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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

**PUBLIC COPY**

U.S. Citizenship and Immigration Services

C1

[redacted]

DATE: DEC 0 1 2011 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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. 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,

Mai Johnson

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) summarily dismissed the petitioner's appeal of that decision. The AAO then concluded that it had summarily dismissed the appeal in error, and reopened the proceeding on its own motion. The AAO remanded the petition to the California Service Center for further consideration and action under new regulations. The director again denied the petition. The petitioner filed a motion to reconsider that decision, and the director dismissed the motion. The matter is now before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner is a [redacted] denomination. 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 the pastor of a member church in [redacted] The director determined that the petitioner had not established that the beneficiary had the required two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

The petitioner filed a motion to reconsider that decision, which the director dismissed, based on a finding that the filing did not meet all the requirements of such a motion. On appeal from the director's latest decision, the petitioner submits a copy of a previously submitted brief.

Before discussing the merits of the appeal, the AAO takes note of a procedural issue. The Form I-290B Notice of Appeal or Motion includes, at Part 2, instructions to "Check the box below that best describes your request." The six boxes are labeled as follows:

A. □ I am filing an appeal. My brief and/or additional evidence is attached.
B. □ I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days.
C. □ I am filing an appeal. No supplemental brief and/or additional evidence will be submitted.
D. □ I am filing a motion to reopen a decision. My brief and/or additional evidence is attached.
E. □ I am filing a motion to reconsider a decision. My brief is attached.
F. □ I am filing a motion to reopen and a motion to reconsider a decision. My brief and/or additional evidence is attached.

The instructions to the Form I-290B state, on page 2: "You must clearly indicate if you are filing an appeal or a motion."

Counsel, who prepared and signed the form on the petitioner's behalf, checked box "E," indicating that he was filing a motion to reconsider. The first page of the brief included, in bold capital letters, the heading "**MOTION TO RECONSIDER/APPEAL OF DENIAL.**" Counsel concluded the brief by stating: "[W]e respectfully request that you reconsider this denial and approve the petition. In the alternative we request that this be forwarded to the Administrative Appeals [Office] for further review."

The director did not forward the motion to the AAO. Instead, the director dismissed the motion and advised the petitioner of its appeal rights. On appeal, counsel protests that he had twice requested that the director forward the motion to the AAO. Counsel acknowledges that he "marked off option 'E' in part 2 of the form I-290B. However, the regulation [at] 8 CFR § 103.3(a)(2)(iii) states that an appeal may be treated as a motion to consider and this should work both ways." Counsel offers no persuasive explanation as to why "this should work both ways." The cited regulation permits consideration of an appeal as though it were a motion, but no reciprocal regulation exists to allow treatment of a motion as though it were an appeal. Counsel claims, in effect, that there should be no functional difference between an appeal and a motion, provided that the petitioner requests that a single filing be treated as both an appeal and a motion. U.S. Citizenship and Immigration Services (USCIS) regulations, however, provide different procedures for appeals and for motions, thus indicating that USCIS considers the two processes to be separate and distinct.

Nevertheless, the director did err insofar as the AAO's February 5, 2009 remand notice included the following instruction: "If the new decision is adverse to the petitioner, it shall be certified to the Administrative Appeals Office for review." The director did not certify the decision as instructed. The AAO will now review the record, as it would have done upon certification.

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 July 23, 2007. At the time the petitioner filed the petition, the USCIS regulation at 8 C.F.R. § 204.5(m)(3)(ii)(A) required the petitioner to establish that, immediately prior to the filing of the petition, the alien has the required two years of experience in qualifying religious work. On the petition form, asked to list the beneficiary's "Current Nonimmigrant Status," the petitioner answered "Out of status." The petitioner indicated that the beneficiary's (unspecified)* nonimmigrant status expired on April 22, 1999, more than eight years before the filing date.

In a letter dated July 4, 2007, [redacted] of the petitioning organization stated that the beneficiary had served as pastor of the petitioner's church "in [redacted] since 1998." The record also refers to the beneficiary as a professor at the [redacted] in the petitioner's [redacted]

On September 25, 2007, the director issued a request for evidence, instructing the petitioner to submit, among other things, copies of tax and payroll documentation from 2004-2006 and "evidence of the beneficiary's current immigration status" and employment authorization. In response, the petitioner did not submit any evidence of lawful status or employment authorization; the petitioner did not claim that the beneficiary had either of those. The petitioner submitted uncertified copies of the beneficiary's personal income tax returns from 2004 to 2006, indicating that the beneficiary earned $10,000 as a minister in 2005 and $20,000 in 2006. He identified himself as a minister on the 2004 return as well, but did not report any income from that activity. (In any event, 2004 fell outside the two-year qualifying period that began in July 2005.)

