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

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U.S. Citizenship and Immigration Services

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[redacted]

DATE: APR 0 2 2012 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, ("the director") denied the employment-based immigrant visa petition on January 4, 2010. 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 a Church. 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 an assistant pastor. On August 31, 2009, the petitioner filed a Form I-360 petition. On December 4, 2009, a notice of intent to deny was issued, to which a response was timely received. On January 4, 2010, the director denied the petition. The director denied this petition because he found that the beneficiary had not been continuously working in lawful status as an assistant pastor for at least the two year period immediately preceding the filing of the petition.

On appeal, the petitioner submits a brief and further documentation in order to overcome the director's decision.

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;
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> (ii) seeks to enter the United States--
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> > (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
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> (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 issue here is whether the beneficiary possesses two years of lawful work experience in the country immediately prior to the filing of the form I-360 petition. 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:
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> * * *
>
> (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:
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> (i) The alien was still employed as a religious worker;
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> (ii) The break did not exceed two years; and
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> (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, 8 C.F.R. § 204.5(m)(11) states that:

> (11) *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:
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> (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.
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> (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)

In the present case, the current I-360 petition was filed on August 31, 2009. 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 August 31, 2007 to August 31, 2009. However, according to the Form I-360 petition, the beneficiary arrived in the United States on August 8, 2006 as a B-2 nonimmigrant visitor for pleasure. His status expired on February 7, 2007, well before the two year period began. The USCIS regulation at 8 C.F.R. § 214.1(e) states that a B-2 nonimmigrant may not engage in any employment, and that any unauthorized employment by a nonimmigrant constitutes a failure to maintain status. Further, for the two year period prior to filing of the Form I-360 petition, the beneficiary was out of status. The beneficiary did not satisfy the regulation at 8 C.F.R. § 204.5(m)(4), which requires that the beneficiary be in lawful immigration status, and at 8 C.F.R. § 204.5(m)(11) which requires that the beneficiary's work experience be authorized under United States immigration law. Therefore, the beneficiary did not satisfy the regulations because he was out of status at the time of filing the Form I-360 petition and for the two years prior to the filing of the Form I-360 petition.

On appeal, the petitioner's counsel argues that the beneficiary's unauthorized status and unauthorized employment are irrelevant. She writes in both her Form I-290B appeal statement and her appeal brief dated February 1, 2010:

The Service has not properly applied the Neufeld Memorandum dated June 25, 2009, which implements the district court's order in Ruiz Diaz v. United States, No. C07-1881RSL (W.D. Wash. June 11, 2009). By requiring the two years employment immediately preceding the I-360 petition be authorized employment by the Service, the Service is essentially rendering the Neufeld Memo and the Court Order moot. The whole point of the Order and the Memo was to deem such authorized employment as authorized.

Because the petitioner has established that 1) beneficiary is a member of a class of plaintiffs certified in Ruiz-Diaz; 2) the beneficiary's unauthorized employment is tolled until September 9, 2009; 3) the beneficiary has the requisite two-year work

> experience, the petitioner respectfully requests that this appeal be granted and the petition be approved.

The AAO disagrees with this interpretation. Counsel refers to *Ruiz-Diaz v. U.S.*, (W.D. Wash., June 11, 2009) in which the court addressed the issue of the concurrent filing of the Form I-485, Application to Register Permanent Resident or Adjust Status, with the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. The court invalidated the United States Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 245.2(a)(2)(i)(B), which permits concurrent filing of the Form I-485 under certain provisions of the Act, including under section 203(b)(4), only after approval of the petition or application. On June 11, 2009, the court ordered:

> Beneficiaries of petitions for special immigrant visas (Form I-360) whose Form I-485 and/or Form I-765 applications were rejected by [USCIS] pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B) and who reapply under paragraph (2) of this Order are entitled to a [sic] have their applications processed as if they had been submitted on their original submission date. Any employment authorization that is granted shall be retroactive to the original submission date.
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> 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 [USCIS] 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.
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> . . .
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> The accrual of unlawful presence, unlawful status, and unauthorized employment time against the beneficiaries of pending petitions for special immigrant visas (Form I-360) shall be STAYED for 90 days from the date of this Order to allow the beneficiaries and their family members time in which to file adjustment of status petitions (Form I-485) and/or applications for employment authorization (Form I-765).

