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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

C1

DATE: APR 0 5 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, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 associate director. The director determined that the beneficiary did not have two years of continuous employment immediately prior to the filing as he had not been in lawful immigration status. The director additionally determined that the petitioner had failed to establish its ability to compensate the beneficiary.

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 issues presented on appeal are whether the beneficiary possessed two years of continuous employment immediately prior to the filing and whether the petitioner has established its ability to compensate the beneficiary.

The regulation at 8 C.F.R. § 204.5(m) provides that to be eligible for classification as a special immigrant religious worker, the alien must:

(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:

(i) The alien was still employed as a religious worker;

(ii) The break did not exceed two years; and

(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.

Therefore, the petitioner must show that the beneficiary worked 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 petitioner filed the Form I-360 on August 31, 2009. Accordingly, the petitioner must establish that the beneficiary was continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

The regulation at 8 C.F.R. § 204.5(m)(11) provides:

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:

(i) Received salaried compensation, the petitioner must submit IRS [Internal Revenue Service] documentation that the alien received a salary, such as an IRS Form W-2 [Wage and Tax Statement] or certified copies of income tax returns.

(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.

On the Form I-360 petition, the petitioner indicated that the beneficiary arrived in the United States without inspection in January of 1989. Therefore, the beneficiary was in the United States throughout the entire two-year qualifying period. On the Form I-360, under "Current Nonimmigrant Status," the petitioner indicated "[redacted]" or entered without inspection. Thus, the beneficiary has not maintained legal immigration status to live or work in the United States. Accordingly, the AAO concurs with the director's finding that the beneficiary was not in lawful immigration status during the two-year qualifying period.

In her April 1, 2010 decision, the director also found that the beneficiary had engaged in unauthorized employment throughout the two years preceding the petition's filing date. The director highlighted that counsel for the petitioner had indicated in a signed letter dated August 28, 2009 that the beneficiary had worked for the petitioner since September of 1997. The AAO notes that the petitioner additionally submitted a signed letter dated August 24, 2009 that also stated that the beneficiary began working there in September of 1997. However, within a copy of its webpage that the petitioner had submitted with the petition, the petitioner had instead indicated that she began working there in January of 2004. Counsel has failed to explain sufficiently why these inconsistencies exist within the record of proceeding. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

As the director indicated, not only has the petitioner failed to show that the beneficiary was in a valid nonimmigrant status, the petitioner has also failed to submit any documentation illustrating that the beneficiary possessed authorization to work by means of an Employment Authorization Document (EAD).

The regulation at 8 C.F.R. § 204.5(m)(4) prohibits U.S. Citizenship and Immigration Services (USCIS) from considering work that was not "in lawful immigration status" and any "unauthorized work in the United States." The regulation at 8 C.F.R. § 204.5(m)(11) requires that "qualifying prior experience . . . must have been authorized under United States immigration law." Therefore, the regulations, separately and together, require that USCIS must have affirmatively authorized the beneficiary to perform any claimed religious functions while in the

United States. The record therefore reflects that the beneficiary was not in an authorized immigration status during the two years immediately preceding the filing of the visa petition.

The AAO concurs with the director's finding that the petitioner has failed to submit sufficient documentation to establish that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years immediately preceding the filing of the petition.

In a letter accompanying the appeal, counsel asserts that the requirement within 8 C.F.R. § 204.5(m)(11) that the beneficiary's prior religious work must have been authorized under U.S. immigration law is ultra vires as it well exceeds the statutory requirement for religious workers.

On November 26, 2008, USCIS issued a final rule amending the regulations that add or revise definitions and evidentiary requirements for both the religious organization and religious workers. Based on the November 26, 2008 amendment, USCIS denied the form I-360 petition because the evidence was insufficient to establish the beneficiary had been in lawful immigration status during the qualifying two year period.

If USCIS had not intended the lawful employment requirement to be retroactive, it would have phased in the requirement or specified that it applies only to employment that took place after November 26, 2008. Instead, supplementary information published with the new rule specified: "All cases pending on the rule's effective date and all new filings will be adjudicated under the standards of this rule." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). Thus, the regulations and standards provided within were to be applied immediately and retroactively, and include work performed before the effective date.

The wording of the relevant legislation demonstrates Congress' 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))

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." As the AAO has previously noted, USCIS applied the new regulations to already-pending cases as well as new filings.

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 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' interpretation and application of those regulations.

Counsel additionally contends that the director's decision regarding the beneficiary's religious work is contrary to section 245(i) of the Act. The AAO notes that this section 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." "Grandfathered alien" is defined in 8 C.F.R. § 245.10(a) to include "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."[1] 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 aliens to adjust their status on every grandfathered immigrant petition, nor does the law require every grandfathered immigrant petition to be approved. However, 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.

---

[1] 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.]."

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 in this case has no basis for adjustment of status, and therefore section 245(i) relief does not apply.

Sections 245(i) does not retroactively transform periods of unauthorized employment into qualifying employment for purposes of 8 C.F.R. §§ 204.5(m)(4) and (11) simply through the filing of a Form I-485 adjustment application with a Form I-360 immigrant 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 sections 245(i). 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 relief under these sections of the Act at the adjustment stage does not require the AAO to approve the underlying immigrant petition before the beneficiary has even reached that stage.

The director additionally determined that the petitioner had failed to establish that it had the ability to compensate the beneficiary. The regulation at 8 C.F.R. § 204.5(m)(10) provides that the petitioner must submit:

> *Evidence relating to compensation.* Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. If IRS [Internal Revenue Service] documentation, such as IRS Form W-2 [Wage and Tax Statement] or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

On Part 8 of the petition, the petitioner stated that it would compensate the beneficiary $28,000.00 a year.

The director highlighted that the petitioner's church is an entity of the [redacted] but that the petitioner submitted a document from its [redacted] showing that neither the [redacted] provide the center with monetary support. Thus, the petitioner would not be able to claim that those other hierarchical [redacted] entities would be able to compensate the beneficiary instead. The director further highlighted that the petitioner had failed to provide any Internal Revenue Service (IRS) documentation reflecting that the beneficiary had indeed worked for the petitioner to demonstrate past evidence of compensation.

On appeal, the petitioner submitted one pay stub for the beneficiary from June 15, 2010 showing that it had provided her $9,565.60 in net pay thus far that year. The AAO finds that this singular document showing payment of the beneficiary not to be persuasive evidence of its ability to compensate her the proffered wage. A petitioner must establish eligibility at the time of filing. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). The petitioner has failed to submit verifiable evidence such as budgets showing money set aside for salaries or IRS documentation to establish its ability to compensate the beneficiary.

Finally, counsel asserts that the director's decision was contrary to the First Amendment's protection of religious activity. At issue in this proceeding is not the petitioner's or the beneficiary's free exercise of religion, but rather a secular benefit (immigration status). Determining the status or duties of an individual within a religious organization is a distinct question from determining whether that individual qualifies for status or benefits under our immigration laws and authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States. Matter of Hall, 18 I&N Dec. 203 (BIA 1982). No alien has a First Amendment right to immigration benefits, whether or not that alien seeks employment with a religious organization. As USCIS explained in the preamble to its revised regulations, USCIS did not intend the rule to "impose a 'categorical bar' to any religious organization's petition for a visa or alien's application for admission. Instead, the rule sets forth the evidentiary standards by which USCIS will adjudicate nonimmigrant and immigrant petitions." 73 Fed. Reg. at 72283-84.

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 AAO will dismiss the appeal.

ORDER: The appeal is dismissed.