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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

D13

Date: **MAY 09 2011** Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 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 (kashrut supervisor). The director determined that the petitioner's employment arrangement with the beneficiary "does not conform to the . . . regulations and appears to be a circumvention of USCIS nonimmigrant religious worker regulations."

On appeal, counsel asserts that the director's "refusal to consider the petition in light of the unique industry involved was an error of law." Counsel submits additional documentation in support of the petition.

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.

The issue presented is whether the petitioner's employment arrangement with the beneficiary conforms to the regulations.

In a January 10, 2005 letter submitted with the petition, the petitioner stated that the proffered position was that of [REDACTED].” The petitioner further stated that “[o]nce hired, [the beneficiary] will be placed in a facility under our supervision” and that she would work five days a week earning \$10 per hour.

The petitioner provided uncertified copies of the beneficiary’s unsigned and undated Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, for the years 2005 and 2006, on which she reported self-employment income of \$20,800 and \$24,500, respectively. The beneficiary indicated on the Schedule C-EZ that her business income was from the petitioning organization.

In a January 5, 2010 Notice of Intent to Deny (NOID) the petition, the director notified the petitioner that on August 13, 2008, an immigration officer (IO) conducted an onsite inspection of the petitioner’s premises for the purpose of verifying the petitioner’s claims. The IO stated that office space at the petitioner’s location would not support the 80 employees it claimed and the petitioner’s payroll did not indicate that it paid 80 individuals. The USCIS Fraud Detection and National Security (FDNS) office in Miami concluded that the petitioner “petitions for religious workers and hires out these workers or places them in kosher eateries, acting as a quasi job placement facility for foreign religious workers.”

In its March 23, 2010 response to the director’s NOID, the petitioner stated that the findings of the FDNS “seem to be based on a lack of understanding of the kosher supervision industry,” which is “by nature a field worker industry.” The petitioner further stated:

The job of a mashgiach is to supervise local establishments to ensure that they comply with kashrut standards. A mashgiach temidi must be on the premises of the establishment from the time the doors open until closing in order to ensure compliance with these standards. The mashgiach generally opens and closes the establishment and has the only key to the meat freezer.

Further, the mashgiach’s job is to uphold the kashrut standards of the certifying agency. His loyalty, therefore, is to the certifying agency – not to the owner of the establishment he supervises. To ensure the independence of the mashgiach with respect to the kashrut of the establishment he supervises, he **must** be the employee of the supervising agency. The mashgiach must be free to enforce the rules of kashrut and impose necessary sanctions on the establishment without having to worry about losing his job. The mashgiach can only have this freedom if his employer is the certifying agency and not the local establishment.

The fact that most of its employees work in the field does not make the employer a “quasi job placement agency[.]” Placement of mashgichim in kosher establishments is **essential** to ensuring the kashrut of those establishments for the local Jewish

community. . . . Having these mashgichim work in a central office rather than in the establishments they supervise would result in an unacceptably unreliable standard of kashrut in the community. No one would trust such an agency to provide kosher certification.

The majority of mashgichim on the [petitioner's] staff are mashgichim temidim working full time supervising local restaurants and other kosher establishments. [Emphasis in the original.]

The petitioner submitted documentation from various sources explaining the responsibility of the kashrut supervisor and the role of the rabbinical agencies that place them in the various food establishments. The petitioner also submitted a copy of IRS Form W-2, Wage and Tax Statement, that it issued to the beneficiary in 2008, on which it reported wages of \$22,341.70. The petitioner stated:

As it was becoming established, the [petitioner] paid its mashgichim as contract workers rather than W-2 employees. Over the past two years, [it] has worked diligently to change over all of its field mashgichim from 1099s to W-2s. As of January 1, 2010, all [] mashgichim – whether part or full time workers – are paid as W-2 employees of the certifying agency.

The director denied the petition, finding that the petitioner's employment arrangements with its kosher supervisors violate immigration regulations in that the supervisors do not work for the petitioner but for the organizations in which they are placed.

On appeal, counsel asserts that the director "gave no weight to the Petitioner's explanations and accepted the site inspection officer's conclusions as fact." Counsel submits additional documentation from sources such as [redacted] that discuss the role of the kosher supervisor and the certifying agency.

The evidence indicates that the petitioning organization serves as the certifying agency for kosher food establishments. To this end, it either sends a kosher supervisor to the designated organization or it selects and places a full-time kosher supervisor in the organization requesting kosher certification. The onsite mashgiach is responsible to the petitioner for his or her work as a kashrut supervisor. However, the salaries of many of these full time mashgichim are paid directly to the mashgichim, thus blurring the lines and modifying the employer-employee relationship. Although the petitioner asserts that the mashgiach's loyalty is to the petitioner as the certifying agency and that the mashgiach must be free to impose sanctions for the organization failure to follow the rules, the petitioner submitted no documentation to establish that its mashgichim are fully independent of the organizations for which they work. For example, the petitioner submitted no documentation to establish that the organization does not claim the full-time mashgiach as an employee, does not supervise the employee in matters beyond that of the kashrut operation, and cannot terminate the individual's employment and simply request the services of another.

We concur with the petitioner that its work space is not necessarily inconsistent with the size of its organization as most of the work would be performed outside the petitioner's premises. Additionally, if many of the petitioner's "employees" are paid by the requesting organizations, the size of its payroll and associated expenses are not necessarily indicative of its operation or evidence that it does not operate as claimed. Therefore, we do not find that the petitioner has engaged in intentional fraud in the hiring of mashgichim. However, we do not concur with the petitioner that every mashgiach within its organization qualifies as its employee. The petitioner must establish that it employs and compensates the alien pursuant to the regulation.

The petitioner indicated that the position that is the subject of this petition is one of its full-time staff positions and the salary is paid by the petitioner not by a third party. The petitioner submitted a copy of an IRS Form W-2 reflecting that it paid the beneficiary wages in 2008. However, the petition was filed on March 16, 2007. While the petitioner provided copies of the beneficiary's federal income tax returns for 2005 through 2007, it provided no documentation to establish that it paid the beneficiary's compensation. The beneficiary's federal tax returns indicate that she was self-employed, and while she indicated that she worked for the petitioner, nothing in the record established that she was an employee of the petitioner prior to 2008.

The petitioner has submitted insufficient documentation to establish that the arrangement regarding the beneficiary's employment complied with the regulations at the time the petition was filed.

Beyond the decision of the director, the petitioner has not established that it is a bona fide nonprofit religious organization.

The regulation at 8 C.F.R. § 214.2(r)(3) defines a tax-exempt organization as "an organization that has received a determination letter from the IRS establishing that it, or a group it belongs to, is exempt from taxation in accordance with section 501(c)(3) of the Internal Revenue Code" (IRC). Additionally, the regulation at 8 C.F.R. § 214.2(r)(9) provides:

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 IRS showing 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), or subsequent amendment or equivalent sections of prior enactments, of the [IRC], 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 statement certifying that the petitioning organization is affiliated with the religious denomination. The statement must be submitted by the petitioner along with the petition.

The petitioner submitted no documentation to establish that it is a bona fide nonprofit religious organization.

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) (noting that the AAO conducts appellate review on a *de novo* basis).

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.