The AAO notes that on August 20, 2010, the Ninth Circuit of Appeals reversed and remanded the district court's decision. *Ruiz-Diaz v. U.S.*, 618 F.3d 1055 (9th Cir. 2010). Nonetheless, in accordance with the district court's decision, USCIS implemented a policy tolling the accrual of unlawful status and unauthorized employment until September 9, 2009. The requirements for tolling unlawful presence and unauthorized work is set forth in a memorandum from Donald Neufeld, Acting Associate Director of the USCIS Office of Domestic Operations, *Clarifying Guidance on the Implementation of the District Court's Order in Ruiz-Diaz v. United States, No. C07-1881RSL (W.D. Wash. June 11, 2009)* (August 5, 2009):

1. For those who had previously submitted a concurrently filed Form I-360 with a Form I-485 or Form I-765 and whose applications were rejected pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B), and who refiles the Form I-360 and Form I-485, the period of unlawful presence and unauthorized work was tolled from either the filing date of the Form I-360 or November 21, 2007, whichever was earlier, until September 9, 2009.

2. For any alien who had an approved or pending Form I-360 with USCIS as of June 11, 2009 (the date of the district court's decision), the period of unlawful presence and unauthorized work was tolled from the date the Form I-360 was filed until September 9, 2009.

3. For any alien who filed a new Form I-360 on or after June 11, 2009, the period of unlawful presence and unauthorized work was tolled from the date the Form I-360 was filed to September 9, 2009.

In the present case, counsel erred in relying on the *Ruiz-Diaz* decision. The *Ruiz-Diaz* ruling waives the accrual of unlawful presence in relation to adjustment applications and unauthorized employment for specific time periods. The AAO notes that the beneficiary filed a Form I-485 Application to Adjust Status on August 31, 2009, the same day that the petitioner filed the Form I-360 petition on behalf of the beneficiary. There is no evidence that either was rejected pursuant to 8 C.F.R. § 245.2 (a)(2)(i)(B). The AAO also notes that the petitioner previously filed a Form I-360 petition on July 7, 2006. On August 30, 2007, the director initially denied the petition. An appeal was timely filed. On October 16, 2008, the AAO dismissed the appeal. On November 17, 2008, present counsel improperly filed a second appeal with the AAO. On February 26, 2010, the second appeal was rejected.

When applying the three categories above to the petitioner, the petitioner does not qualify for the first category of requirements tolling unauthorized employment, since there is no evidence that the petitioner and the beneficiary had a previously filed Form I-360 and a Form I-485 rejected based on concurrent filing pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B). The petitioner also does not qualify for the second category of requirements tolling unlawful employment, since the prior petition was not approved or pending with USCIS as of June 11, 2009.

The petitioner qualifies for the third category, since it filed a new Form I-360 petition on August 31, 2009, which is after June 11, 2009. Pursuant to that category, the beneficiary's period of unauthorized employment would be tolled from August 31, 2009 to September 9, 2009. However, the *Ruiz-Diaz* decision and subsequent USCIS policy based on that decision fail to toll any of the beneficiary's unauthorized presence or unauthorized work experience for the two years immediately preceding the filing of the Form I-360 petition. The *Ruiz-Diaz* decision does not nullify the requirements set forth in 8 C.F.R. § 204.5(m), listed above. Therefore, the AAO will not accept counsel's argument that the beneficiary should not be considered to have accumulated any unauthorized employment due to the *Ruiz-Diaz* decision. The evidence submitted does not establish that the beneficiary worked in lawful status or was authorized to work under United States

immigration law for the two years prior to the filing of the Form I-360 petition. As a result, the appeal will be dismissed.

Therefore, the AAO is not persuaded by counsel's argument that the beneficiary's unlawful presence and work experience should be waived due to the *Ruiz-Diaz* decision. The evidence submitted does not establish that the beneficiary worked in lawful status or was authorized to work under United States immigration law for the two years prior to the filing of the Form I-360 petition. Therefore, the appeal will be dismissed.

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