The director denied the petition on January 29, 2008, stating that the petitioner failed to provide reliable, first-hand evidence of the beneficiary's employment or compensation during the 2005-2007 qualifying period. On appeal, the petitioner submitted copies of IRS and bank documents intended to show that the beneficiary worked as claimed.

While the appeal was pending, USCIS published new regulations for special immigrant religious worker petitions. Supplementary information published with the new rule specified: "All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

The revised USCIS regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation, either abroad or in lawful immigration status in the United States, continuously for at least the two-year period immediately preceding the filing of the petition. The revised regulation at 8 C.F.R.

§ 204.5(m)(11) requires that qualifying prior experience, if acquired in the United States, must have been authorized under United States immigration law.

On February 5, 2009, the AAO remanded the matter to the director, for issuance of a new decision under the revised regulations. On August 10, 2009, the director advised the petitioner of the new regulations and instructed the petitioner to submit newly required evidence. The director quoted, with emphasis, the clause at 8 C.F.R. § 204.5(m)(11) that qualifying experience, "if acquired in the United States, **must have been authorized under United States immigration law**." In response, the petitioner's then-attorney of record cited a federal court decision allowing concurrent filing of Form I-485 adjustment applications with Form I-360 special immigrant religious worker petitions. The petitioner's present attorney of record repeats this argument on appeal, and the AAO will address it in that context.

The director denied the petition on October 28, 2009, because the beneficiary had no lawful immigration status or employment authorization during the 2005-2007 qualifying period. On motion from that decision, counsel argued several points of law in a brief which the AAO will consider shortly.

The director dismissed the motion on January 13, 2010, stating that the petitioner's filing did not meet the requirements of a motion. The USCIS regulation at 8 C.F.R. § 103.5(a)(3) states:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The director found that the petitioner's motion did not establish that the decision was incorrect based on the evidence of record at the time of the decision, because USCIS applied the regulations retroactively. The director asserted that counsel's disagreement with those regulations is not a valid basis for a motion to reconsider.

On appeal from the latest decision, counsel resubmits the brief from the motion.

Much of counsel's brief revolves around disputing the new regulations. Counsel contends that the "Beneficiary meets all the requirements under the regulations in place at the time the I-360 was originally filed"; that the "retroactive effect" of the new regulations was "impermissible"; and that "The amended regulation is ultra vires the statute." Counsel observes that other immigrant petitions (filed on Forms I-130 and I-140) do not require lawful immigration status at the petition stage, and therefore it is unlawful to apply such a requirement to Form I-360 petitions for special immigrant religious workers.

With respect to counsel's objection to the lawful status and employment authorization clauses at 8 C.F.R. §§ 204.5(m)(4) and (11), the regulations are binding on USCIS employees in their administration of the Act. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory*

*Commission,* 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C.,1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). An agency is not entitled to deference if it fails to follow its own regulations. *U.S. v. Heffner,* 420 F.2d 809, (C.A. Md. 1969) (government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down). The AAO cannot accept the argument that the director erred by following the regulations. Furthermore, an administrative appeal is not the venue for challenging the regulations. The AAO is subject to USCIS regulations, and has no authority to modify or strike down those regulations.

The previously-quoted passage from the *Federal Register* demonstrates that USCIS intended to apply the new regulations immediately to all pending cases. With respect to counsel's claim that the regulation goes outside the bounds of the statute, and therefore beyond the intent of Congress, the wording of the relevant legislation demonstrates Congress's interest in USCIS regulations and the agency's commitment to combating immigration fraud. Section 2(b) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391 (Oct. 10, 2008), reads, in pertinent part:

> *Regulations* – Not later than 30 days after the date of the enactment of this Act, the Secretary of Homeland Security shall –
>
> > (1) issue final regulations to eliminate or reduce fraud related to the granting of special immigrant status for special immigrants described in subclause (II) or (III) of section 101(a)(27)(C)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(C)(ii))

Previously, in proposing the requirement that all prior qualifying employment have been authorized and "in conformity with all other laws of the United States" such as the Fair Labor Standards Act of 1938 and "tax laws," USCIS explained that "[a]llowing periods of unauthorized, unreported employment to qualify an alien toward permanent immigration undermines the integrity of the United States immigration system." 72 Fed. Reg. 20442, 20447-48 (April 25, 2007). Accordingly, the adoption of the final rule requiring that all prior qualifying employment have been lawful clearly comports with the explicit instructions from Congress to "eliminate or reduce fraud."

