

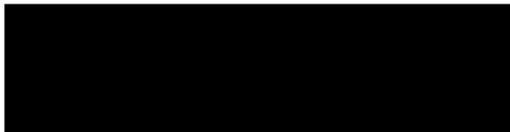
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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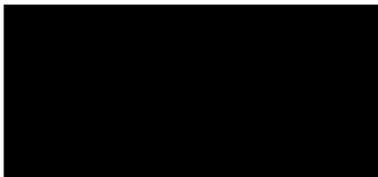
D13

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.

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 AAO will withdraw the director's decision and will remand the petition for further action and consideration.

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 its September 25, 2008 letter submitted in support of the petition, the petitioner stated that in the proffered position:

[The beneficiary] will check and verify that all food shipments received by the establishment are kosher certified and that all meat products arrive double sealed; check eggs for blood spots before use; check vegetables for insects before use; separate challah from bread dough and light pilot light on oven prior to use; ensure that all meat and dairy equipment remains separate; explain kashrut rules to customers and employees.

The petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that the beneficiary would receive a salary of \$425 per week. It also indicated that it had six employees, a gross annual income of \$675,664 and an annual net income of \$29,470. The petitioner provided unsigned and uncertified copies of the beneficiary's Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, for 2006 and 2007, on which she reported income from self-employment of \$22,800 and \$24,180, respectively.

In response to the director's February 2, 2009 request for evidence (RFE), the petitioner stated:

The Petitioner employs or contracts over 100 mashgichim. Some are paid as employees of the petitioner, while most are paid as contractors by the individual kosher establishments themselves. The Petitioner recently received a determination from the IRS advising the organization that its regular, full-time contracted mashgichim should be paid as W-2 employees rather than 1099 contractors. The Petitioner is in the process of changing over most of its regularly employed workers from 1099 contractors to W-2 employees.

The petitioner listed the beneficiary as one of the regular mashgichim on its staff and stated that it has 30 mashgichim who are paid directly by the facility in which they are placed, approximately 51 mashgichim who work for about 10 days per year, and 10 to 15 mashgichim who work only sporadically.

On August 13, 2008, an immigration officer (IO) conducted an onsite inspection of the petitioner's premises for the purpose of verifying the claims in similar petitions filed by the petitioner. The IO stated that, although the petitioner claimed to have 80 employees, office space at the petitioner's location would not support that many employees and the petitioner's payroll did not indicate that it paid 80 individuals. In a February 9, 2009 Request for Investigation, 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."

Based on this conclusion, the director, on January 19, 2010, the director notified the petitioner of her intent to deny the petition. In response, the petitioner stated that the conclusion of FDNS appeared

“to be based on a lack of understanding of the kosher supervision industry.” The petitioner explained:

Like the U.S. Postal Service, the kosher supervision is by nature a field worker industry. Just as the vast majority of U.S. postal workers spend their days delivering mail in communities around the United States, field mashgichim work in kosher establishments under the supervision of their employer. It is not practical for these employees to work in a large central office because the actual work to be done is in the field.

The fact that most of its employees work in the field – like US postal employees – does not make the employer a “quasi job placement agency[.]” No one would call the US Postal Service a quasi job placement agency just because the employees work in the field! Placement of mashgichim in kosher establishments is essential to ensuring the kashrut of those establishments for the community. According to the regulations of most certifying agencies, an establishment that handles meat must have a mashgiach temidi (full-time mashgiach) to maintain the certification of its facility

The majority of mashgichim on the [petitioner’s] staff are mashgichim temidim working full time at local restaurants and other kosher establishments.

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 copies of IRS Form W-2, Wage and Tax Statement, that it issued to the beneficiary in 2008 and 2009, on which it reported wages of \$22,241.70 and \$1,841.67, respectively.¹

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:

[T]he 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 certifying agency. The mashgiach must be free to enforce the rules of kashrut

¹ The petitioner stated that the beneficiary only worked until February of 2009, at which time she was injured and her R-1 visa expired.

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.

Counsel submits additional documentation from sources such as [REDACTED] and the Chicago Rabbinical Council that discuss the role of the kosher supervisor and the certifying agency.

The evidence of record 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 counsel argues 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 another supervisor.

The AAO concurs 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, the AAO does not find that the petitioner has engaged in intentional fraud in the hiring of mashgichim.

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. While we do not find that every mashgiach within the petitioner's organization qualifies as its employee, we find that the petitioner has submitted sufficient documentation to establish that it has extended a qualifying job offer to the beneficiary. The AAO will withdraw the director's decision

Nonetheless, the petition cannot be approved as the record now stands. The petitioner has not established that it is a bona fide nonprofit tax-exempt 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.

With the petition, the petitioner submitted a partial copy of a May 23, 2002 advance ruling letter from the IRS, advising the petitioner that the IRS had determined that it was an organization exempt from income tax as a publicly supported organization as described in section 509(a)(2) of the IRC. The advance ruling period ended on December 31, 2005. The petition was filed on October 27, 2008. Thus, the petitioner did not submit a currently valid determination letter from the IRS establishing its tax-exempt status as required by the regulation. Further, the petitioner submitted no documentation to establish that its status as a tax-exempt organization derived from its activities as a religious organization. The petitioner can do this by submitting documentation that establishes the religious nature and purpose of the organization, such as a copy of its organization instrument, brochures or other literature describing the religious purpose and nature of the activities of the organization. 8 C.F.R. § 214.2(r)(9).

The matter will be remanded for the director to address this issue. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.