's employment.

In denying the petition, the director recognized that the petitioner places the mashgiach in various organizations and the organizations then pay the mashgiach directly for their services, but stated that this "kind of employment arrangement does not conform to the [ ] regulations and appears to be a circumvention of USCIS nonimmigrant religious worker regulations."

The petitioner takes issue with this assessment on appeal, arguing a lack of understanding of Jewish religious customs and practices. The petitioner likens the position of mashgiach to that of a Food and Drug Administration (FDA) inspector, who goes into food preparation establishments to ensure compliance with government regulations. The petitioner states: "However, the FDA inspector reports to the FDA and is employed by the FDA. It is impossible to even suggest that the FDA inspector is employed by the establishment it inspects." The petitioner further states:

Since the mashgiach acts as an extension of the certifying rabbi or religious organization, he is not subject to taking orders regarding his/her work [from] the establishment he/she supervises. This well defined separation of the mashgiach from the establishment ensures that the mashgiach can not be influenced by the establishment it supervises while performing his duties. However, the mashgiach can be fired or disciplined by the rabbi or religious institution if he fails to enforce the religious law.

The record, however, does not support the petitioner's statements. First, the FDA does not concede any of its authority to the establishments it visits. Here, however, the petitioner has done so by permitting the establishment to pay the beneficiary directly. Not only did [REDACTED] pay the beneficiary, it also reported the beneficiary as an employee and thus would have paid employer taxes (the employer's share of FICA taxes and federal unemployment taxes) on the beneficiary's earnings. In fact, Mr. [REDACTED], while conceding some responsibility over the position to the petitioner, clearly saw the beneficiary as an employee of [REDACTED], and the job description indicates that he was expected to "integrate fully" into [REDACTED]'s staff, while taking direction from both Mr. [REDACTED] and another employee of [REDACTED].

Additionally, the record does not establish that the petitioner merely "places" a mashgiach into an establishment. Mr. [REDACTED] stated that the petitioner "recommended" the beneficiary. This implies that [REDACTED] had a choice and could have not accepted the beneficiary as the mashgiach. The petitioner states that the establishment cannot terminate a mashgiach and that if it was a job placement agency, [REDACTED] would have also had some form of input in the selection/screening of the mashgiach it wanted. It would have had the authority to fire or discipline the mashgiach. However, it did not." But again, the evidence does not support the petitioner's statements. We note once more that the petitioner recommended the beneficiary, and while the establishment may suffer the consequences of terminating a mashgiach (loss of kosher certification), nothing in the record suggests that it cannot terminate the relationship or that dissatisfaction with or termination of one mashgiach would prevent an establishment from arranging to hire another through the petitioning organization.

The petitioner asserts on appeal that it is "the ultimate entity responsible for providing financial [remuneration] to the mashgiach" and points as evidence, the seamless transition of its payment to the beneficiary in 2008 after he was no longer working for [REDACTED]. The petitioner states that it has contractual arrangements with other organizations whereby the mashgchim are paid directly. However, this does not alter the fact that the beneficiary was in the employ of [REDACTED] subject to many of its rules, at the time the petition was filed or that other contracts have the same arrangement. The petitioner controls and supervises the work of a mashgiach for the purpose of kosher certification; nonetheless, the record reflects that salaries (even though negotiated by the petitioner), working hours and other assigned duties are controlled by the establishment requesting kosher certification services.

Accordingly, the AAO finds that at the time of filing, the petitioner failed to establish that the beneficiary sought to enter the United States to work for the petitioner. The petitioner asserts on

appeal that it “has been transferring its alien workers to W-2 and paying them directly, even when doing so increases operational costs dramatically.” However, the petitioner stated that it was “increasing those paid with W-2 and decreasing those paid with 1099.” This does not affect the instant case where the beneficiary was not being paid directly by the petitioner but rather by another employer.

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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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 sustained that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.