The October 2008 legislation extended the special immigrant nonminister religious program only until March 5, 2009. From the wording of the statute, it is clear that this extension was so short precisely because Congress sought to learn the effect of the new regulations before granting a longer extension. Congress has since extended the life of the program three times.[1] On any of those occasions, Congress could have made substantive changes in response to the regulations they ordered USCIS to promulgate, but Congress did not do so. Congress is presumed to be aware of an administrative or

[1] Pub. L. No. 111-9 § 1 (March 20, 2009) extended the program to September 29, 2009. Pub. L. No. 111-68 § 133 (October 1, 2009) extended the program to October 30, 2009. Pub. L. No. 111-83 § 568(a)(1) (October 28, 2009) extended the program to September 29, 2012.

judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). The AAO may therefore presume that Congress has no objection to the new regulations as published, or to USCIS's interpretation and application of those regulations.

Counsel asserts that the beneficiary qualifies for relief under section 245(i) of the Act, because the petitioner had previously filed a special immigrant religious worker petition on the beneficiary's behalf on June 11, 1998. This argument fails here, because it is irrelevant to the adjudication of the petition.

Section 245(i) of the Act, 8 U.S.C. § 1255(i), states, in pertinent part:

> **Adjustment of Status for Aliens Physically Present in the United States**
>
> (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States –
>
> (A) who –
>
> (i) entered the United States without inspection ; or
> (ii) is within one of the classes enumerated in subsection (c) of this section;
>
> (B) who is the beneficiary . . . of –
>
> (i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001
>
> * * *
>
> (C) who, in the case of a beneficiary of a petition for classification . . . that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000 [enacted December 21, 2000];
>
> may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application . . . .

Section 245(i) of the Act permitted certain aliens who were physically present in the United States on December 21, 2000, and who were otherwise ineligible to adjust their status, such as aliens who entered the United States without inspection or failed to maintain lawful nonimmigrant status, to pay a penalty and have their status adjusted without having to leave the United States. Section 245(i) of the Act expired as of April 30, 2001, except for those aliens who are "grandfathered." The regulatory definition of a "grandfathered alien" at 8 C.F.R. § 245.10(a) includes "an alien who is the beneficiary . . . of . . . [a] petition for classification," such as a Form I-360 petition, "which was

properly filed with the Attorney General on or before April 30, 2001, and which was approvable when filed."[2]

The regulation at 8 C.F.R. § 245.10(a)(2) states:

> *Approvable when filed* means that, as of the date of the filing of the qualifying immigrant visa petition under section 204 of the Act . . . , the qualifying petition . . . was properly filed, meritorious in fact, and non-frivolous ("frivolous" being defined herein as patently without substance). This determination will be made based on the circumstances that existed at the time the qualifying petition or application was filed.

Section 245(i) relief applies to adjudication of a Form I-485 adjustment application, not to adjudication of the underlying immigrant petition. Specifically, section 245(i)(2)(A) of the Act mandates that an alien seeking section 245(i) relief be "eligible to receive an immigrant visa." *See INS v. Bagamasbad*, 429 U.S. 24, 25 n. (1976) (per curiam); *Lee v. U.S. Citizenship & Immigration Servs.*, 592 F.3d 612, 614 (4th Cir. 2010) (describing the legislative history of 8 U.S.C. § 1255(i)).

The law does not require approval of every grandfathered immigrant petition. In order to seek relief under section 245(i) of the Act based on classification under section 204 of the Act, the alien in this case must first have an approved immigrant petition and an approvable when filed immigrant petition or labor certification filed on or before April 30, 2001.

The law does not require USCIS to approve every immigrant petition filed on behalf of an alien who intends to seek section 245(i) relief. Rather, such relief presupposes an already-approved immigrant petition. Without an approved immigrant petition, the beneficiary has no basis for adjustment of status, and therefore section 245(i) relief does not apply. The AAO need not re-adjudicate the June 11, 1998 petition here, because even if the AAO were to find that it was properly filed, meritorious in fact, and non-frivolous, that finding would not lead to approval of the 2007 petition.

The new regulations at 8 C.F.R. § 204.5(m) say nothing about what benefits are or are not available to the beneficiary at the adjustment stage, and the director, in this proceeding, did not bar the beneficiary from ever receiving benefits under section 245(i) of the Act. Rather, the director found that the beneficiary's lack of lawful status during the two-year qualifying period prevents the approval of the present immigrant petition based on the regulatory requirements at 8 C.F.R. §§ 204.5(m)(4) and (11). Counsel's assertion that the beneficiary is eligible for section 245(i) relief at the adjustment stage does not require USCIS to approve the underlying immigrant petition before the beneficiary has even reached that stage. The AAO rejects counsel's argument that section 245(i) of the Act limits the application of the new "lawful employment" requirement. As the AAO has already noted, Congress has revisited and reenacted the statute numerous times since 2008. On any of those occasions, Congress could have repudiated or modified the regulatory "lawful employment"

[2] The regulation at 8 C.F.R. § 245.10(a)(2) defines "properly filed" to mean that "the application was physically received by the Service on or before April 30, 2001, or if mailed, was postmarked on or before April 30, 2001, and accepted for filing as provided in § 103.2(a)(1) and (a)(2) of [8 C.F.R.]."

requirement, but did not do so. Instead, Congress has repeatedly endorsed the current regulation – including the clauses disputed by counsel – by renewing the statute without substantive change, precisely the situation covered by *Lorillard.*

Counsel cites *Ruiz-Diaz v. United States*, No. C07-1881RSL (W.D. Wash. June 11, 2009), a federal court decision which ordered USCIS to accept concurrent filing of Form I-485 adjustment applications with Form I-360 special immigrant religious worker petitions. Counsel asserts that the beneficiary would have concurrently filed a Form I-485 application with the Form I-360, had the regulations permitted concurrent filing at the time. The AAO notes that the Ninth Circuit Court of Appeals has since overturned the *Ruiz-Diaz* decision. *Ruiz-Diaz v. USA*, No. 09-35734 (9th Cir. Aug. 20, 2010). USCIS ceased to accept concurrent filings of Forms I-360 and I-485 on November 8, 2010.

The district court's *Ruiz-Diaz* order to grant an injunction tolled unlawful presence and unauthorized employment only in the limited context of aliens who attempted to file Form I-485 concurrently with a Form I-360, only to have USCIS reject the adjustment applications because the regulations made no provision for concurrent filing. The ruling did not touch the revised regulations at 8 C.F.R. §§ 204.5(m)(4) and (11), which were already in effect when the district court issued its 2009 order.

The district court's now vacated injunction waived the accrual of unlawful presence in relation to adjustment applications, but did not waive or nullify the regulations at 8 C.F.R. § 204.5(m)(4) and (11), which require an alien's qualifying experience in the United States to have been authorized under United States immigration law. Specifically, the district court held that:

> For purposes of 8 U.S.C. § 1255(c) and § 1182(a)(9)(B), if a beneficiary of a petition for special immigrant visa (Form I-360) submits or has submitted an adjustment of status application (Form I-485) or employment authorization application (Form I-765) in accordance with the preceding paragraphs, no period of time from the earlier of (a) the date the I-360 petition was filed on behalf of the individual or (b) November 21, 2007, through the date on which the United States Citizenship and Immigration Services ("CIS") issues a final administrative decision denying the application(s) shall be counted as a period of time in which the applicant failed to maintain continuous lawful status, accrued unlawful presence, or engaged in unauthorized employment.

*Id.* at 2. The district court's order specifically referred to 8 U.S.C. § 1255(c) and § 1182(a)(9)(B). The former statutory passage relates to adjustment of status; the latter passage relates to unlawful presence in the context of inadmissibility. The district court's *Ruiz-Diaz* order did not require USCIS to approve any petition under 8 U.S.C. § 1153(b)(4), or to overlook any beneficiary's unlawful employment in the context of such a petition. Rather, like section 245(i) of the Act, the *Ruiz-Diaz* order presupposed an already-approved immigrant petition, and dealt exclusively with adjustment of status, which is the next step in the immigration process. In this instance, USCIS has

not approved the underlying immigrant petition. The injunction, while it was in effect, never required USCIS to disregard unauthorized employment or lack of lawful status at the petition stage.

Furthermore, the plain wording of the decision unambiguously affects unlawful presence and unlawful employment only after "the earlier of (a) the date the I-360 petition was filed on behalf of the individual or (b) November 21, 2007." Counsel is obviously aware of this provision, because the brief quotes from a USCIS memorandum paraphrasing that language. The petitioner filed the petition before November 21, 2007. Therefore, in the beneficiary's case, the ruling applies only to the beneficiary's unlawful presence and unauthorized employment after the July 2007 filing date. Even the most generous reading of *Ruiz-Diaz* cannot possibly resolve the beneficiary's unlawful presence and unauthorized employment during the two years before the filing date. Counsel fails to explain why the ruling should have any effect on the adjudication of the petition.

Counsel speculates that USCIS's interpretation of the regulations, and its statutory mandate to revise those regulations, would be unlikely to survive judicial review. Counsel, however, provides no evidence to support this claim. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has never contested the beneficiary's lack of lawful status and employment authorization during the two years immediately preceding the petition's filing date. The regulations clearly state that employment under those circumstances is non-qualifying. Counsel has provided no persuasive reason why the director's mandatory compliance with those regulations is, itself, a form of adjudicative error to be reversed on appeal. The AAO affirms the denial of the petition.

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.